Singapore Journal of Legal Studies
[2002] 122 -148

CANADA'S NEW ANTI-TERRORISM LAW

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The author examines Canada's new Anti-terrorism Act enacted in response to the terrorist attacks of September 11, 2001. The first part assesses whether the existing criminal law was adequate to deal with the threat of terrorism. The second part examines the crucial definitions of terrorist activities and terrorist groups that have been added to Canadian criminal law and whether these definitions satisfy constitutional requirements of legality, specificity, the presumption of innocence and respect for freedom of expression and association. The third part outlines the many new criminal offences of financing and facilitating terrorism that have been added to Canada's Criminal Code, as well as the increased punishment available for terrorism offences. The final part examines the enhanced investigative powers for terrorism and whether they will be used in a manner that involves discriminatory profiling that targets people because of their religion or race.

Canada immediately felt the repercussions of the terrible terrorist attacks in the United States on September 11, 2001. A significant number of Canadians died in these attacks and many planes were diverted from American destinations to Canada. Increased border security slowed the frequent movement of goods and people across the long border between Canada and the United States. Although this turned out not to have been the case, there were concerns that the September 11 terrorists might have entered the United States through Canada, as had Ahmed Rassad, a terrorist who was apprehended in 1999 coming from Canada with plans to bomb the Los Angeles International Airport.

The main legislative response in Canada to September 11 was the enactment of a new Anti-terrorism Act that was introduced for debate in Parliament on October 15, 2001. After debate in Parliament and various committees, it was enacted and proclaimed in force in December of 2001. This legislation was a massive undertaking consisting of over 180 pages of legislative text. It provides for the first time in Canadian law a detailed definition of terrorist activities which is the focus for a new separate part of the Canadian Criminal Code. This definition of terrorism is incorporated in many new offences against various forms of financing and facilitation of terrorist activities. Some of these offences were enacted to honour Canada's

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commitments to implement various United Nations' conventions against terrorism including the 1999 Convention for the Suppression of the Financing of Terrorism and some were enacted to bolster the existing criminal law with respect to assisting and attempting acts of terrorism. The bill also provides controversial new powers of preventive arrest and investigative hearings, as well as an increased ability for the Attorney General to issue certificates preventing the disclosure of sensitive information even to the accused. It also provides for listing of terrorist groups by the Governor in Council and the deprivation of their charitable status.

The bill was subject to extensive debate in Canada[1] and was amended after second reading in response to concerns that it might be applied against illegal acts of protest and dissent. The new powers of investigative hearings and preventive arrests were also subject to a renewable five-year expiry date and provisions were included for a limited form of judicial review of the Attorney General's power to prevent the disclosure of sensitive information. The government did not, however, act on calls from a special Senate committee and others that a non-discrimination clause be included in the bill to signal disapproval of racial or religious profiling. Aspects of the new law and its administration may be challenged under the Canadian Charter of Rights and Freedoms and the entire law is subject to a Parliamentary review in three years time. Although the intent of the Anti-terrorism Act is to prevent terrorism before it occurs, questions have been raised about the effectiveness of its reliance on the criminal law as opposed to increasing the powers and capabilities of security intelligence agencies and taking administrative measures to improve the security of airports and restrict access to hazardous substances that can be used for terrorism. The government has introduced a second major piece on anti-terrorism legislation, the Public Safety Act, 2002 which focuses on various administrative measures to prevent and respond to the type of catastrophic terrorism seen on September 11, 2001 by, for example, improving airport security and controlling access to explosives and biological materials. This bill has, however, not been fast-tracked and has not been enacted as of June, 2002.

In this paper, I will examine the changes that the Anti-terrorism Act make to Canadian criminal law and possible challenges to the law under Canadian constitutional law. The first part of the paper will assess whether the criminal law that existed before September 11 was adequate to deal with the threat of terrorism. The next part will examine the definitions of terrorist activities and terrorist groups that were added to the Criminal Code and

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[1] For example, a book of essays arising from a quickly convened conference was published in between second and third reading of the bill. See R Daniels, P Macklem and K Roach *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001).

incorporated in many new offences relating to terrorism. It will explore whether these crucial definitions satisfy constitutional requirements of legality, specificity, the presumption of innocence and respect for freedom of expression and association. I will next examine the many new criminal offences contained in the anti-terrorism law as well as the increased punishment available for terrorism offences. This part will also outline the limited provisions that are made for the victims of terrorism. Finally, I will examine the enhanced investigative powers of investigative hearings and preventive arrests and whether the legislation provides adequate safeguards that these new powers and existing powers are not used in a discriminatory fashion that targets people simply because of their religion or race.

I. WAS THE EXISTING CRIMINAL LAW INADEQUATE TO DEAL WITH TERRORISM?

An important threshold issue is whether Canada required new anti-terrorism laws in the aftermath of September 11. Before the enactment of Bill C-36, the Anti-terrorism Act, the Criminal Code did not contain specific crimes of terrorism.[2] There were, however, many crimes that would apply to terrorist activities such as murder, hijacking an airplane, threatening internationally protected persons and the like. In addition, people could be prosecuted for conspiring, counseling or attempting to commit such offences or for being an accessory after the fact.[3] Some of the preventive peace bond or recognizance provisions in the Criminal Code[4] could also apply in cases where there were reasonable grounds to fear a terrorist act of violence.

Despite the wide and powerful array of offences and instruments that already existed in Canadian criminal law to prevent and punish terrorist acts, Parliament made the decision that the existing criminal law was inadequate. The Canadian Minister of Justice argued that the existing criminal law could not prevent terrorism before the terrorists boarded the planes and that it did not take adequate account of how terrorists operated in cells sometimes without full knowledge of the intended crimes. In my view,

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2 The infamous s 98 of the Criminal Code which was used against dissent was to my knowledge the last time that the word "terrorism" was specifically included in Canadian Criminal Code. Section 98(8) provided that: "Any person who ... shall in any manner teach, advocate, or advise or defend the use, without authority of law, of force, violence, terrorism, or physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, industrial or economic change, or otherwise, shall be guilty of an offence and liable to imprisonment for not more than twenty years." SC 1919 c 46 s 98 repealed SC 1936 c 29 s 1.

3 The existing criminal law in relation to terrorism is outlined in my "The New Terrorism Offences and the Criminal Law" in Daniels, Macklem and Roach eds *The Freedom of Security* (Toronto: University of Toronto Press, 2001) at 152-4. On incomplete crimes in Canadian criminal law see generally D Stuart *Canadian Criminal Law* 4th ed (Toronto: Carswell, 2001) ch 10 and K Roach *Criminal Law* 2nd ed (Toronto: Irwin Law, 2000) ch 3.

4 See for example s 810.01 relating to fear of criminal organization offences and s 810.2 relating to fear of serious personal injury offence.

this conclusion discounted the ability of the existing Canadian criminal law to apply to apprehended acts of terrorist violence. The Canadian law of attempted crimes is very broad and it applies to acts committed with the intent to commit crimes even though there might be a "considerable period of time"[5] before the completed offence could be committed. The September 11 terrorists could have been convicted of attempted murder at the time they were in flight school and long before they boarded the planes that crashed. The breadth of the Canadian law against attempts has been criticized by some, but it is a valuable asset in allowing the police to arrest terrorists long before the actual commission of the terrorist act.

Canadian criminal law also has a general offence against conspiracies to commit all crimes. This offence applies to all agreements to commit and carry out crimes, even though "there may be changes of operation, personnel or victims."[6] A person who counsel or instructs another to commit terrorism could also be punished even though no agreement to commit a terrorist act was reached. Counselling another person to commit a crime is an offence even though that offence is immediately rejected by the person counselled.[7] This would allow the police to arrest a person who counsels an undercover operative to commit a terrorist act. Although a person who assists in the commission of a crime with no knowledge of a crime would not be guilty, accomplices can be liable even though they do not know the exact means of a planned terrorist attack.[8] Finally, Canadian criminal law already provided accessory after the fact liability for receiving, comforting or assisting a known offender for the purpose of enabling the offender to escape.[9]

Although new financing offences were required to implement the United Nations Convention for Suppression of the Financing of Terrorism, the existing criminal law was not inadequate to deal with terrorist violence.

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5 Criminal Code of Canada RSC 1985 c C-34 s 24 as interpreted in *R v Deutsch* (1986) 27 CCC (3d) 385 at 401 (SCC). In contrast, the law of attempts in the Penal Code of Indonesia requires the "commencement of the performance and the performance is not completed only because of circumstances independent of the will." Penal Code of Indonesia Article 53 (English translation).

6 Criminal Code of Canada s 465 as interpreted in *R v Cotroni* (1979) 45 CCC (3d) 1 at 17 (SCC). In contrast, the Penal Code of Indonesia does not have a general law against conspiracy.

7 *Ibid*, s 464 as interpreted in *R v Gonzague* (1983) 4 CCC (3d) 505 (OntCA). In contrast, the Penal Code of Indonesia does not have a general offence of counselling a crime that is not committed.

8 *DPP for Northern Ireland v Maxwell* [1978] 3 All ER 1140 (HL) (accomplice liability in a terrorist operation when the accused did not know the exact means of the attack). See also *R v Jackson* (1993) 86 CCC (3d) 385 at 391 (accused can be party to manslaughter if reasonable person would "have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken").

9 Criminal Code s 23. In contrast, the Penal Code of Indonesia provides for accomplice liability for those who assist in the commission of crimes, but not necessarily those who have assisted a person to escape after the commission of a crime.

There is little reason to think that Canadian courts would not have sensibly interpreted existing Canadian criminal law to apply to apprehended acts of violent terrorism through the existing laws dealing with attempted crimes, counselling crimes, and conspiracy to commit crimes. The existing criminal law is based on the traditional principle that no motives excuse the commission of crimes[10] whereas the new crimes of terrorism require proof of political, ideological or religious motive.

II. The Definition of Terrorism in the New Anti-terrorism Act

Parliament has provided in the new Anti-terrorism Act for new crimes of terrorism based on the commission of "terrorist activities" and various forms of support of "terrorist groups". In this part of this essay, these two crucial definitions will be examined in some detail because they provide the focal point for much of the act.

A. *The Definition of Terrorist Activities*

Section 83.01 of the Criminal Code contains a complex definition of terrorist activities that covers acts of domestic and international terrorism committed both inside and outside of Canada. Section 83.01(a) provides that a terrorist activity includes "an act or omission that is committed in or outside of Canada and that, if committed in Canada, is one of the following offences". It then has 10 subparagraphs incorporating various offences listed in s 7 of the Criminal Code, but only to the extent that they implement international conventions and related protocols against various acts of terrorism. These acts of terrorism include the unlawful seizure of aircraft, crimes against internationally protected persons, the taking of hostages, crimes in relation to nuclear materials, terrorist bombings and the financing of terrorism. The section 7 offences (some of which are amended by the act) are complex because they incorporate other offences and extend Canadian jurisdiction to acts committed outside of Canada, but that have some nexus to Canada. In the *Finta*[11] case, a closely divided Supreme Court disagreed over which provisions in a former war crimes offence in s 7 of the Criminal Code only granted jurisdiction to Canadian courts and which defined essential elements of the offence for the purpose of determining the accused's fault. Canadian courts will have to disentangle those parts of the s 7 offences and the international conventions which grant them jurisdiction to hear crimes committed outside Canada from those parts which provide the essential elements of the offence that must be proven by the prosecutor beyond a reasonable doubt in order to obtain a conviction. In an apparent attempt to signal in the legislative text that Canada was implementing

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[10] *United States of America v Dynar* (1997) 115 CCC (3d) 481 at 509 (SCC).

[11] (1994) 88 CCC (3d) 417 (SCC).

various international conventions relating to terrorism, the drafters have made this part of the definition of terrorist activities complex and uncertain.

Criminal laws may violate the principles of fundamental justice protected in s 7 of the Charter if they are so vague that they fail to provide fair notice or limit law enforcement discretion.[12] By extension, it could be argued that at some point the complexity of the law deprives it of the ability to give the accused fair notice. Nevertheless, the current jurisprudence suggests that courts are not likely to accept such arguments. The Court's void for vagueness jurisprudence has been characterized by deference to the legislature and a willingness to accept the role of subsequent judicial interpretation in refining the law.[13] The Supreme Court has recently held that references to "danger to the security of Canada" and "terrorism" in immigration legislation were not unconstitutionally vague or "so unsettled that it cannot set the proper boundaries of legal adjudication."[14]

Another possible Charter argument is that the requirement that offences listed in s 83.01(1)(a) constitute terrorist activities to the extent they implement various international conventions offends the principles of legality and codification. The conventions listed in the section are not incorporated in the Criminal Code and they are not annexed to the Criminal Code making it difficult for a person to ascertain the nature of the offence. Again, the current jurisprudence does not provide room for optimism about such a challenge. The Court has already held that un-codified crimes such as the common law crime of contempt of court do not violate s 7 of the Charter because there is still an intelligible standard for legal debate that provides sufficient notice to the accused.[15] Comprehensive codification is not a principle of fundamental justice. In addition, the Court itself is increasingly interpreting Canadian law in light of international standards.[16] Courts will likely reject a Charter challenge to the definition of terrorist activities on the basis of vagueness, complexity or the incorporation of international law. Nevertheless, the fact remains that the complex definition of terrorism in s 83.01(1)(a) of the Code with its references to other parts of the Code and international conventions does not accord with the ideal of an accessible and comprehensive code. It is ironic that the United Kingdom which does not have a Criminal Code eschewed such a complex reliance on unincorporated international conventions in its simpler definition of terrorism.

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12 *R v Nova Scotia Pharmaceuticals* (1992) 74 CCC (3d) 289 (SCC). Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

13 *Winko v British Columbia* (1999) 135 CCC (3d) 129 at 166-67 (SCC). See generally D Stuart, *Charter Justice in Canadian Criminal Law* 3rd ed (Toronto: Carswell, 2001) at 102-107.

14 *Suresh v Canada* 2002 SCC 1 at para 95.

15 *United Nurses of Alberta v Alberta (AG)* (1992) 71 CCC (3d) 225 (SCC).

16 See for example *Suresh v Canada*, *supra* note 14 at para 14.

Section 83.01(b) provides an alternative definition of terrorist activities modelled on s 1 of the United Kingdom's Terrorism Act, 2000. The prosecutor must establish that acts committed inside or outside of Canada were committed "in whole or in part for a political, religious or ideological purpose, objective or cause." This provision has been criticized for creating a risk of criminalizing political, religious or ideological beliefs. In response, Parliament added s 83.01(1.1) after second reading providing that the expression of political, religious or ideological beliefs or thoughts do not constitute terrorist activities unless they fall within the other parts of the definition. This new provision might preclude a challenge to the offence under freedom of expression or religion and would at the very least play an important role in determining whether any limitation on fundamental freedoms was reasonable and proportionate under s 1 of the Charter. Nevertheless, it is somewhat chilling that the motive-based approach required a provision to preclude political, religious or ideological thoughts and beliefs from the broad definition of terrorist activities.

The requirement for proof of political, religious, or ideological motive has also been defended on the basis that it helps restricts the definition to the terrorism context. In my view, however, such a limitation would already have been accomplished by the separate requirements of proof of intention to intimidate the public with regard to its security or to compel certain actions. Indeed, this is the approach taken in the American PATRIOT ACT enacted after September 11 which, unlike the Canadian legislation, does not require proof of political or religious motive for terrorist crimes.

Even though it is at odds with the traditional principle of the criminal law that proof of motive is not necessary,[17] courts may hold that adding motive as an essential requirement of a terrorism offence does not violate the principles of fundamental justice or fundamental freedoms under the Charter. In other contexts, the Supreme Court of Canada has drawn a distinction between "criminal law theory" and the principles of fundamental justice under s 7.[18] The Court would also likely stress that motive is only part of the definition of terrorist activities and that the motive still has to be manifested in some voluntary act. Although the inclusion of motive as an essential element of new crimes of terrorism may be "Charter proof", it remains a disconcerting departure from the traditions of the criminal law. As a practical matter, the difficulties of requiring the prosecutor to prove motive beyond a reasonable doubt should not be underestimated. The motive requirement will make the politics and religion of accused terrorists a central feature of their criminal trials. In my view, it would have been

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[17] *R v Lewis* (1979) 47 CCC (2d) 24 at 33 (SCC); *United States v Dynar* (1997) 115 CCC (3d) 481 at 509 (SCC).

[18] *R v Creighton* (1993) 83 CCC (3d) 346 (SCC).

better to rely on the traditional principle that the prosecutor does not have to establish motive and that no motive excuses the commission of a crime.

The prosecutor must next establish that the acts were committed with the intention of intimidating the public with regard to its security or compelling persons, organizations, or governments in and outside of Canada to do or refrain from doing any act. This is a much broader definition of terrorism than is found in s 1(1)(b) of the United Kingdom's Terrorism Act, 2000 which is restricted to attempts to influence governments or to intimidate the public. The broader Canadian definition defines security to include economic security[19] and applies to attempts to compel not only domestic and international governments and organizations, but also "persons" including corporations. Politically motivated crimes designed to compel corporations or individuals to change their behaviour or which threaten economic security could constitute a terrorist activity under the broad Canadian definition of terrorist activities. This may reflect the realities of globalization, but it goes beyond the traditional scope of anti-terrorism measures that have been directed against the subversion of governments and the intimidation of the public.

After having established motive and intent to intimidate or compel, the prosecutor must then establish that the activities are intended to cause certain harms. Clause A includes the intentional causing of death or serious bodily harm by the use of violence. This would apply to traditional acts of terrorism such as bombings and assassinations. Clause B is a bit broader requiring intent to endanger a person's life. Courts will have to define the exact ambit of danger to a person's life in a purposive manner, but also one that resolves reasonable ambiguities in favour of the accused. Clause C applies to causing a serious risk to the health or safety of the public. Both clauses B and C would apply to acts of biological or nuclear terrorism, as well as attempts to poison water, air and food supplies.

Clause D applies to the intentional causing of substantial damage to public or private property but only if causing such damage "is likely to result" in the harms defined in clauses A-C. The property damage clause D is narrower than s 1(2)(b) of the United Kingdom's Terrorism Act, 2000 which simply prohibits serious damage to property without regard to whether it is likely to result in other harms. Under the Canadian definition, politically motivated destruction of government or corporate property would not constitute a terrorist activity unless it was likely to cause death or serious bodily harm, endanger life, or cause a serious risk to public health or safety. This is an important restraint on the ambit of terrorist activities that may preclude much but not all politically motivated property destruction.

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[19] The preamble of Bill C-36 amplifies this concern by stating that terrorism threatens "the stability of the economy and the general welfare of the nation." On the role of preambles in legislation see K Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill LJ 129.

The accused could perhaps challenge clause D under s 7 of the Charter for not requiring subjective fault in relation to all aspects of the harms prohibited in that section. The accused could argue that clause D violates s 7 of the Charter by punishing unintended death, danger to life and risks to public health or safety as severely as the intentional commission of such harms. Another argument would be that terrorism has a special stigma that, like murder, attempted murder and war crimes,[20] requires subjective fault for all aspects of the prohibited consequences of the offence and/or which provide Canada with jurisdiction to try the offence. It is difficult to predict whether the courts will add all terrorism-based offences to the short list of special stigma crimes as many have commented on the uncertain and conclusory nature of the reasoning used to determine whether a particular offence has "stigma" in the constitutional sense. It is, however, possible that courts may conclude that the stigma of terrorism warrants such a rigourous approach to criminal fault. To label a person as a terrorist today is almost the same as saying that they are a murderer or a war criminal. The international context of terrorism, as well as the complex provisions granting Canada jurisdiction over crimes committed outside of Canada, may also encourage courts to find that terrorism like war crimes is a stigma offence and that the prosecutor is constitutionally required to establish some degree of subjective fault with respect to the elements which give Canada jurisdiction to try the crime. If the courts conclude that terrorism offences are stigma offences that constitutionally require subjective mens rea in relation to all elements of the prohibited act, they may either strike down clause D or more likely read in a requirement that accused also intend or know that the property damage would result in the conduct or harms outlined in clauses A to C.

Clause (E) represents the most controversial and debated provision in Canada's Anti-terrorism Act. As amended it defines as a terrorist activity the intentional causing of serious interference or disruption "of an essential service, facility or system, whether public or private." The prohibited harm goes beyond threats to life, health and bodily integrity to include the disruption of essential services which may include electricity, gas, roads, computer and communication systems, as well as other essential public and private services. Attempts to disrupt the activities of corporations which provide "essential services" would fall under this definition of terrorist activities. Taken on its own, the definition of terrorist activities to include serious disruptions of essential public or private services could cover a staggeringly wide number of activities that might otherwise only be considered property crimes and sometimes not even crimes at all. There is no equivalent to clause E in the United Kingdom legislation which only applies to the disruption of an electronic system.

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[20] *R v Martineau* (1990) 58 CCC (3d) 353 (SCC); *R v Logan* (1990) 58 CCC (3d) 391 (SCC); *R v Finta* (1994) 88 CCC (3d) 417 (SCC).

Clause E falls outside the definition of terrorism used by the Supreme Court in the immigration case of *Suresh v Canada*[21] as a working definition that "catches the essence of what the world understands by 'terrorism.'" That definition taken from the 1999 International Convention on the Suppression of the Financing of Terrorism defines terrorism as "any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act." The Court in *Suresh* was, however, quick to add that "Parliament is not prevented from adopting more detailed or different definitions of terrorism." Parliament has indeed expanded the definition of terrorist activities in Bill C-36 beyond the above definition of terrorism to include attempts to intimidate a population with regard to its economic security; to compel persons, as well as governments or international organizations; and to cause serious disruption to essential public or private services.

Clause E provides an important exemption that it does not apply to "advocacy, protest, dissent, or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses A to C." The government made an important amendment after second reading to remove the qualifier that the protests or strikes must be "lawful." Now the fact that a politically motivated disruption of essential public or private services would violate the criminal code, provincial trespass laws or even municipal by-laws would not render it automatically a terrorist activity. At the same time, however, the exemption for protests and strikes is not absolute. Serious disruptions of essential public or private services, whether unlawful or lawful, that are intended to result in death, serious bodily harm, danger to life or serious risk to public health and safety would fall under the definition of terrorist activities in subsection E. The intent requirement here is important so that it is possible that a striking nurses' union could argue that their intent was not to cause serious risk to public health or danger to life, but rather to secure concessions from the government or their employer. At the same time, however, a court might find intention to endanger life or public health if it was proven that the accused knew with a high degree of certainty that their disruption of essential services would have such effects. The intent requirement would also play an important role should clause E be challenged as a violation of freedom of expression. In *R v Keegstra*[22] for example, the Court stressed the intent requirement of wilful promotion of hatred help to justify any infringement of freedom of expression as a reasonable limit. In the case of advocacy, protest, dissent or strikes that

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[21] *Suresh v Canada*, *supra* note 14 at para 98.

[22] (1990) 61 CCC (3d) 1 (SCC).

interfere with essential services, the intent requirement would be related to the serious harms in clauses A-C.

Section 83.01(b) includes as a terrorist activity not only completed offences which result in the proscribed harms outlined in clauses A to E, but also a "threat… to commit any such act or omission…" If an expression of a political or religious belief or opinion also constituted a threat to commit a terrorist activity, it would not be exempted from being a terrorist activity under s 83.01(1.1) because it would constitute an act or omission "that satisfied the criteria of that paragraph." Threats to commit violence, as distinct from violence, would most likely be protected under the guarantee of freedom of expression so that the criminalization of threats to commit terrorist activities would have to be justified as a reasonable limit on freedom of expression under s 1 of the Charter. As is often the case, the s 1 analysis would depend on how the government's objective was defined. If it was defined in a limited manner as preventing terrorism, there might even be a doubt about whether criminalizing threats to commit terrorism is rationally connected to that objective. If it was defined more broadly as responding to the insecurity caused by the threat of terrorism, the criminalization of threats of terrorism would be rationally connected with this broader objective. Questions of proportionality and especially overall balance between chills on expression and gains in security would, however, still exist. The existence of other threatening based offences in the Code such as uttering threats under s 264.1 and intimidation under s 423(1)(b) might be interpreted as evidence of less drastic means to respond to threats than designating the threats themselves to be terrorist activities.

In addition to defining threats to commit terrorist activities as a terrorist activity, the concluding paragraph of s 83.01(b) also defines as a terrorist activity "a conspiracy [or] attempt…to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission…" To understand concerns about these forms of inchoate liability, it must first be recognized that the offences in Bill C-36 which incorporate this definition of terrorist activities are themselves best seen as inchoate crimes. Offences such as financing, facilitating and instructing terrorist activities prohibit acts done in preparation to commit acts of terrorism. The incorporation of inchoate forms of liability such as attempts, conspiracy and counselling in the definition of terrorist activities empowers courts to impose inchoate liability for inchoate crimes. Canadian courts have avoided doing this under the regular criminal code, rejecting for example, crimes such as counselling and conspiring to commit an attempt or a conspiracy. [23] Unless courts are prepared to hold that such expansions of liability violate the principles of fundamental justice, it is doubtful that they can reject such combinations of inchoate forms of liability under the Anti-terrorism Act because the definition of terrorist activities clearly and

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[23] D Stuart, *Canadian Criminal Law*, 4th ed (Toronto: Carswell, 2001) at 704.

unequivocally includes inchoate forms of liability for offences that are committed well in advance of actual terrorist violence. In my view, the inclusion of inchoate forms of liability for inchoate offences in s 83.01 "expands the net of criminal liability in unforeseen, complex and undesirable ways."[24]

There is an exemption from the definition of terrorist activities of "armed conflict…in accordance with customary international law or conventional international law" and "the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law." It is unclear whether this exemption adequately responds to concerns that support for revolutions against dictatorships and other unjust regimes in foreign countries could be classified as support for terrorist activities. The Supreme Court has taken notice that "that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organisation, not only by the South African government but by much of the international community."[25] The ANC definitely did not constitute the military forces of the state and it is not crystal clear that they were at all times engaged in an armed conflict in accordance with international law. The exemption for armed conflict conducted in accordance with international law may not exempt support for revolutionary movements against dictatorships from the definition of a terrorist activities. This part of the definition of terrorist activities, likes s 83.01(a), can be criticised for incorporating international law in a manner that is neither clear nor accessible. As discussed above, however, this incorporation of un-codified international law is likely not unconstitutional.

B. *The Definition of a Terrorist Group*

The definition of a terrorist group in s 83.01 is important because, like the definition of terrorist activity, it is incorporated in many of the new offences created in Bill C-36. A terrorist group is defined in s 83.01 as "an entity that has one of its purposes or activities facilitating or carrying out any terrorist activity" and "includes an association of such entities." An entity can include "persons" as well as groups. An alternative definition of a terrorist group is "a listed entity." This refers to groups or individuals that are listed as terrorist groups under s 83.05 on the basis that "the Governor in Council is satisfied that there are reasonable grounds to believe that (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (b) the entity is knowingly acting on behalf of, at the

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[24] K Roach, "The New Terrorism Offences and the Criminal Law", *supra* note 3 at 160.

[25] *Suresh v Canada*, *supra* note 14 at para 95.

direction of or in association with an entity referred to in paragraph (a).[26] On its face, this provision seems to require a judge in a criminal trial to accept a listing decision as definitive even though there might still be a reasonable doubt that the listed entity is in fact a terrorist group as required in the criminal offence. An accused would have a serious argument that the presumption of innocence is violated by a criminal trial court accepting an administrative decision to list a group or individual as a terrorist group as definitive proof of an essential element of a criminal offence. In other words, being listed by the Governor in Council as a terrorist group should not be substituted for actual proof beyond a reasonable doubt in a criminal trial that the entity was a terrorist group.[27] It would be unduly formalistic for a court to conclude that all the essential elements of the offence have been proven simply because the definition of terrorist group incorporated in the offence deems a listed entity to be a terrorist group. This argument would be even stronger if the courts concluded that terrorism was a stigma offence that required subjective fault in relation to all aspects of the prohibited act.

But a violation of the presumption of innocence under Canadian constitutional law can still be justified as a reasonable limit on that right. The government's s 1 case for relying on the listing decision should, however, run aground on the fact that the definition of a terrorist group itself provides an example of an alternative that is more respectful of the presumption of innocence. This alternative would require the Crown to prove beyond a reasonable doubt in the criminal trial that the group or individual had as one of its purposes or activities the facilitation or carrying out of terrorist activities. Another less restrictive alternative would be to use the administrative listing of an entity as placing an evidential burden on the accused to point to some evidence that would raise a reasonable doubt as to whether the group was a terrorist group.

III. THE NEW TERRORISM OFFENCES

The new offences relating to terrorism in the Criminal Code often incorporate the above definitions of terrorist activities and terrorist groups. Unlike most criminal offences, all of these offences require the consent of the federal or provincial Attorney General before prosecution.

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[26] There are limited grounds under s 83.05(6)(d) for judicial review before a judge of the Federal Court of whether the listing decision "is reasonable on the basis of the information available to the judge" without all that information necessarily being disclosed or even summarized for the applicant seeking judicial review.

[27] D Paciocco, "Constitutional Casualties of the War Against Terrorism" (2002) 15 Supreme Court L Rev (2d) (forthcoming).

A. *Offences in Relation to Financing and Property*

Section 83.02 makes it an offence willfully to provide or collect property intending or knowing that it will be used in whole or part for the commission of terrorist activities as defined in s 83.01(a) (*ie* the first part of the definition of terrorist activities incorporating various international conventions) or any other act or omission intended to cause death or serious bodily harm in order to intimidate the public or compel a government or international organization. This latter requirement taken from the International Convention for the Suppression of the Financing of Terrorism is narrower than the definition of terrorist activities in s 83.01(b). This offence is limited to the provision or collection of property. It requires high levels of subjective fault and would also not apply if the accused had a lawful justification.

Section 83.03 is a much broader offence than s 83.02. Section 83.03(a) applies not only to collecting, inviting to provide or making property available, but also to the provision of "financial or other related services" intending or knowing that they would be used to facilitate or carry out any terrorist activity. This provision is further extended to include benefiting any person who in turn will facilitate or carry out terrorist activity. It also includes all forms of terrorist activities caught under s 83.01. Section 83.03(b) is even broader than s 83.03(a) and applies to those who know that the property or financial service "will be used by or will benefit a terrorist group." This requires no nexus to a terrorist activity and could punish for up to 10 years those who directly or indirectly rent a house or invite a person to rent a house knowing that it will benefit a terrorist group. Given the breadth of this offence, it would be very important that the prosecutor establish beyond a reasonable doubt that the accused both knew that the group was a terrorist group and that the group was a terrorist group. Reliance on the administrative listing under s 83.05 of the group as a terrorist group should not suffice for proof of either the *mens rea* or the *actus reus* of this offence. Although s 7 of the Charter does not protect property rights or the right to provide commercial services, an accused, including a corporate accused,[28] should be able to challenge this offence under s 7 of the Charter for overbreadth. The argument would be that criminalization of the provision of any property or financial services for the use or benefit of a terrorist group is overbroad to the government's objective of preventing terrorism.

Section 83.04 makes it an offence to use property for the purpose of facilitating or carrying out terrorist activities or simply to possess property intending or knowing that it will be used for such purposes. Unlike s 83.03(b), this offence requires some connection to terrorist activities. At the same time, however, s 83.04 does not require any overt act beyond the

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[28] *R v Wholesale Travel* (1991) 67 CCC (3d) 193 (SCC).

possession of property whereas the other offences require overt acts such as the use, collection or provision of property or services.[29]

Section 83.08 prohibits any person in Canada and any Canadian outside of Canada from knowingly dealing[30] with property owned or controlled by a terrorist group or providing any financial or related services in respect of such property for the benefit of or at the direction of a terrorist group. Exemptions from this offence can be made by the Solicitor General under s 83.09.[31] The knowledge requirement should be interpreted to extend to all aspects of the prohibited act including knowledge that the group is a terrorist group; that the property is owned or controlled by the terrorist group or that the services are in relation to property owned by or at the direction of the terrorist group. As under s 83.03, reliance on the administrative listing under s 83.05 of a terrorist group should not suffice for proof of either the *mens rea* or the *actus reus* of this offence.

Section 83.1 places a mandatory duty on all persons in Canada and every Canadian outside of Canada to disclose property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group as well as proposed or actual transactions in relation to such property. A key to this offence will be how widely the courts interpret the requirements that the accused possess or control property. At the very least, landlords or vendors of property could be prosecuted for renting or selling property to those they know are a terrorist group or are controlled by a terrorist group. Section 83.1 imposes specific duties on various financial institutions and foreign companies to report to their regulators whether or not they are in possession or control of property owned or controlled by or on behalf of a terrorist group. These mandatory duties constitute an exception to the general principles that individuals have no legal duties to assist the state in criminal investigations.

B. *The New Offences of Participation, Facilitation, Instruction and Harbouring Terrorists*

The Anti-terrorism Act also adds five new non-financing terrorist based crimes to the Criminal Code. All of these offences incorporate the definition of terrorist activity discussed above and some of them also incorporate the definition of terrorist group. As discussed above, all five offences are best seen as inchoate offences that criminalize activities both before and after the

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[29] For a discussion of the absence of an overt act (other than possession of property) in s 83.04(b) see K Davis, "Cutting off the Flow of Funds to Terrorists" in Daniels *et al The Security of Freedom*, *supra* note 1 at 301-2.

[30] Under s 83.08(1)(b), this includes entering in or facilitating any transaction in relation to the property.

[31] These exemptions from criminal liability would have to be provided in a procedurally fair manner. *R v Morgentaler* (1988) 37 CCC (3d) 449 (SCC).

actual commission of terrorist violence. They all require the consent of a provincial or federal Attorney-General to be prosecuted.

Section 83.18 makes it an indictable offence punishable by up to 10 years' imprisonment if a person "knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity…". The prohibited act of this offence is extremely broad. Not only participation in, but direct or indirect contributions to a terrorist group are prohibited. As discussed above, a terrorist group may be a listed entity or any other group or individual that has as one of its purposes facilitating or carrying out any terrorist activity. The offence may be committed whether or not the accused's participation or contribution actually enhances the ability of a terrorist group to carry out a terrorist activity. The *actus reus* of participation and contribution includes providing or receiving "training"; "providing or offering to provide a skill or expertise for the benefit of at the direction of or in association with a terrorist group" and "entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group." This latter clause criminalizes a "sleeper" who enters a country at the direction of a terrorist group, but who does nothing. The *actus reus* is defined so broadly as to encompass many forms of association with a "terrorist group", something that is underlined by the direction to courts in determining liability to consider whether a person "frequently associates with any of the persons who constitute the terrorist group" or receives any benefits or follows the instructions or uses words or symbols associated with the terrorist group.

The breadth of the *actus reus* in s 83.18 could give rise to Charter challenges based on freedom of expression or association under s 2 of the Charter or vagueness, overbreadth or lack of a voluntary act under s 7 of the Charter. The courts may well find that the limits placed on fundamental freedoms are reasonable limits especially when viewed in light of the more drastic alternative of making membership in a terrorist group itself illegal as is done under anti-terrorism legislation in a number of countries including the United Kingdom, India and Pakistan. It could, however, be argued that s 83.18 is even broader than such an offence because it catches those who only contribute directly or indirectly to a terrorist group as opposed to those who are actual members. Although the courts have been very reluctant to strike down laws under s 7 of the Charter as excessively vague, an argument could be made that the offence is overbroad to the objective of combating terrorism. Making it an offence to provide legal, medical or other services for the benefit of a terrorist group could be overbroad to the legitimate objective of stopping terrorism in much the same way as the Canadian Supreme Court held it was overbroad to prohibit all convicted sex offenders from loitering in public places where children could not reasonably be

expected to be present.[32] There may be activities caught in the extremely broad offence of participating or contributing to terrorist groups that are very far removed from actual facilitation of terrorism.

In determining the constitutionality of s 83.18, however, the courts will pay attention to the fault requirements that the participation or contribution be "knowingly" and "for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity." The requirement of enhancing the ability of terrorist groups to facilitate or carry out terrorist activity should require proof of something more than contributing to the otherwise lawful existence of the group. Although it is not completely clear, the knowledge requirement should require the prosecutor to prove that the accused knowingly participated or contributed and knew that the group was a terrorist group. In addition, the prosecutor must establish that the accused participated or contributed "for the purpose" of enhancing the ability of any terrorist group to either carry out or facilitate a terrorist activity. The requirement that the accused act with such a guilty purpose is a fairly high level of fault or *mens rea*.

Section 83.19(1) provides that every one who "knowingly facilitates a terrorist activity" is guilty of an indictable offence punishable by up to 14 years' imprisonment. The fault requirement is then qualified by providing that it is not necessary that the facilitator knows that a particular terrorist activity is facilitated. "Reading the legislation in its best possible light, one can interpret subsection 2(a) as emphasizing the word "particular" which could mean that the facilitator need not know which terrorist activity is being assisted."[33] On such a reading, all that may remain of the fault requirement would be knowledge of a wide range of generic or non-particularized terrorist activities. Even more troubling is s 83.19(2)(b) which provides that it is not necessary that "any particular terrorist activity was foreseen or planned at the time it was facilitated." This provision goes beyond watering down the fault element to obliterating it. In other words, it seems impossible to knowingly facilitate a terrorist activity when you do not know that "any particular terrorist activity was foreseen or planned at the time it was facilitated." There would seem to be little or no *mens rea* at the time that the *actus reus* of facilitation was committed. It has been suggested that the controversial concept of wilful blindness[34] may bridge the temporal gap, but this would place the fault element closer to failing to take reasonable care to ensure that what was being facilitated was actually a

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[32] *R v Heywood* (1994) 94 CCC (3d) 481. Legislation in the United States and the United Kingdom is generally more precise and somewhat more limited in setting out the forms of assistance to terrorist groups that is prohibited. The American PATRIOT ACT s 805 for example excludes the provision of medicine and religious materials from the prohibited act.

[33] E Machado, "A Note on the Terrorism Financing Offences" (2002) 60 U T Fac L Rev 103 at 105.

[34] D Paciocco, "Constitutional Casualties of September 11", *supra* note 27 at para 27.

terrorist activity. The problem would be that the accused would still be convicted and punished for knowing as opposed to negligent facilitation of a terrorist activity. There is a significant difference between labeling and stigmatizing a person as an intentional terrorist and as a person who has negligently assisted terrorists. Courts may want to consider reading down or even invalidating s 83.19(2) in order to preserve the subjective fault element of knowledge in s 83.19(1).

Section 83.21 provides an offence of knowingly instructing any person to carry out any activity that benefits a terrorist group "for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity". The *actus reus* of this offence can include instructions to carry out activities that are themselves legal, but nevertheless which enhance the ability of any terrorist group to carry out terrorist activities. This "could include acts such as setting up a bank account or supplying lodgings and food that would under the law of attempts be held to be mere preparation for the commission of a crime. It might also include some activities that would be too peripheral to be classified as aiding, abetting or counseling a crime."[35] The only restraint on this very broad offence is that the accused must knowingly instruct the activities for the purpose of enhancing the ability of any terrorist group to facilitate or carry out terrorist activities. The knowledge requirement should be interpreted not only to refer to the act of instruction, but also to knowledge that a group is a terrorist group.

Section 83.22 provides an offence of knowingly instructing any person to carry out a terrorist activity. The instruction may be either direct or indirect and it is not necessary that the accused instructs a particular person to carry out the terrorist activity or knows the identity of the person instructed. "General instructions to political or religious groups or the public-at-large to commit a terrorist activity could fall under this new offence."[36] Such instructions would not fall under the exemption in s 83.01(1.1) even if they were an "expression of a political, religious or ideological thought, belief or opinion" if they also constituted under s 83.01 either a threat of or counseling of a terrorist activity. An instruction to commit a terrorist activity could constitute expression under s 2 of the Charter, but the prohibition of such communication would probably be justified as a reasonable limit on the right under s 1 of the Charter.

The new offence in s 83.23 applies to "everyone who knowingly harbours or conceals any person who he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity". It requires a high level of subjective fault in the form of both subjective knowledge that a person has or is likely to carry out a terrorist activity and

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35 K Roach, "The New Terrorism Offences and the Criminal Law", *supra* note 3 at 164.

36 *Ibid* at 164.

that the accused provide assistance for the purpose of enabling the person to facilitate or carry out the terrorist activity. This is a higher form of fault than found in a comparable provision of the American Patriot Act[37] which applies not only to those who know, but those who ought to know that they are harbouring or concealing a terrorist. It remains to be seen whether the courts will require subjective fault as a constitutional requirement for all terrorism offences, but such a fault level is appropriate especially given the breadth of the new terrorism offences and the severe stigma and consequences of conviction of a terrorism offence.

The proposed Public Safety Act[38] would add another new offence to the criminal law to respond to concerns about increases in hoaxes about terrorism in the immediate aftermath of September 11, 2001. A proposed s 83.231 would make it an offence to convey information or commit an act that is likely to cause a reasonable apprehension that terrorist activity will occur. The accused must intend to cause any person to fear death, bodily harm, substantial damage to or interference with the lawful use or operation of property. The offence can be punished by up to 5 years' imprisonment. If, however, bodily harm actually results from the hoax, the punishment can be up to 10 years and if death results, the punishment can be up to life imprisonment even though the accused may not necessarily intend death or even bodily harm, but only damage or interference with property. Outside of the context stigma offences such as murder, attempted murder and war crimes, the Supreme Court of Canada has upheld other offences which punish people for the harm caused even though their fault or mens rea may not relate to the harm caused. [39]

C. *Other New Offences*

The Anti-terrorism Act also adds other new offences to the Criminal Code. A new s 231(6.01) of the Criminal Code provides that irrespective of whether murder is planned and deliberate, "murder is first degree murder when the death is caused while committing or attempting to commit an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity." This follows a pattern in Canada of expanding the law of first degree murder in response to horrific crimes.[40] First degree murder in Canada is punishable by life imprisonment with ineligibility for parole for 25 years.

Section 431.2(2) is an important new offence punishable by life imprisonment for those who deliver, place, discharge or detonate an explosive or lethal device (including biological agents, toxins or radioactive

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37 HR 3162 s 803 amending s 2339 of the United States Code.

38 Bill C-55 First Reading 29 April 2002.

39 *R v Creighton* (1993) 83 CCC (3d) 346 (SCC).

40 K Roach, "Did September 11 Really Change Everything: Preserving Canadian Values in the Face of Terrorism" (2002) 47 McGill LJ (forthcoming).

material) into a place of public use, a public transport system or a public or private infrastructure system distributing services such as water, energy and communications for the benefit of the public. This serious offence requires the prosecutor to prove either intent to cause death or serious bodily injury or intent to cause extensive destruction resulting or likely to result in major economic loss. It might have been better for this offence to have constituted two separate offences, one requiring the intent to harm people and a less serious one requiring the intent to harm property. Nevertheless, the offence as presently constituted requires subjective fault in the form of intent to cause death, serious bodily injury or major property damage. This offence also demonstrates that the reference in the definition of terrorist activities in s 83.01(1)(b)(ii)(E) to the disruption of essential services could have been more precisely defined with less fear of overbreadth.

A new offence of hate-motivated mischief to religious property is provided in s 430(4.1) of the Criminal Code. This recognizes the close connection between many acts of terrorism and hate crimes. This new hate crime requires proof of a hate motive as an essential element of the offence and marks a departure in Canadian criminal law from only using hate as an aggravating factor at sentencing.[41] The new hate crime applies only to places of religious worship and requires the prosecutor to establish that the crime was "motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin." This new hate crime was part of the government's argument that the new anti-terrorism law was designed to protect human rights.

D. *Punishment*

A significant feature of the Anti-terrorism Act is the extent to which it provides for increased and some mandatory punishment for terrorism offences. This accords with statements by the Minister of Justice that one of the purposes of the legislation was to impose tougher penalties on terrorists, but it also accords with a trend to increased legislative direction on issues of punishment that until relatively recently had been largely left to the sentencing discretion of trial judges.

Section 83.2 provides that every one who commits an indictable offence under the Criminal Code or other federal legislation "for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life." Imprisonment for life is the most severe sanction imposed in Canadian criminal law. The indictable offence itself does not have to be a terrorist offence or activity. It could be any indictable offence including offences such as fraud. The only requirement is that the offence be for the benefit of or at the direction or in association with a terrorist group. Although the wording is not clear, this

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[41] See Criminal Code s 718.2(a)(I).

section should be interpreted to require the prosecutor to establish fault in relation to all its elements. Hence, the accused should intend to benefit or follow the directions of a known terrorist group and not simply commit an indictable offence that in fact benefits a terrorist group. This provision also raises the issue discussed above of whether the listing of a group as a terrorist group under s 83.05 is conclusive evidence in a criminal trial. As suggested above, the better position is that the prosecutor in a criminal trial must prove beyond a reasonable doubt that the group being benefited is in fact a terrorist group.

Section 83.27 provides that "notwithstanding anything in this act", that a person convicted of an indictable offence that does not have a minimum sentence of life imprisonment can be liable to imprisonment for life "where the act constituting the offence also constitutes a terrorist activity". This provision for enhanced penalties could apply even to the new offences in the legislation that are otherwise punishable by only a maximum sentence of ten years imprisonment. Before this enhanced punishment can apply, the prosecutor must notify the accused and prove that the offence was a terrorist activity with the elements of motive and intent required in s 83.01.

Section 83.26 provides that sentences other than life imprisonment for the new offences created in the legislation must be served consecutively to any other punishment imposed arising from the same event or series of events or any punishment that the accused is subject to at the time of sentencing. Mandatory consecutive sentence might result in disproportionate punishment given the overlapping and multiple nature of crimes that could result from terrorist acts. In addition, offences involving firearms could result in consecutive mandatory minimum penalties of four years imprisonment. Given the Supreme Court's recent decision that the mandatory minimum punishment of four years imprisonment for a variety of offences committed with firearms is constitutional,[42] it is unlikely that the mandatory sentencing provisions of the act will violate the right against cruel or unusual punishment under s 12 of the Charter. Nevertheless, in determining the quantum of punishment for crimes without mandatory penalties, judges should respect the requirement that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh".[43] Factors like the youth of the accused and whether he or she was a leader or a follower should still be considered when sentencing offenders for terrorism offences.[44]

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42 *R v Morrisey* [2000] 2 SCR 29. On the Court's new deference to mandatory minimum penalties see K Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39 Osgoode Hall LJ 367.

43 Criminal Code s 718.2(C).

44 *R v Belmas* (1985) 27 CCC (3d) 127 (BCCA).

E. *Victims*

The American Patriot Act has many provisions relating to compensation of the families of the victims of September 11. In contrast Bill C-36 contains only one provision contemplating that the proceeds of forfeited property of terrorists may be used to compensate victims of terrorist activities.[45] Victim compensation fits into a non-punitive and restorative model of victims' rights, as does crime prevention efforts such as enhanced airline security and better controls on dangerous explosive, nuclear, and biological materials contemplated in some parts of Canada's proposed Public Safety Act.[46] At the same time, most of Canada's new Anti-terrorism Act, like the American Patriot Act, falls into a punitive model of victims' rights that offers new offences and enhanced penalties and police powers as the main response to crime victimization. The tendency in a punitive model is to assert the rights of victims as a reason to limit the rights of the accused and to make optimistic assumptions about the ability of tough criminal laws to deter crime.

IV. NEW INVESTIGATIVE POWERS

In addition to the creation of many new offences relating to various forms of financing and facilitation of terrorism, Canada's new Anti-terrorism Act also gives the police new powers.[47] It makes it easier for the police to obtain wiretaps for longer periods of time. The most novel of the new police powers, the powers of preventive arrest and investigative hearings, can only be exercised with both the consent of the Attorney-General and except in exigent circumstances with prior judicial authorization. The Attorneys-General are also required to prepare yearly reports on the use of such police powers and these new police powers themselves will expire in five years time unless Parliament again authorizes their use.

A. *Preventive Arrests*

Section 83.3 provides a new power of preventive arrest. This power can only be exercised on the consent of the provincial or federal Attorney-General and requires a police officer to have reasonable grounds to believe that a terrorist activity will be carried out and reasonable grounds to suspect that the imposition of a recognizance with conditions or an arrest

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45 Criminal Code s 83.14(5.1) and PATRIOT ACT ss 621-624.

46 On the distinction between punitive and non-punitive models of victims' rights see K Roach, "Four Models of the Criminal Process" (1999) 89 J of Crim Law and Criminology 489.

47 The act does not give Canada's civilian security intelligence agency new powers, but it does recognize the Comunications Security Establishment for the collection of foreign intelligence.

is necessary to prevent the carrying out of a terrorist activity. A preventive arrest can only be made without a prior judicial warrant in exigent circumstances. In any event, the arrestee must be brought before the judge as soon as possible and within 24 hours. After the arrest, the provincial court judge is given the discretion to adjourn hearings for up to 48 hours, thus possibly extending the period of preventive arrest on suspicion to a possible 72 hours, a period that is shorter than the 7-day period allowed under the United Kingdom legislation. Unfortunately, the legislation provides no criteria to guide judges in their discretion to extend periods of preventive arrest. If the judge is satisfied that there are reasonable grounds to suspect that the arrestee will commit a terrorist activity, the judge may require the arrestee to enter into a recognizance or peace bond that requires him to be of good behaviour and not to possess weapons or explosives for a period up to 12 months. A person who refuses to enter into such a recognizance may be jailed for up 12 months and a person who violates a recognizance is guilty of an offence punishable by up to 2 years' imprisonment.

B. *Investigative Hearings*

Section 83.28 of the Criminal Code introduces the new and controversial concept of investigative hearings in Canadian criminal law. As with preventive arrests, the prior consent of the Attorney-General is required. The police have to establish to a judge that there are reasonable grounds to believe that a terrorism offence has or will be committed and that the subject has direct and material information relating to the offence and that reasonable efforts have been made to obtain such information. The judge can order the person to answer questions and provide documents. The judge is empowered to decide objections on the grounds of laws relating to non-disclosure of information or privilege, but otherwise must allow the Attorney-General to question a person and require the production of things, even though the subject objects on grounds of self-incrimination. If the person refuses to talk at an investigative hearing, the judge must decide what to do. Again, the new legislation provides no specific guidance. Options include the use of contempt powers or subsequent prosecutions for disobeying a court order. Given the broad nature of the many new offences relating to facilitating, harbouring or financing terrorism, it can be expected that the subject of the investigative hearing may frequently face subsequent criminal prosecutions for his or her involvement with terrorists. Section 83.28(10) does not provide immunity from subsequent prosecution, but it does provide immunity against the direct or derivative use of statements compelled at investigative hearings in subsequent prosecutions. This accords with Canadian constitutional law which holds that the rights to silence and against self-incrimination are not absolute. Except in cases in which the state's sole purpose is to obtain incriminating statements, use and derivative use immunity for compelled statements will under Canadian

constitutional law constitute an appropriate balance between the rights of the individual and the state's interests.[48] Although the provision for investigative hearings are not likely to be struck down under the Charter, they do represent a departure from the adversarial traditions of Canadian criminal law. It will be interesting to see whether they spread beyond the terrorism context to other parts of the Criminal Code.

C. *Anti-Discrimination*

The Senate Special Committee on Bill C-36 called on the government to add a non-discrimination clause to the Anti-terrorism Act as is found in s 4(b) of Canada's Emergencies Act.[49] Government backbencher and human rights lawyer Irwin Cotler also called for such a non-discrimination clause because of his recognition that "there is a potential in the expansive powers of the anti-terrorism act for the possible singling out of visible minorities for differential treatment".[50] A coalition of Muslim organizations who testified before the various committees considering the Anti-terrorism Act called for similar restraints on investigative powers warning that "the adverse impacts of this Bill will not be remedied by judicial oversight and post facto vindication. Stern judicial sanctions of the State's violation of rights make great case law…However, case law will not put together ruined families, regain lost livelihoods, or rebuild friendships and trusts, which were fractured by the suspicion, innuendo and stigmatization sown by the overly zealous acts of the State."[51] Unfortunately, the government decided to ignore all of these proposals. One of the dangers of September 11 is that it will result in the crude, inefficient and discriminatory law enforcement technique of targeting people simply because of their race or religion.

The American PATRIOT ACT expressed a greater concern about the dangers of profiling than the Canadian Anti-terrorism Act. The former condemned discrimination against Arab Americans, Muslim Americans and Americans from South Asia and affirmed "the concept of individual responsibility for wrongdoing" as "sacrosanct in American society" and

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48 *R v S (RJ)* (1995) 96 CCC (3d) 1 (SCC); *British Columbia (Securities Commission) v Branch* (1995) 97 CCC (3d) 505 (SCC). The courts might, however, halt an investigative hearing as violating the Charter if it was demonstrated that the state's sole objective was to compel the accused to engage in self-incrimination. In almost every case, however, the state would be able to argue that their objective was to obtain information about terrorism, not to compel the subject of the investigative hearing to engage in self-incrimination.

49 SC 1988 c 29.

50 I Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem and Roach eds *The Security of Freedom*, *supra* note 1 at 128.

51 Coalition of Muslim Organizations Brief to Standing Committee on Justice and Human Rights Nov 8, 2001 at 3.

applicable "equally to all religious, racial and ethnic groups."[52] A non-discrimination clause, like the American condemnation of discrimination, would have been a largely symbolic statement of opposition to discriminatory enforcement of the many new powers provided in the legislation. A more robust approach would have prohibited profiling as a law enforcement technique on the grounds that it is both discriminatory and inefficient and would have provided for the collection of statistics in order to determine whether the new powers were disproportionately being used against certain groups.[53] As it stands now, the act provides no assurances to those in Canada who may feel they are targeted or suspected simply because they are perceived to be of the same race or religion as the September 11 terrorists.

After the fact litigation will likely provide inadequate remedies for innocent victims of profiling.[54] The factually innocent victim of profiling will probably receive at best only modest financial compensation and faces the downside risk of having to pay the government's costs if civil litigation is unsuccessful. If incriminating evidence is found and a Charter violation is established, it may possibly be excluded under s 24(2) of the Charter. A stay of proceedings is an unlikely remedy.[55] Although some annual reporting requirements were added after second reading to record the "number" of times preventive arrests and investigative hearings are used, such quantitative data may not be sufficient to judge any allegations of racial profiling.[56] Non-judicial remedies for profiling include complaints to human rights agencies or police complaints bodies. These bodies, however, are already overburdened and were given no new resources or powers under the legislation. Much greater attention needs to be paid to ensuring that oversight bodies can provide efficient inquiries and audits and effective remedies for any abuse of new and existing powers. Bill C-36 gives all peace officers increased powers even though many are not subject to

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[52] HR 3162 s 102(a)(3). Note that these are unenforceable "findings of Congress" and widespread concerns about the profiling and detention of people of Arab origin have been raised in the United States. Amnesty International has stated that as many as 1,200 people swept up in the post September 11 investigation have been detained arbitrarily and deprived of basic human rights. "Many foreign nationals still imprisoned in US" *Globe and Mail* (18 March 2002) A8. Similar concerns have been raised about large numbers of people of Arab origin detained in Canadian immigration centres since September 11. S Toope, "Fallout from '9-11': Will A Security Culture Undermine Human Rights?" (2002) 65 Sask L Rev (forthcoming).

[53] K Roach and S Choudhry, "Brief to the Special Senate Committee on Bill C-36" January 2002.

[54] S Choudhry and K Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies and Democratic Accountability" (2003) 40 Osgoode Hall LJ (forthcoming).

[55] The courts will generally only stay proceedings for an abuse of process if a subsequent prosecution would perpetuate the abuse and there are no lesser effective remedies. See *R v Regan* [2002] SCC 12.

[56] Criminal Code s 83.31.

effective external oversight.[57] It remains to be seen whether requirements that either the federal or provincial Attorneys-General consent to the use of many of the new police powers and criminal offences in the Anti-terrorism Act will provide sufficient safeguards. Attorneys-General should use these powers in an independent manner to prevent abuses of the new powers, but much will depend on the information they receive from the police.

V. CONCLUSION

This paper has outlined the way Canada's new Anti-terrorism Act expands offences and increases punishment for terrorism under the Criminal Code and some of the new investigative powers it provides to the police. Many of the new offences added to the Criminal Code incorporate expansive definitions of terrorist activities and terrorist groups. The manner in which courts interpret these key definitions, as well as the broad wording of the many new offences, will be crucial in the development of Canada's new terrorism crimes. Given present Charter jurisprudence, most direct Charter challenges to the new offences and punishments whether on the basis of vagueness, overbreadth, unreasonable infringement of expression or the imposition of cruel and unusual punishment will likely fail. It is possible that the courts will find that terrorism offences have a special stigma that requires proof of subjective fault in relation to all aspects of the prohibited act and all aspects which give Canada jurisdiction over the offences. In any event, the new offences should be interpreted in a manner that require the prosecutor to prove subjective fault in relation to all aspects of the prohibited act and to require the prosecutor to establish all elements of the offence beyond a reasonable doubt without reliance on an administrative decision to list a group or an individual as a terrorist group. Time will tell the extent to which these new offences are used in prosecutions and their efficacy. The requirement to prove political or religious motives, the combination of various forms of inchoate liability and the overlapping nature of many of the new offences may make some prosecutions under the new offences unwieldy. Some prosecutors may prefer to rely on traditional criminal offences such as murder and kidnapping with their various forms of inchoate liability, which as suggested in this paper, are adequate to deal with terrorist violence.

Time will also tell how much the new investigative powers of preventive arrests and investigative hearings will be used and their effectiveness in preventing terrorism. These new investigative powers will expiry in five years time, but can be renewed by Parliament. In addition, the entire Anti-

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[57] A case can be made that new powers should have been given not to every police officer but to the Canadian Security Intelligence Agency which is subject to special forms of accountability. See ML Friedland, "Police Powers in Bill C-36" in Daniels *et al*, *The Security of Freedom*, *supra* note 1 at 270-4.

terrorism Act is subject to Parliamentary review late in 2004. At that time, Parliamentarians should carefully consider the necessity for the new measures and in particular whether it is necessary or wise to require proof of religious or political motives for crimes of terrorism. If the Act is retained, Parliament should also add a non-discrimination clause and other oversight measures to ensure that discriminatory profiling and other forms of abuse do not occur in its administration. Like the threat of terrorism, the Canadian debate about anti-terrorism measures will continue for some time.