Preventing Terrorism Bill C-36: The *Anti-terrorism Act 2001*

Richard G. MOSLEY*

* Assistant Deputy Minister, Criminal Law Policy and Community Justice Branch, Department of Justice Canada. Comments in this paper are those of the author and should not be taken as a statement of the policy of the Government of Canada unless expressly indicated.

"The brothers, who conducted the operation, all they knew was that they have a martyrdom operation and we asked each of them to go to America but they didn't know anything about the operation, not even one letter. But they were trained and we did not reveal the operation to them until they are there and just before they boarded the planes […]. Those who were trained to fly didn't know the others. One group of people did not know the other group."[1]

"[…] Our current laws allow us to investigate terrorism, prosecute and impose serious penalties on those who have engaged in various specific activities generally associated with terrorism […]. However, these and other laws are not sufficient to prevent terrorist acts from occurring in the first place. Those who carried out the atrocities of September 11 were clearly not deterred by the stiff penalties associated with their actions […]. Our current laws do not adequately address the reality of how terrorist cells operate and how support is provided. Our laws must fully implement our intention to prevent terrorist activity and, currently, they do not."[2]

---

[1] Oussama Ben Laden, from the transcript of the videotape released by the US Department of Defense on December 13, 2001. Transcript prepared by George Michael, Diplomatic Language Services and Dr. Kassem M. Wahba, Arabic language program coordinator, School of Advanced International Studies, Johns Hopkins University.

[2] The Honourable Anne MacLellan, Minister of Justice and Attorney General of Canada, appearance before the Senate Committee on the Subject Matter of Bill C-36, December 4, 2001.

I. CONTEXT IN WHICH C-36 WAS DEVELOPED

Prior to the introduction of Bill C-36,[3] the approach that Canada had taken over the past thirty years in response to the growth of terrorism had been to rely, for the most part, on the criminal law of general application and to support collective international efforts to address the problem. Canada was usually among the first to subscribe to international agreements aimed at particular threats to the security of the global community, as they were opened for signature. This was done on an issue-by-issue basis, rather than through comprehensive antiterrorist legislation. Where gaps were perceived in the scope of our criminal law with respect to those threats, new offences were enacted, and extra-territorial jurisdiction extended over those offences. Thus Parliament enacted amendments to the *Criminal Code* of Canada creating new offences[4] to implement a series of United Nations agreements[5] adopted since 1970 and dealing with the hijacking of aircraft, hostage-taking, the prevention of crimes against internationally protected persons, maritime navigation, fixed-platforms and the protection of nuclear material.

While efforts to develop a broad antiterrorism convention had been undertaken at the United Nations, they had been unsuccessful largely due to the inability of the member states to achieve a consensus on a common definition of terrorism.[6] The most recent meeting of the General Assembly's Ad Hoc Committee on Terrorism concluded on February 1, 2002, still without agreement on a definition for the proposed comprehensive convention. The instruments adopted by the UN in this area each relied on a limited definition dealing with a particular type of terrorist activity. The comprehensive agreement is intended to fill in any gaps left by those sectoral treaties.[7]

---

[3] Now S.C. 2001, c. 41. Assented to December 18, 2001 and brought into force on December 24, 2001. To avoid confusion, reference will be made to Bill C-36 throughout this paper.

[4] The offences were referred to in section 7 of the *Criminal Code* R.S.C. 1985, c. C-46, and continue to be set out there, as amended by Bill C-36.

[5] Canada has now signed all twelve of the United Nations conventions related to terrorism and ratified ten of them. The remaining two should be ratified shortly. A complete list and brief description of each can be found online http:www.odccp.org/terrorism.html.

[6] The first attempt was made at the League of Nations in 1937.

[7] UN Press Release L/2993, February 1, 2002.

During the UN debates, certain countries, notably the United Kingdom[8] and the United States,[9] had enacted comprehensive legislative regimes. Canada continued to address terrorism through a number of discrete initiatives. In addition to the *Criminal Code* changes mentioned previously, amendments had been made to the *Immigration Act*[10] to address security concerns related to terrorism. In September 2001, Bill C-11, the proposed *Immigration and Refugee Protection Act*,[11] and Bill C-16, *The Charities Registration (Security of Information) Act*,[12] were before Parliament. Bill C-16 was introduced in 2001 to deny the use of charitable status to organizations believed to be involved in raising funds for terrorist activities. Neither bill included a definition of "terrorism", "terrorist acts" or "activities" nor was one to be found in other Canadian statutes in which one or more of the terms were employed such as the *Canadian Security Intelligence Service Act*.[13] This reflected the perception that had long plagued international efforts in this area: that it would be difficult, if not impossible, to arrive at satisfactory definitions that would be broadly accepted. Challenges brought against Canadian statutes on the ground that the lack of definition rendered the use of the terms void for vagueness were successfully defended as the courts were prepared to breathe meaning into the expressions.[14]

In September, before the attacks on New York and Washington took place, consideration was being given in Canada to the ratification and implementation of the two most recent of the UN conventions: the *International Convention for the Suppression of Terrorist Bombing*[15] and the *International Convention for the Suppression of the Financing of Terrorism*.[16] Work had begun on drafting the necessary amendments to

---

8 *Terrorism Act 2000* (U.K.), 2000, c. 11.

9 *Antiterrorism and Effective Death Penalty Act of 1996*, Publ. L. No. 104-132, 110 Stat. 1214.

10 R.S.C. 1985, c. I-2, as am. by R.S.C. 1985 (4th Supp.), c. 29 and S.C. 1992, c. 49, s. 31.

11 Now S.C. 2001, c. 27.

12 The content of this bill was incorporated into Bill C-36 as Part VI and enacted.

13 R.S.C. 1985, c. C-23.

14 For the most recent pronouncement on the subject see *Suresh* v. *Canada,* 2002 SCC 1.

15 Adopted by the General Assembly of the United Nations on December 15, 1997.

16 Adopted by the General Assembly on December 9, 1999.

implement the bombing convention and plans were being made to consult on what might be required to conform to the financing convention. Experience with the introduction of Bill C-16 suggested that implementation of the financing convention would be particularly difficult.

In the immediate aftermath of September 11, 2001, officials in the Department of Justice took stock of the existing legislation and the work in progress that could be brought to bear on the terrorist threat. The conclusion reached, as exemplified by the quote above of remarks of the then Minister of Justice, was that our existing legislation was not adequate to meet the challenge.

The Government of Canada was determined to rectify that situation and decided that the only effective way to prevent terrorist acts was to provide law enforcement with the tools to identify and stop terrorist plots before they could be carried out. The enforcement agencies had to be able to interdict people at a point where they are knowingly facilitating or enabling a future terrorist act to be committed even if they do not know the specifics of what that act will be or when it will occur. But this had to be done while respecting Canadian values. Thus the components of C-36 were developed in a somewhat unique process that involved the integration of counsel from the Human Rights Law Section of the Department of Justice with policy counsel and members of the Federal Prosecution Service in each of the teams that worked on the bill. Further, human rights concerns were highlighted in each of the policy documents considered by the Public Security and Antiterrorism Committee of Cabinet (PSAT).[17] The result has been criticised as being "Charter-proofed"[18] as if there is something insidious in meeting constitutional standards. The Department prefers to view it as striking the appropriate balance between the need to respect human rights and the need for effective measures to ensure that Canadians and the global community are better protected.

---

[17] For a more detailed description of this process, see the lead article in vol. 2, No 1 of *Justice Canada*, the Department of Justice magazine available online: http://www.canada.justice.gc.ca.

[18] K. Roach, "The Dangers of a Charter-Proof and Crime Based Response to Terrorism" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001) 131.

While we were beginning our work on developing the elements of what would become Bill C-36, a consensus was also rapidly emerging in the international community about the immediate measures required to deal with terrorism. That consensus was incorporated in the United Nations Security Council Resolution 1373 adopted on September 28. Key operative clauses of that resolution **required** that all member States:

- Prevent and suppress the financing of terrorist acts;
- Criminalize the wilful provision or collection of funds to be used to carry out terrorist acts;
- Freeze the funds and other financial assets or economic resources used to commit or to facilitate the commission of terrorist acts;
- Prohibit the making available of funds or financial or other related services for those purposes;
- Suppress the recruitment of terrorist groups and the supply of weapons to terrorists;
- Deny safe haven to those who finance, plan, support or commit terrorist acts.[19]

Meeting just days after the commission of one of the worst acts of terrorism in modern history,[20] the members of the Security Council were, undoubtedly, driven by a determination to do all they could to prevent the recurrence of such acts. They concluded that collective action was essential to identify and eliminate the networks that support international terrorism.[21]

---

[19] This is an abbreviated and paraphrased listing of the content of Articles 1 and 2 of the resolution.

[20] The highest prior casualty toll in UN list is 477 deaths arising from arson at Abadan, Iran in 1979.

[21] Efforts continue at the UN to prepare a comprehensive antiterrorism convention. Also, the Organization of American States (OAS) has mandated its committee on terrorism known by the Spanish acronym CICTE to develop an antiterrorism convention for this hemisphere.

As subsequent information has established, instructions for the events of September 11 were given in Afghanistan, planning took place in Italy and Germany, preparations were made in the south-eastern United States and the attacks were executed in the northeast US. Associates of those who flew the planes and others trained by Al-Qaeda at its camps in Afghanistan, have been traced to connections in widely dispersed parts of the world, including Canada.[22] Under these circumstances, while there may be preferred targets, no country is immune from the risk of a terrorist attack.[23] As the Prime Minister stated in the House of Commons:

> It has become clear that the scope of the threat that terror poses to our way of life has no parallel. We in North America have been extraordinarily fortunate to live in peace, untouched by attack, but that has changed. Additional action is required from Canada and all nations, domestically and in concert with each other, for there to be a truly effective and truly global offensive against terrorism.[24]

Most countries, like Canada prior to September 11, had been content to rely on a body of domestic law that has been adequate to provide for the determination of guilt and imposition of punishment for substantive and inchoate offences, in most cases long after the completion of the act. The scope of inchoate offences has been properly limited for fear of capturing those engaged in "mere preparation" or, in the case of conspiracy law, those who hadn't fully agreed to pursue a known unlawful object of the common design.[25]

The consensus that emerged in the Security Council and in most nations after September 11 is that the nature of terrorism requires a different approach to disrupt and disable the terrorist network before it can carry out its design. In the words of the Minister of Justice during the

---

[22] See for example the series *Filière Montréalaise du Terrorisme Islamique* by André Noël that appeared in *La Presse* de Montréal between November 30 and December 14, 2001. Also, "Canada Faces 'Real' Terrorist Threat", *The Ottawa Citizen* (March 8, 2002).

[23] See "International Terrorism: the Threat to Canada", *RCMP Gazette*, vol. 63, No 6, 2001.

[24] Hansard, House of Commons, October 15, 2001, 1910.

[25] *USA* v. *Dynar*, [1997] 2 S.C.R. 462.

Parliamentary debates on C-36, "[…] if we don't stop the terrorists getting on the plane, it's too late."[26]

II. OVERVIEW OF THE *CRIMINAL CODE* AMENDMENTS IN C-36

Bill C-36 responds to the requirements of Resolution 1373[27] and implements Canada's outstanding obligations arising from the most recent UN antiterror conventions. Bill C-36, in part, follows the approach adopted with respect to the earlier international agreements in that it adds to the *Criminal Code,* new crimes related to bombing[28] and terrorist financing[29] to fill gaps identified in the scope of the existing legislation. Also consistent with the approach taken with the earlier initiatives, Bill C-36 extends extra-territorial jurisdiction to permit the prosecution in Canada of acts or omissions that if committed in Canada would constitute one or more of the new crimes.[30] Bill C-36, however, also goes much further than previous initiatives. A new Part II.1 of the *Criminal Code* addresses the core need for comprehensive criminal measures against terrorism, including provisions on the fundamental issue of definition.

---

[26] Proceedings of the Standing Committee on Justice and Human Rights, October 18, 2001.

[27] Resolution 1373 also called on the member States to undertake administrative and operational measures to increase their capacity to prevent and suppress terrorist acts and to provide assistance in that regard to other countries.

[28] Bill C-36 adds to the existing Code offences respecting explosives, new section 431.2 which makes it a crime punishable by life imprisonment to place an "explosive or other lethal device" in a place of public use, a Government or public facility, a public transportation system or an infrastructure facility (defined as a facility providing services to the public) with intent to cause death, serious bodily harm or "extensive destruction" to that place, facility or system likely to cause major economic loss. Amendments currently before Parliament in Bill C-42 would create new offences respecting threats involving simulated explosives or other lethal devices.

[29] Bill C-36 creates several new offences relating to terrorist financing which will be discussed later in greater detail.

[30] Clause 3(2) of Bill C-36 adds new subsections 7(3.71) and (3.72) dealing respectively with jurisdiction for terrorist bombing and terrorist financing. New ss. 7 (3.73) and (3.74) extend jurisdiction more broadly with respect to terrorism offences and terrorist activity as defined by the Act.

III. DEFINITIONS: "TERRORIST ACTIVITY" AND OTHER KEY TERMS

For the first time in Canadian legislation, the bill defines what is "terrorist activity".[31] As had been anticipated, this was the subject of intense debate during the parliamentary proceedings and was amended prior to passage. In drafting the definition, Justice officials had regard to the several versions that are contained in the U.K. and US legislation and to the various attempts by experts in the field to offer a suitable descriptor. Of particular assistance was the report prepared for the U.K. Government on terrorism legislation by Lord Lloyd[32] and the draft European Union Framework Decision made available to us early in our consideration of the matter.

Terrorist activity is defined as an act or omission committed in or outside Canada that would be an offence under a number of named international conventions applying to activities commonly related to terrorism, such as the conventions against hijacking and terrorist bombings.

However, in addition, a general definition is also provided. Under this general definition, terrorist activity may also be an act or omission undertaken, inside or outside Canada, for a political, religious or ideological purpose that is intended to intimidate the public with respect to its security, including economic security, or to compel a person or a government from doing or refraining to do any act, and that is intended to cause one of a number of enumerated forms of serious harm. These harms include causing death or serious bodily harm, endangering life, causing a serious risk to health or safety, causing substantial property damage where it would also cause one of the other listed harms, and, in certain circumstances, seriously interfering with or disrupting an essential service, facility or system, whether public or private.

---

[31] New section 83.01 of the *Criminal Code.*

[32] *Inquiry Into Legislation Against Terrorism*, (Cm. 3420), October 1996. See also the Consultation Paper issued by the U.K. Government in December 1998, *Legislation Against Terrorism*, (Cm 4178).

This definition of terrorist activity refers to acts and omissions that may take place inside or outside Canada. This does not extend existing Canadian principles of extraterritorial jurisdiction for the prosecution of offences. Individual offences must still have a substantial connection to Canada in order to be tried in a Canadian court. However, the extended definition of terrorist activity is extremely relevant to the offences, such as financing terrorist activity or preparing for or contributing to terrorist activity, that *can* be prosecuted in Canada. Under the extended definition, we can prosecute for such financing or participation in Canada even if the ultimate terrorist activity being financed or participated in does not occur in Canada, but takes place or is intended to take place in the United States or any other country.

Another aspect of the Canadian definition that is especially worthy of note is that it refers to political, religious, or ideological purposes of the terrorism. This was drawn from the U.K. legislation. Some critics of the definition saw the reference to political, religious or ideological purposes as meaning that the Canadian legislation could be used to target particular political, religious or ideological groups. In fact, this is not the case. Nothing in the new legislation targets any particular group. Further, political, religious or ideological activities are not criminalized in and of themselves. Rather, it is only the extremely harmful acts or omissions described, undertaken for political, religious or ideological purposes, that fall under the definition of terrorist activity. The reference to motivation is, in fact, a limiting aspect of the definition that helps to distinguish terrorism from other types of "ordinary" crime.

A unique aspect of the definition not found in other legislative models is that—in relation to activity that may interfere with or disrupt an essential service—it contains an exception for advocacy, protest, dissent and stoppage of work, providing this was not intended to cause any of the other forms of serious harm referred to in the definition. This exception recognizes that protests and strikes—even if they go beyond the bounds of the law—are not the same thing as terrorist activity.

A final aspect of the definition that is worthy of note is that it does not try to make any distinction between "bad" terrorism and "good" terrorism. This is a contentious issue in international debates, although it did not prove to be as problematic as might have been expected.

This is not to say that the application of antiterrorist measures in specific cases will not be, in practice, sometimes a difficult and even contentious matter. The Canadian definition does contain an exception so as not to apply to acts of war that are in accordance with international law, and we can expect that this issue could be the object of disagreement in some cases. As well, the laying of charges in individual cases will be subject to the discretion of attorneys-general, which can make the application of antiterrorist legislation subject to some discretionary evaluation of the nature of the acts. Nevertheless, any general distinction between "bad" terrorism and "good" terrorism in the definition itself was thought to be unmerited and unworkable, and was not included.[33]

There was much internal debate about the incorporation of a motivation requirement and the form and content of each of the other constituent elements of the definition. Debate continued to the moment on October 13, 2001 when the final version had to be sent to print for introduction in the House of Commons on the following Monday, October 15. The internal debate foreshadowed the ensuing public debate that resulted in amendments to the definition in committee. In the end, that which is now in the *Criminal Code* is a distinctly "made in Canada" solution that must be left to the courts to interpret and apply.

In addition to "terrorist activity", C-36 amends the *Criminal Code* to add definitions of "terrorism offence", "terrorist group", "listed entity", "justice system participant", and "United Nations personnel" and "associated personnel".

"Terrorism offence" refers to specific new offences created under Part II.1 of the Code, but also can include any indictable offence under federal law committed for the benefit of, at the direction of or in association with a terrorist group, or an indictable offence where the act or omission constitutes terrorist activity.

"Terrorist group" as defined in section 83.01 refers to (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity or (b) a listed entity. "Listed entity" is defined as meaning an entity, *i.e.,* a person group, trust, partnership, or fund or unincorporated association or organization, on a list established by the Governor in Council under section 83.05. The creation of lists of entities

---

[33] I am grateful to Shawn Scromeda of the Department of Justice for his assistance on the definitional issues.

is a key feature of the new legislation that is further discussed, in detail, in these remarks.

The definitions of "United Nations personnel" and "associated personnel" support those provisions of the Act that implement the *Convention on the Safety of United Nations and Associated Personnel*. "Justice system participant" is related to the amendments in Bill C-24, the *Organized Crime and Law Enforcement Act*[34] that create a new intimidation offence further amended by clause 17 of C-36.

As well, the definition of "Attorney General" in section 2 of the *Code* is amended to give the Attorney General of Canada concurrent jurisdiction to prosecute the new and existing offences related to terrorism in addition to the authority that the provincial Attorneys General would have by virtue of the existing definition. This includes the new offences defined as "terrorism offences" as well as a broad range of existing offences that relate to terrorist activity and the UN conventions. The Government of Canada has a particular duty to protect the national security of Canada and is responsible for international relations. Terrorism offences may have an effect on the relations between Canada and other states and international bodies. Federal agencies are also responsible for gathering much of the security and intelligence information that is involved in the investigation and prosecution of these offences. Discussions have been undertaken with the provincial Governments on the development of a protocol or guidelines as to how the prosecutorial authority will be exercised in specific cases.

IV. LIST OF ENTITIES

Paragraph 83.05(1)(a) authorizes the Governor in Council to list any "entity", as defined, if satisfied there are reasonable grounds to believe it has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity, or, is knowingly acting on behalf of, at the direction of or in association with an entity engaged in such activity.

---

[34] Now S.C. 2001, c. 32.

This provision was created to give effect to Security Council Resolution 1373,[35] specifically the requirement that member States freeze the funds, property, financial or related services of persons carrying out terrorist activities. Persons listed under this process will have their property effectively frozen by the operation of new section 83.08 that prohibits anyone dealing in property belonging to a terrorist group, including a listed terrorist entity.

A review mechanism is provided for by subsections 83.05(2)-83.05(10). A listed entity may apply in writing to the Solicitor General of Canada to challenge the reasonableness of the listing. The Solicitor General then has 60 days in which to determine if there are reasonable grounds to de-list the entity. If the Minister so determines, he or she must recommend that the entity be de-listed. If no decision is made during that period, the Solicitor General is deemed to have refused to recommend the requested de-listing. Written notice of the decision or deemed decision is required. Where there is a refusal or deemed refusal, the applicant can make an application for judicial review to the Chief Justice of the Federal Court of Canada or to a judge of the Trial Division of that Court designated by the Chief Justice.

The Federal Court is required to consider in private those portions of the evidence or information relied upon by the Solicitor General that are of a sensitive or secret nature. The judge may, at the request of the Solicitor General, hear the information in the absence of the applicant if the judge is of the opinion that disclosure would injure national security or endanger the safety of any person. In those circumstances, the judge will provide the applicant a written statement summarising the information. The summaries of the evidence have been in use for a decade in the immigration context and have been approved by the Supreme Court of Canada[36] where the rights of the individual must be balanced against the state's legitimate national security interests.

---

[35] Lists of entities have also been made by regulation under the *United Nations Act,* R.S.C. 1985, c. U-3, to identify persons or entities whose assets must be frozen to comply with Security Council resolutions. See the *United Nations Afghanistan Regulations* SOR/99-444 and the *United Nations Suppression of Terrorism Regulations* SOR/2001-360 as amended.

[36] *Chiarelli* v. *Canada (Minister of Employment and Immigration),* [1992] 1 S.C.R. 711 [hereinafter *Chiarelli*].

Under section 83.06, the Solicitor General may also apply for the admission of information that has been obtained in confidence from a foreign Government or international organization without disclosure to the applicant, even in the form of a summary. The court may determine that the information is not relevant or, if relevant, should be disclosed to the applicant. In those circumstances, the information must be returned to the Solicitor General and not considered further. If the judge decides that it is relevant but disclosure would injure national security or endanger the safety of persons, it may be used in making the determination without disclosure to the applicant.

Upon considering all of the information, the judge must determine whether there is a reasonable basis upon which the Solicitor General could have been satisfied that de-listing should not occur. A ruling in favour of the applicant results in an order for de-listing. Any decision of the Federal Court may be subject to appeal pursuant to section 27 of the *Federal Court Act*.[37]

The review procedure cannot be re-engaged unless there has been a material change in circumstances. However, the Solicitor General is required to review the list every two years after it comes into effect and a further application can be brought following each of those reviews.

There is an additional procedure under section 83.07 to allow for the issuance of certificates by the Solicitor General in cases of mistaken identity. This is to assist persons with identical or similar names to those on the list by providing verification that they are not subject to the freezing or other requirements of the legislation.

The provisions relating to the examination of evidence or other information presented by or on behalf of the Solicitor General in private and for non-disclosure to the applicant are similar to those already found in immigration proceedings.[38] National security has been recognized by the courts as a valid justification for the adoption of special measures that have the effect of abridging procedural rights that might otherwise be available to the subject of the proceedings.[39]

---

[37] R.S.C. 1985, c. F-7.

[38] *Immigration Act, supra* note 10, s. 40.1.

[39] *Chiarelli, supra* note 36; *Chan* v. *Canada,* [1996] 3 F.C. 349.

V. FREEZING, SEIZURE, RESTRAINT AND FORFEITURE

Related to the listing mechanism are new freezing,[40] seizure and restraint,[41] and forfeiture[42] provisions as well as requirements for disclosure[43] to the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) of information relating to property or transactions in respect of property owned or controlled by or on behalf of a terrorist group. Immunity from criminal or civil liability is provided for disclosure in good faith. Banks, trust companies, stock brokers and similar companies are required[44] to audit their accounts on a continuing basis to ensure that they are not in possession or control of property owned or controlled by or on behalf of a listed entity.

New section 83.09 permits the Solicitor General of Canada or a person designated by the Solicitor General to authorize persons to carry out activities or transactions in respect of frozen property that would otherwise be prohibited. This would allow for individuals in possession or control of that property to deal with it without incurring criminal liability. It also allows for controlled deliveries or other investigative techniques dealing with the property for law enforcement purposes. Secured and unsecured rights, other than those of the terrorist group or their agents, are preserved. Also, persons other than those directly authorized to deal with the property are protected if the terms and conditions of the authorization are met.

Section 83.13 provides a mechanism for the seizure and/or restraint of any property owned, controlled or used by or on behalf of a terrorist group or in support of or on behalf of any past or planned terrorist activity. The Attorney General, either federal or provincial, may bring an *ex parte* application before the Federal Court to obtain a warrant or order seizing or restraining the property. The application is heard in private. The Attorney General or his agent may, in providing evidence in support of this application, submit an affidavit based upon information

---

40 Section 83.08.

41 Section 83.13.

42 Section 83.14.

43 Section 83.1. Actual knowledge is required but note the mandatory "suspicious transaction" reporting required under the revised s. 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, Part IV of Bill C-36.

44 Bill C-36, section 83.11.

and belief rather than direct knowledge. Where this occurs the normal Federal Court rule[45] allowing a judge to draw an adverse inference from the failure to provide an affidavit based upon personal knowledge will not apply.

The judge may, as part of the warrant or restraint order, appoint a receiver or manager to deal with all or part of the property.[46] The usual authorities to sell perishable or rapidly depreciating property or to destroy property of little value that apply to seized or restrained proceeds of crime are available to the receiver/manager.

The provisions of Part XII.2 of the *Criminal Code* respecting Proceeds of Crime are incorporated by reference and apply to this seizure and restraint scheme. They provide for undertakings as to damages that may occur if the seizure or restraint proves to have been unwarranted; for review of the decision to issue the order as well as its conditions, duration and renewal; procedures to void transfers or conveyances; and procedures for the release of property for the purpose of meeting reasonable business, living and legal expenses and to meet bail requirements.

The Federal Court is authorized to make a forfeiture order under section 83.14 in respect of any and all property that is owned or controlled by or on behalf of a terrorist group or has been or will be used to facilitate or carry out a terrorist activity. This is an authority in relation to the property itself (*in rem)*, and does not require a prior conviction for a criminal offense.

While the application for a forfeiture order may be made on information and belief, as for a seizure or restraint order, notice is required to be given to such persons as are known to own or control the property or as directed by the judge or the rules of the Court, and that person may contest the proceedings. The judge may make an order affirming the interest of any person added as a respondent. Where the property in question is a principal residence and is occupied by members of the respondent's immediate family, the judge must consider the impact

---

45 Federal Court Rules, r. 81(2).

46 The receiver or manager will be the Minister of Public Works and Government Services at the request of the Attorney General. This is to take advantage of the existing management services provided by that ministry for seized proceeds or instruments of crime.

of the forfeiture on the family and their complicity or collusion, if any, in the terrorist activity.

Provision is made for applications to vary or set aside the order of forfeiture within 60 days[47] and appeals can be made to the Federal Court of Appeal. The provisions of the *Code* respecting the disposal of the property and suspension of forfeiture pending appeal are incorporated by reference.[48]

An amendment made in the House of Commons Committee proceedings on the motion of the Official Opposition authorises the use of any proceeds arising from the disposal of the property to compensate victims of terrorist activities and to fund antiterrorist initiatives.[49] However, priority is given to any other forfeiture provision in an Act of Parliament and to any restitution or compensation order made in favour of persons affected by the commission of offences.[50]

VI. OFFENCES

Broadly stated, C-36 creates new offences that make it a crime to:

- Collect, provide or make available funds or property to carry out terrorist activities;
- Participate in, contribute to or facilitate terrorist activities;
- Instruct anyone to carry out terrorist activities; and
- Harbour or conceal a terrorist.

As a general safeguard, these offences require the consent of the Attorney General to commence proceedings.[51] The prosecution may be initiated on behalf of the Government of Canada and conducted by the Attorney General of Canada or counsel on his or her behalf in any territorial division in Canada.[52] Sentences for these new offences are to be served consecutively[53] and parole eligibility can be fixed at one half of the

---

47 Section 83.14(10).

48 Section 83.15.

49 Section 83.14(5.1).

50 Section 83.17.

51 Section 83.24.

52 Section 83.25.

53 Section 83.26.

sentence.[54] In addition, new section 83.27 allows for imposing the maximum penalty of life imprisonment for any indictable offence that also constitutes terrorist activity (other than those for which the minimum penalty is already life imprisonment). The offender must be notified in advance of making his or plea that the aggravated penalty will be sought.

Articles 2, 3, 7 and 8 of the *International Convention for the Suppression of the Funding of Terrorism* require States to establish offences to apply to every person who provides or collects funds for terrorist purposes. New section 83.02 makes it an indictable offence punishable by 10-year imprisonment for any person to provide or collect property *intending* that it be used or *knowing* that it will be used to carry out an act or omission constituting a terrorist activity.

Section 83.08 prohibits *any person in Canada* and *any Canadian outside Canada* from knowingly dealing in property owned or controlled by a terrorist group, facilitating any transaction with respect to such property or providing any financial or other related services in respect of such property for the benefit of or at the direction of a terrorist group. "Canadian" is a defined term that includes a citizen and a permanent resident. A due diligence exemption from civil liability is provided in subsection 83.08(2) for anyone taking all reasonable steps to satisfy themselves the property was not controlled by such a group. Violation is a hybrid offence[55] punishable by a fine of not more than $100, 000 or a year imprisonment on summary conviction or 10 years by indictment. The same penalties apply to the contravention of the disclosure and audit requirements.

Participation in or contribution to, any activity of a terrorist group for the purpose of enhancing the ability of any group to facilitate or carry out a terrorist activity is made an indictable offence punishable by imprisonment up to ten years by section 83.18. This crime is similar to the "participation" offence in Bill C-24 with regard to criminal organizations. However, it is wider in scope than the organized crime offence as the participation may be either direct or indirect and the purpose of facilitating the ability to carry out a terrorist activity can be directed to either the group in which the accused participates or to any other group engaged in such activity. Indeed the "group" may be a single individual

---

[54] Section 743.6 as amended by clause 21.

[55] Section 83.12.

by virtue of the definitions of "terrorist group" and "entity" in section 83.01 and the listing process under section 83.05. Thus the terrorism offences in Part II.1 have less of a group focus than that applied to the criminal organization offences in C-24.

The participation offence can be committed whether or not a terrorist activity was actually facilitated or carried out, or whether the participation actually enhanced the terrorist's ability or whether the accused knew the specific nature of any terrorist activity that might be facilitated or carried out.

The offence is cast very broadly to address the cellular nature of terrorist activity as illustrated by the Ben Laden quote at the beginning of this paper. The groups are very loosely structured and may be formed and disbanded rapidly. The activity may be carried out by a team or by a single person acting alone and relying on local support as needed.

For illustrative purposes, subsection 83.18(3) sets out a number of examples of activities that would be included in participation or contribution to the activities of a terrorist group if done for the purpose of enhancing a terrorist group's ability. They include: recruiting a person to receive training; providing a skill or expertise for the benefit of a terrorist group; recruiting someone to facilitate or commit a terrorism offence in or out of Canada. Further the court is invited to consider a number of factors in determining whether an accused participates in or contributes to any activity of a terrorist group. These include the use of names or symbols identified with the group; frequent association with members of the group; the receipt of benefits from the group or repeatedly engaging in activities at the instruction of a member of the group.

A step up from participation is the new offence of *knowingly* facilitating a terrorist activity in section 83.19, punishable by 14-year imprisonment. In this offence, the facilitation must go to commission of the terrorist activity, and not just to enhance the ability of the organization to commit such an activity. A similar offence is contained in Bill C-24 in relation to criminal organizations.

"Facilitate" is to be defined by its ordinary meaning. In the New Shorter Oxford English Dictionary[56] it is defined as "make easy or easier, promote, help forward". In Webster (1980 edition) it is "to make easy or less difficult". Without further clarification, however, it may have been interpreted as being equivalent to the aiding and abetting provision in section 21 of the *Criminal Code*. Aiding and abetting requires knowledge of the specific crime assisted and that crime must be completed before liability attaches to the aider or abettor.

As noted above, terrorist groups operate in a loose cellular structure. The intention in creating the facilitation offence was to capture the person who is prepared to assist a "martyrdom operation" without knowing the specific objective. For that reason, subsection 83.19(2) provides that the terrorist activity is facilitated whether or not (a) the facilitator knows that a particular activity is facilitated; (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or (c) any terrorist activity was actually carried out. Paragraph (c) is especially relevant with respect to the preventive aspect of Bill C-36: enhancing our capacity to charge and convict persons of terrorist activity before the actual attack is carried out.

Actual commission of an indictable offence for the benefit of, at the direction of or in association with a terrorist group is in itself an indictable offence punishable by a maximum of life imprisonment. This is similar to the new section 467.12 enacted by Bill C-24. The intention in both cases is to treat the commission of serious offences in furtherance of the objectives of the terrorist group or the criminal organization with particular severity. The offender has demonstrated his or her intention to advance the capacity of the group through significant criminality.

Those who play leadership roles intended to enhance the ability of the terrorist group to commit or facilitate terrorist activity will also attract a maximum penalty of life imprisonment as set out in section 83.21 and section 83.22. The first attaches liability to instructing others effectively to do anything for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity. The second deals with instructing the commission of a terrorist activity. Under Bill C-24, a similar provision is found in new section 467.13 for instructing actions on behalf of a criminal organization.

---

[56] Oxford University Press, 1993.

These "leadership" offences proscribe the serious harm occasioned by those who "instruct" others to carry out tasks in furtherance of the common objective. Those captured by these offences may not be at the highest levels of the organization. Rather they seek to attack the entire support structure of the terrorist group by focusing on anyone who is in a position to instruct someone to do something to enhance the ability of the organization to commit or facilitate terrorist activities.

Subsection 83.21(2) prescribes that the offence may be committed whether or not: the instructed activity is actually carried out; the identity of the person instructed is known to the accused; any specific person is instructed;[57] the person instructed knows that it is to be carried out for the benefit, at the direction of or in association with a terrorist group; the ability of the group is actually enhanced; or the accused knows the specific nature of the activity that may be facilitated or carried out. A similar provision excluding irrelevant factors and modified to fit the requirements of the section is found in 83.22(2).

Harbouring or concealing a person known to have carried out or who is likely to carry out a terrorist activity is expressly dealt with in section 83.23. A person who receives, comforts or assists another known to have been a party to an offence is an accessory after the fact under section 23 of the *Criminal Code* where it is done to enable the other to escape.[58] The new offence in this section does not require that it be done for the same purpose and may be committed before or after the commission of the terrorist activity. In that respect it addresses prospective harm. A similar offence was found in the *Official Secrets Act* and is replicated in section 21 of the successor statute, the *Security of Information Act*.[59]

---

[57] This may have caught Henry II for his statement regarding Becket "who will rid me of this turbulent priest?"

[58] The general penalty provision for being an accessory after the fact is found in section 463 of the Code. Section 240 provides for liability to life imprisonment for being an accessory to murder.

[59] As enacted in Part II of the *Anti-terrorism Act*, S.C. 2001, c. 41.

VII. INVESTIGATIVE HEARINGS

Section 83.28 provides for the making of a judicial order to compel testimony of material witnesses in the investigation of offences related to terrorist groups. The order may compel the person to appear at a specified time and place for examination under oath and to produce records or things. The examination may only be held where a judge is satisfied that there are reasonable grounds to believe that a terrorism offence has been or will be committed and that the person has information that relates to the offence or to the whereabouts of someone who may commit a terrorist offence. The consent of the Attorney General is required to initiate the process. Charges need not have been laid against any suspects at the time of the hearing. The witness is accorded legal safeguards including the right to legal counsel, protection against the disclosure of information subject to privilege under Canadian law and protections against self-incrimination. No answer given or thing produced can be used against the person examined in any criminal proceedings against that person, other than for perjury (section 132) or for giving contradictory evidence (section 136) and the protection extends to derivative evidence.

This mechanism is comparable to the investigative Grand Jury system in the United States. A common misconception is that witnesses who appear before such Grand Juries may avoid testifying by "pleading the 5th amendment". However, under American law, the prosecution and the court presiding over the Grand Jury may authorize a grant of immunity for offences disclosed in which case the witness would be compelled to testify.

The proposal to add such a procedure to the *Criminal Code* attracted considerable attention in the debate over Bill C-36. Some were led to suggest in the parliamentary proceedings that the procedure might contravene the constitutionally protected right against self-incrimination. The constitutionality of a similar provision has arisen in the context of mutual legal assistance proceedings, as discussed below. However as a general comment, it is important to note that this process is not invoked in the context of a trial of the person for an offence: the person is a witness, not an accused. Further, the very nature of this process ensures that it cannot be used against someone that the authorities suspect of having committed a crime. Apart from the specific exclusions provided in the

statute, the witnesses would be protected from the use of the evidence against them[60] under sections 7 and 13 of the *Charter*.

A similar mechanism[61] to compel testimony was enacted in the 1988 *Mutual Legal Assistance in Criminal Matters Act.*[62] Sections 17 and 18 of that Act provide the authority for a Superior Court of the province to issue an order compelling the attendance of a witness before a designated person (not necessarily a judge as with C-36) to give evidence or to produce documents. The validity of these orders was challenged in *United States of America* v. *Ross,*[63] a 1995 decision of the Quebec Court of Appeal. The respondent had argued that the procedure violated his constitutionally protected right to silence. Fish J.A. considered the jurisprudence respecting the right to silence and determined that no violation occurred if immunity was granted to the witness against the subsequent use of the evidence. The principle against self-incrimination is not absolute.[64]

In an Ontario case, *United Kingdom* v. *Hrynyk*,[65] MacPherson J. (as he then was) found that there was no absolute right to silence in Canada and that it was proper to balance the interests of the witness with those of the state in determining the constitutionality of the provision. MacPherson J. held that sections 17 and 18 of the Act did not violate the principles of fundamental justice and were not contrary to section 7 of the *Charter*.

---

60 *BC Securities Commission* v. *Branch*, [1995] 2 S.C.R. 3.

61 Similar procedures are available for investigations under the *Competition Act*, R.S.C. 1985, c. C-34 and the *Income Tax Act*, R.S.C. 1985, c. I-3.3.

62 R.S.C. 1985 (4th Supp.), c. 30.

63 (1995) 100 C.C.C. (3d) 320.

64 *R.* v. *S. (R.J.),* (1995), 21 O.R. (3d) 797 (S.C.C.) affirming (1993) 80 C.C.C. (3d) 397 (Ont. C.A.).

65 (1996) 107 C.C.C. (3d) 104 (Ont. Gen. Div.). Referred to with approval by Doherty J.A. in *Re: Russian Federation*, (1999) 138 C.C.C. (3rd) 321 (Ont. C.A.).

VIII. RECOGNIZANCE WITH CONDITIONS: "PREVENTATIVE ARREST"

The recognizance with conditions provision in C-36 allows for the arrest and detention, in strictly defined circumstances and for brief periods of time, of persons suspected of preparing to commit a terrorist activity where there are insufficient grounds to arrest and charge those persons with specific offences. The object of this provision is to provide a mechanism to disrupt the preparations and to impose conditions that will make it difficult for the terrorist activity to be carried out.

There are comparable provisions in the legislation of the United Kingdom, United States and France that authorize detention for much longer periods. The U.K. legislation allows for detention without charge for the purpose of detention and to obtain evidence. Detention beyond 48 hours is subject to review but may be granted for up to 7 days from the time of arrest if a judge is satisfied the detention is warranted. In France, a terrorist suspect can be detained for up to four days and right to counsel attaches only after 72 hours. The most recent US legislation allows for the mandatory detention of suspected alien terrorists where the Attorney General certifies that there are reasonable grounds to believe the non-citizen endangers national security. Immigration or criminal charges, not necessarily related to terrorism, must be filed within 7 days of the initial detention. Thereafter it may be continued indefinitely subject to review through *habeas corpus* proceedings.

Section 83.3 provides that where the consent of the Attorney General has been obtained, a peace officer may lay an information before a provincial court judge if it is believed on reasonable grounds that a terrorist activity will be committed and there are reasonable grounds to suspect that the imposition of conditions or the arrest of a person is necessary to prevent the carrying out of the terrorist activity. The court may cause the person to be brought before the court. Where a person is detained for that purpose, he or she must be brought before a judge within 24 hours, if a judge is available during that period. If not, the person must be brought before a judge as soon as possible.

In exigent circumstances, where the two level tests of reasonable grounds can be met but it would be impracticable to lay the information, the officer may make an arrest without warrant, detain and bring the person before a judge. In those circumstances, the officer must still lay an information and obtain the consent of the Attorney General to proceed unless the person is released during the specified time period.

Where the person is brought before a judge, the officer must show cause why the detention of the person is required for a hearing to determine whether conditions should be imposed. The grounds for detention are similar to those in subsection 515(10) with suitable modifications. The person shall be released at this stage if cause for detention is not shown. Where the person is detained, the court may adjourn the matter for hearing for no longer than 48 hours. On the hearing of the application, the court may, if satisfied that the officer has reasonable grounds for the suspicion, order that the person enter into a recognizance to keep the peace and be of good behaviour for up to 12 months and may impose any conditions that the judge considers desirable for preventing the carrying out of a terrorist activity. The person shall then be ordered released, subject to the terms of the recognizance.

If the person fails or refuses to enter into the recognizance, he or she may be committed to prison for a term not exceeding 12 months. Breach of the recognizance constitutes a dual procedure (hybrid) offence under section 811,[66] punishable on indictment by up to two-year imprisonment. A separate procedure for obtaining a recognizance can be initiated by a person who fears on reasonable grounds that another person will commit a terrorism offence, under section 810.01.[67]

IX. REVIEWS AND "SUNSET CLAUSE"

The investigative hearing and recognizance with conditions provisions attracted considerable controversy during the parliamentary proceedings. The Government had taken the position that these measures were necessary and justifiable in the context of a terrorist threat that could last for many years but responded to calls for an expiry mechanism. As a result, a so-called "sunset" clause was added to the bill in committee on a Government motion. The clause, in, new section 83.32, applies only to the two procedures and provides that they cease to be operative at the end of the fifteenth sitting day of Parliament after December 31, 2006 unless they are extended by passage of a resolution by both Houses of Parliament. The extension may be for a period of up to five years and may be renewed should the need remain.

---

[66] As amended by clause 23 of C-36.

[67] As amended by clause 22(1) C-36. This procedure is not subject to the "Sunset Clause".

In addition to the sunset provision, C-36 provides for annual reports on the operation of the investigative hearing and recognizance provisions[68] and for a comprehensive review of the complete Act within three years after it received royal assent. The Attorney General of Canada and the Solicitor General of Canada are to make their annual reports to Parliament. To respect the constitutional framework, provincial Attorneys General and Ministers responsible for policing in the provinces are to make their reports available to the public rather than to the federal Parliament. These reports will contain information respecting the number of applications made for investigative hearings, the number of such hearings ordered, the number of informations laid to obtain a recognizance, arrests without warrant and length of detention and the number of cases in which a person was arrested and then released. To ensure consistency in the data collection, a federal-provincial working group has developed report templates to be issued to law enforcement agencies and Crown counsel. While the statutory requirement is to report quantitative data, a research and evaluation program is in development to conduct a qualitative analysis of the experience with the use of these new procedures as well as the other key features of the Act. That analysis, we trust, will be invaluable for the comprehensive review in three years.

CONCLUSION

This paper touches only on key amendments to the *Criminal Code* relating to the objective of preventing terrorism. There are also significant changes in C-36 to the former *Official Secrets Act*, renamed the *Security of Information Act,* to the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and the *National Defence Act* to support that objective. It also creates the new *Registration of Charities – Security Information Act* and makes a number of consequential amendments to other statutes.

C-36 is a major component of the Federal Government's strategy to fight terrorism. It reflects the global consensus that emerged in the aftermath of September 11, 2001 and responds to Canada's international obligations. In particular, implementation of the *International Conventions on the Suppression of the Financing of Terrorism* and the *Suppression of Terrorist Bombing* fills gaps in Canadian law in these areas. The laws adopted in other free and democratic nations were

---

[68] Section 83.31.

compared and taken into account in the development of this legislation. The provisions of this Act have been tailored to the objectives of protecting national security and preventing terrorism while respecting Canadian values. Numerous safeguards have been incorporated within the individual measures of the Act. The requirements for annual reports and a comprehensive review by Parliament in three years, as well as the role of the courts in the interpretation and application of the Act provide opportunities for continued scrutiny of the need for and value of such measures within our society.