The New Terrorism Offences in Canadian Criminal Law

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Before the enactment of Bill C-36, the *Anti-terrorism Act*, the *Criminal Code* did not contain specific crimes of terrorism.[1] 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.[2] Some of the preventive peace bond or recognizance provisions in the *Criminal Code*[3] could also apply in cases 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 in Bill C-36 to add a new Part II.1 entitled *Terrorism to the Criminal Code* which contains many new terrorism offences, enhanced penalties of terrorist offences and new recognizance

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1 The oft-criticized section 98 of the *Criminal Code* was to my knowledge the last time that terrorism was specifically included in the *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": *An Act to amend the Criminal Code*, S.C. 1919, c. 46, s. 98, as rep. by *An Act to Amend the Criminal Code,* S.C. 1936, c. 23, s. 1.

2 The existing criminal law in relation to terrorism is outlined in: K. Roach, "The New Terrorism Offences and the Criminal Law" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Freedom of Security* (Toronto: University of Toronto Press, 2001) 152 at 154.

3 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.

provisions.[4] Many of these new offences relating to the financing and facilitation of terrorism incorporate the newly defined concepts of "terrorist activities" and "terrorist groups". For example, it is an offence under the new section 83.03(b) to provide property or financial services knowing it will benefit a terrorist group and an offence under section 83.19 to knowingly facilitate a terrorist activity. The definition of terrorist activities and groups is a controversial exercise and one that plays a key role in the new regime established by Bill C-36.

It should be remembered, however, that the criminal law as it existed before Bill C-36 still may be applied in the terrorism context. For example, those who participated in terrorist acts in Quebec in 1970 were subsequently charged with offences such as murder and kidnapping even though they could also have been charged under special measures at the time that made membership or participation in and assistance of certain terrorist organizations a crime.[5] One important difference, however, is that the laws enacted in response to terrorism in Quebec in 1970 were temporary measures whereas the new crimes of terrorism added to the *Criminal Code* in Bill C-36 are permanent. Thus it is much more likely that courts will be called upon to interpret and decide *Charter* challenges to the new terrorism offences in the *Criminal Code*.

In this essay, I will critically examine the definition of terrorist activities in section 83.01 of the *Criminal Code* as amended by Bill C-36. Attention will be paid to issues such as the breadth of the definition of terrorist activities, the requirement of proof of a religious or political motive, the exemptions for protests and strikes, the criminalization of threats of terrorist activities and the incorporation of international law in the definition of terrorist activities. I will also examine the definition of terrorist groups in section 83.01 with attention to the role that the Governor in Council's decision to list an entity under section 83.05 as a terrorist group may have in criminal terrorism trials. I will next briefly examine the new financing of terrorism and use of property for terrorism offences in ss. 83.02-83.04, 83.08, 83.1 and 83.11 of the *Criminal Code*. I will then focus on five new non-financing offences in section 83.18 to 83.23 of the *Criminal Code* which prohibit participation in the activity of

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[4] It also contains new investigative procedures such as investigative hearings and preventive arrests which are not discussed in this paper.

[5] *Public Order Regulations,* SOR /70-444 and *Public Order (Temporary Measures) Act, 1970* S.C. 1970-71-72, c. 2.

a terrorist group, facilitation of or instruction to commit terrorist activities or activities for the benefit of terrorist groups and harbouring or concealing those who have carried out terrorist activities. In the next section, I will briefly examine other crimes that are changed as a result of Bill C-36 including new offences of first degree murder, hate-motivated mischief to religious property and offences relating to the use of recognizances against suspected terrorists. Finally, I will explore how Bill C-36 provides for enhanced penalties for terrorist offences. At various junctures, I will attempt to predict some of the *Charter* challenges and questions of interpretation that courts may face in the administration of these new terrorism offences.

I. THE KEY DEFINITIONS

In this section, the key definition sections of Bill C-36 will be examined as they are the basis for understanding many of the other offences and other provisions in the act. Reference will also be made to the definition of terrorism in the United Kingdom's *Terrorism Act, 2000*[6] which was influential in the drafting of Bill C-36.

A. Terrorist Activity as Defined in Section 83.01

The definition of terrorist activities in section 83.01 is the pivotal feature of Bill C-36 because this definition is incorporated in many other provisions of the act including many of the new criminal offences.

B. Section 83.01(a): The Incorporation of Section 7 of the *Criminal Code* and Various International Conventions

Section 83.01(a) is fairly obscure and has so far escaped much critical scrutiny. It 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 section 7 of the *Criminal Code*, but only to the extent that they implement international conventions and related protocols against various acts of terrorism including the unlawful seizure of aircraft, crimes against internationally protected persons, the taking of hostages, crimes in relation to nuclear materials, terrorist

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6 (U.K.), 2000, c. 11.

bombings and the financing of terrorism. Both the offences listed in section 7 of the *Criminal Code* and the international conventions are complex. The section 7 offences (some of which are amended in the bill) are complex because they themselves incorporate other offences and extend Canadian jurisdiction to acts committed outside of Canada, but that have some nexus to Canada. In the *Finta*[7] case, a closely divided Supreme Court disagreed over what provisions in a former war crimes offence in section 7 only granted jurisdiction to Canadian courts and which defined essential elements of the offence for the purpose of determining the accused's fault. Even if the long definitions of crime in section 7 were made clear, it would still be necessary to consult the various international conventions to determine the exact extent to which the offences are incorporated into the definition of terrorist activities. These international conventions are themselves complex instruments often containing over 20 separate articles detailing both prohibited acts of terrorism and procedural requirements for the prosecution of terrorism offences. Courts may have to disentangle those parts of the section 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 offences. In an apparent attempt to signal that Canada was implementing various international conventions relating to terrorism, the drafters have made this part of the definition of terrorist activities complex and uncertain.

Laws may violate section 7 of the *Charter* if they are so vague that they fail to provide fair notice or limit law enforcement discretion.[8] 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.[9] The Supreme Court has recently held that references to "danger to the security

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7 (1994) 88 C.C.C. (3d) 417 (S.C.C.).

8 *R*. v. *Nova Scotia Pharmaceuticals* (1992), 74 C.C.C. (3d) 289 (S.C.C.).

9 *Winko* v. *British Columbia* (1999), 135 C.C.C. (3d) 289 at 166-67 (S.C.C.). See generally D. Stuart, *Charter Justice in Canadian Criminal Law*, 3rd ed. (Toronto: Carswell, 2001) at 102-107; K. Roach, *Criminal Law,* 2nd ed. (Toronto: Iwin Law, 2000) at 71-72.

of Canada" and "terrorism" in immigration legislation were not unconstitutionally vague or "so unsettled that it cannot set the proper boundaries of legal adjudication."[10] Any decision that the complexity of the law affected its ability to give fair notice might also require a consideration of whether section 19 of the *Code* providing that ignorance of the law is no excuse is consistent with the principles of fundamental justice. So far, the Court has only made limited incursions on this traditional principle by holding that its operation may make an offence one of absolute liability if it precludes the only possible defence available to the accused.[11] An accused charged with an offence based on the commission of a terrorist activity would have many other defences available including those based on lack of *mens rea.*

Another possible section 7 argument is that the reference in section 83.01(1)(a) to including as a terrorist activity offences "that implement" various international conventions not incorporated in the *Code* offends the principle of legality implicit in the void for vagueness jurisprudence under section 7 of the *Charter*. Again, the current jurisprudence does not provide room for optimism about such a *Charter* challenge. The Court has already held that un-codified crimes such as the common law crime of contempt of court do not violate section 7 of the *Charter* because there is still an intelligible standard for legal debate that provides sufficient notice to the accused.[12] Comprehensive codification is not a principle of fundamental justice. In addition, the Court itself is increasingly interpreting Canadian law in light of various international standards.[13]

Courts will likely reject a section 7 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 incorporation of both other parts of the *Criminal Code* and international conventions makes this part of the definition of terrorist activities less than transparent and 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

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[10] *Suresh* v. *Canada,* 2002 SCC 1 at para. 95.

[11] *R.* v. *Pontes* (1995), 100 C.C.C. (3d) 353 (S.C.C.).

[12] *United Nurses of Alberta* v. *Alberta (A .G.)* (1992), 71 C.C.C. (3d) 225 (S.C.C.).

[13] See for example *Suresh* v. *Canada, supra* note 10.

incorporation of international conventions. The unwieldy nature of this part of the definition may also help to explain why it has so far escaped much critical scrutiny.

C. Section 83.01(b): The Definition of Terrorist Activities

In sharp contrast, the definition of terrorist activities in section 83.01(b) has been subject to much debate and was amended after second reading of the bill in response to concerns that it constituted an overbroad and chilling definition of terrorist activities that would capture illegal protests and strikes that disrupted essential public and private services. At second reading, some safeguards were added namely the deletion of the qualifier "lawful" from the exemption for "advocacy, protest, dissent or stoppage of work" and a new provision that "the expression of a political, religious or ideological thought, belief or opinion" does not constitute a terrorist activity unless it would otherwise fall under the definition of terrorist activity. Despite these safeguards, concerns remain about the nature and breadth of the definition of terrorist activities.

D. Requirement of Political, Religious or Ideological Motive in Section 83.01(b)(I) (A)

The prosecutor must establish that the acts were committed "in whole or in part for a political, religious or ideological purpose, objective or cause."[14] This provision has been criticized for creating a risk of criminalizing political, religious or ideological beliefs. This concern is in part responded to in section 83.01(1.1) added after second reading of the bill which provides that the expression of such 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 section 1 of the

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[14] Section 1(1)(c) of the United Kingdom's *Terrorism Act, 2000* requires that the action or threat be "made for the purpose of advancing a political, religious or ideological cause." In contrast, the American *Patriot Act* s. 808 does not require proof of political or religious motive, but rather defines domestic terrorism as acts dangerous to human life that appear to be intended to intimidate or coerce a civilian population, to influence the policy of a Government by intimidation or coercion, or affect the conduct of a Government by mass destruction, assassination or kidnapping.

Charter. 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, although this is arguably accomplished by separate requirements for 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.

Even though it is at odds with the traditional principle of the criminal law that proof of motive is not necessary,[15] courts may hold that adding motive as an essential requirement of a terrorism offence does not violates the principles of fundamental justice under section 7 of the *Charter*. In other contexts, the Court has drawn a distinction between "criminal law theory" and the principles of fundamental justice under section 7.[16] 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. On a theoretical level, it would have been better to rely on the traditional principle that the prosecutor does not have to establish motive and that no motives excuse crime.

E. Requirement of Intent to Intimate with Regard to Security and Compel in Section 83.01(b)(I)(B)

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 section 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

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[15] *R*. v. *Lewis* (1979), 47 C.C.C. (2d) 24 at 33 (S.C.C.); *United* States v. *Dynar* (1997), 115 C.C.C. (3d) 481 at 509 (S.C.C.).

[16] *R.* v. *Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.).

definition defines security to include economic security[17] 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 antiterrorism measures that have been directed against the subversion of Governments and the intimidation of the public.

F. Intentional Causing of Death or Serious Bodily Harm or Danger to Life or Serious Risk to Public Health or Safety in Section 83.01(b)(ii) A-C.

After aving established motive and intent to intimidate or compel, the prosecutor must then establish that the activities are intended to cause certain harms listed in sections 83.01(b) (ii) (A- E). The requirement of clause A is uncontroversial as it applies to intentionally causing 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 which 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.

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[17] 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".

G. Intentional Causing of Substantial Property Damage That Is Likely to Result in Death or Serious Bodily Harm or Danger to Life or Serious Risk to Public Health or Safety in Section 83.01(b)(ii)(D)

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 section 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.

It is not clear whether the property damage must actually result in the harms in clauses A-C. Clause D could be interpreted to apply to all property damage "that is likely" to result in these harms whether or not those harms actually occur. This could expand this provision especially if endangerment to life was interpreted broadly. On the other hand, intentional property damage that actually results in the harms in clauses in A-C may not fall within the definition in clause D if the harms were not likely to occur. There is a strong argument that courts should require harms in A-C to be objectively foreseeable because unforeseeable harms cannot be said to be "likely". This would exclude property damage that resulted in unforeseeable harms to humans or public health or safety. At the same time, the harms in clauses A to C probably do not have to be intended by the accused and to this extent clause D may impose constructive liability for unintended harms.

It is not clear whether the accused could challenge clause D for not requiring subjective fault in relation to all aspects of the harms prohibited in that section. Given that subsection D has some fault element, namely the intentional and politically motivated causing of substantial property damage, the courts may not be inclined to strike down this part of the offence under section 7 of the *Charter* given their acceptance of constructive liability in which the *mens rea* does not match the prohibited

consequences in other contexts.[18] Courts may be concerned about the effects of either striking down clause D or reading it in such a way that it requires the same intent required in clauses A to C. Nevertheless, there may be some grounds for *Charter* challenges to clause D. The accused could argue that clause D violates section 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 in clauses A to C. Another argument would be that the stigma and punishment of the terrorism based offence was disproportionate to the fault of intentional and politically motivated substantial property damage and the likely but not intentional harms in clauses A-C. Another possibility would be to argue that terrorism based offence have a special stigma that, like murder, attempted murder and war crimes[19], requires subjective fault for all aspects of the prohibited consequences of the offence. It is difficult to predict whether the courts will add all terrorism-based offences to the short list of special stigma crimes which under section 7 of the *Charter* require subjective fault in relation to all elements of the prohibited act. It is, however, possible that courts may conclude that the stigma of terrorism warrants such a rigourous approach. In all these scenarios, the court may either strike down clause D or more likely read in a requirement that the property damage be intended to result in the conduct or harms outlined in clauses A to C.

H. Intentional Serious Disruption of Essential Public or Private Essential Services Under Section 83.01(b) (ii) (E)

This provision represents perhaps the most controversial and debated provision in Bill C-36. 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 the threats to life, health and bodily integrity captured in clauses A to D 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"

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[18] *R.* v. *De Sousa* (1992), 76 C.C.C. (3d) 124 at 141 (S.C.C.); *R*. v. *Creighton*, *supra* note 16 at 378-379.

[19] *R.* v. *Martineau* (1990), 58 C.C.C. (3d) 353 (S.C.C.); *R.* v. *Logan* (1990), 58 C.C.C. (3d) 391 (S.C.C.); *R.* v. *Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.).

would also 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.

Clause E falls outside the definition of terrorism used by the Supreme Court in *Suresh* v. *Canada*[20] as a working definition that "catches the essence of what the world understands by 'terrorism.'" That definition 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.

I. Limited Exemption for Protests and Strikes

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 designed to compel persons to take actions 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

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[20] *Suresh* v. *Canada, supra* note 10 at para. 98.

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 if it was proven that the accused knew with a high degree of certainty that their disruption of essential services would have such an effect. The intent requirement would play an important role should clause e be challenged as a violation of freedom of expression. In *R*. v. *Keegstra*[21] for example, the Court stressed the intent requirement of willful promotion of hatred help to justify any infringement of freedom of expression as a reasonable limit. In this case, the intent requirement would be related to the serious harms in clauses A-C.

J. Threats to Commit Terrorist Activities

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 section 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 section 1 of the *Charter*. As is often the case, the section 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, there would definitely be a rational connection 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 *Criminal Code* such as uttering threats under section 264.1 and intimidation under section 423(1)(b)

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[21] (1990), 61 C.C.C. (3d) 1 (S.C.C.).

might be interpreted as evidence of less drastic means to respond to threats than designating the threats themselves to be terrorist activities.

K. Other Forms of Inchoate Liability

In addition to defining threats to commit terrorist activities as a terrorist activity, the concluding paragraph of section 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 forms of liability. 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. The 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.[22] 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 section 83.01 because the definition of terrorist activities clearly and unequivocally includes inchoate forms of liability for offences that are committed well in advance of actual terrorist violence. Nevertheless, the inclusion of inchoate forms of liability for inchoate offences in section 83.01 "expands the net of criminal liability in unforeseen, complex and undesirable ways."[23]

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[22] D. Stuart, *supra* note 9 at 704.

[23] K. Roach, *supra* note 9 at 160.

L. Exemption for Armed Conflict in Accordance with International Law

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 or 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 labeled a terrorist organization, not only by the South African Government but by much of the international community."[24] The ANC definitely did not constitute the military forces of the state and it is not crystal clear that they were engaged in an armed conflict in accordance with international law. As in section 83.01(I) this part of the definition of terrorist activities can be criticized for incorporating international law in a manner that is neither clear or accessible. As discussed above, however, this reference to international law in the *Criminal Code* is likely not unconstitutional.

M. The Definition of a Terrorist Group

The definition of a terrorist group in section 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. For example section 83.03(b) makes the provision of property or financial services to a "terrorist group" an offence and section 83.18 makes participation or contribution to any activity of a "terrorist group" for certain purposes an offence. A terrorist group is defined in section 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 is defined in section 83.01(1) to include not only groups and organizations but also "a person". Under this part of the definition of a terrorist group, the prosecutor in a criminal trial would have to establish beyond a reasonable doubt that the particular individual or group had terrorist activities as one of its purposes.

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[24] *Suresh* v. *Canada, supra* note 10 at para. 95.

Much more troubling is the alternative definition of a terrorist group at subsection b) as "a listed entity". This refers to groups or individuals that are listed as terrorist groups under section 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 direction of or in association with an entity referred to in paragraph a).[25] Justice Marc Rosenberg has raised the question of whether reliance on the fact that a group or an individual is a listed entity in a criminal prosecution would violate the presumption of innocence. Professor David Paciocco has answered this question with a strong argument that such reliance on an administrative listing of an entity as conclusive proof in a criminal trial that the entity is a terrorist group would in fact violate the presumption of innocence.[26]

The crux of the concern is that the legislation 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. The listing is an administrative measure and reviewed as such and it should not be definitive for the purpose of the criminal trial. A somewhat similar argument was made by Professor Noel Lyon that the declaration of the FLQ as an illegal organization in 1970 was an unconstitutional legislative assumption of judicial power.[27] Professor Lyon's arguments were rejected

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[25] 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.

[26] In his very helpful powerpoint presentation on the legislation Justice Rosenberg also raises a question of whether a challenge to the decision to list in a criminal trial would be held to be an improper collateral attack given that the decision to list is only reviewable in the Federal Court. See M. Rosenberg "The New Antiterrorism Bill: Implications for Provincial Superior Courts". In his very helpful paper on the subject, Professor Paciocco concludes that "the Government has attempted to lower its standard of proof and to save itself from discharging its full burden of proof with respect to each of the 'terrorist group' offences." D. Paciocco "Constitutional Casualties of September 11: Limiting the Legacy of the Anti-Terrorism Act" Supreme Court L.Rev. (forthcoming)

[27] N. Lyon, "Constitutional Validity of Public Order Regulations" (1971) 18 *McGill L.J.* 136.

in 1971 by the Quebec Court of Appeal.[28] Today, however, 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. Such a judicial acceptance would allow a person to be convicted in the face of a reasonable doubt that the group that assisted was in fact a terrorist group. In other words, being listed by the Governor in Council as a terrorist group should not be substituted for actual proof that the entity was a terrorist group. It is unduly formalistic in my view 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.[29] Thus, I agree with Professor Paciocco that deeming a listed entity to be a terrorist group for the purpose of a criminal trial would violate section 11(d) of the *Charter*.

But a section 11(d) violation in itself does not necessarily mean that the accused can raise what be may termed a collateral attack to the listing decision and require the prosecutor in the criminal trial to prove beyond a reasonable doubt that the group was in fact a terrorist group. The Government could attempt to justify this violation under section 1 of the *Charter*. The Government's section 1 case for relying on the listing decision should, however, run aground on the fact that subsection a of the definition of a terrorist group itself provides an example of an alternative that is more respectful of the presumption of innocence that subsection b). 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 that would be less respectful of the presumption of innocence 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. These two less restrictive alternatives should result in a partial declaration of invalidity of subsection b as it is applied in criminal trials.

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[28] *Gagnon* v. *Vallières* (1971), 14 C.R.N.S. 350 (C.A.).

[29] This *Charter* argument would be even stronger if the court found that the existence of the terrorist group was an essential element of the offence under s. 7 of the *Charter*.

II. THE NEW FINANCING AND PROPERTY OFFENCES

Some of the broadest and potentially most important offences added to the *Criminal Code* in Bill C-36 relate to the financing of terrorism. These offences often rely on and incorporate the definition of terrorist activities and terrorist groups discussed above. Under section 83.24, all these offences require the consent of the federal or provincial Attorney General before prosecution.

A. Section 83.02: Providing or Collecting Property for Terrorists

Section 83.02 makes it an offence to directly or indirectly, willfully and without lawful justification or excuse, 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 section 83.01(a) (*i.e.* 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 to do or refrain from doing any act. 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 section 83.01(b). This offence is limited to the provision or collection of property and requires high levels of subjective fault. The offence would also not apply if the accused had a lawful justification.

B. Section 83.03: Financing Terrorists

Section 83.03 is a much broader offence than section 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 section 83.01. Section 83.03(b) is even broader than section 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 be used by or 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 section 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 section 7 of the *Charter* does not protect property rights or the right to provide commercial services, an accused, including a corporate accused[30], should be able to challenge this offence under section 7 for overbreadth because it also applies to individuals. 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.

C. Section 83.04: Using Property for Terrorist Purposes

Section 83.04 makes it an offence to use property for the purpose of facilitating or carrying out terrorist activities or possess it intending or knowing that it will be used for such purposes. Unlike section 83.03(b), this offence requires some connection to terrorist activities. At the same time, however, section 83.04 does not require any overt act beyond the possession of property whereas the other offences requires overt acts such as the use, collection or provision of property or services.[31]

D. Section 83.08: Dealing with Terrorist Property

Section 83.08 prohibits any person in Canada and any Canadian outside of Canada from knowingly dealing[32] 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 section 83.09.[33] The knowledge requirement should be interpreted to extend to all aspects of the prohibited act

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30 *R.* v. *Wholesale Travel Group* (1991), 67 C.C.C. (3d) 193 (S.C.C.).

31 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 R.J. Daniels, P. Macklem & K. Roach, *supra* note 2 at 301-302.

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

33 These exemptions from criminal liability would have to be provided in a procedurally fair manner. *R*. v. *Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.).

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 section 83.03, reliance on the administrative listing under section 83.05 of a terrorist group should not suffice for proof of either the *mens rea* or the *actus reus* of this offence. Under section 83.12, offences under section 83.08 can be prosecuted either as a summary conviction offence punishable by a maximum fine of $ 100,000 and/or one year imprisonment or as an indictable offence punishable by up to 10 years imprisonment.

E. Sections 83.1 and 83.11: Obligations to Disclose Ownership or Control of Terrorist Property

Section 83.1 provides a mandatory duty on all persons in Canada and every Canadian outside of Canada to disclose to both the Commissioner of the RCMP and the Director of CSIS 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 federal or provincial regulators whether or not they are in possession or control of property owned or controlled by or on behalf of a terrorist group. Under section 83.12, the failure to respect the disclosure duties under either section 83.1 or section 83.11 can be prosecuted either as a summary conviction offence punishable by a maximum fine of $ 100,000 and/or one year imprisonment or as an indictable offence punishable by up to 10 years imprisonment.

III. THE NEW OFFENCES OF PARTICIPATION, FACILITATION, INSTRUCTION AND HARBOURING TERRORISTS

Bill C-36 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 actual commission of terrorist violence. Under section 83.24, they all require the consent of a provincial or federal Attorney General to be prosecuted.

A. Section 83.18: Participating in the Activities of a Terrorist Group

This offence 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. Section 83.18(2) makes it clear that 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. Section 83.18(3) provides that 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 section 83.18(4) which directs courts 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 section 83.18 could give rise to *Charter* challenges based on freedom of expression or association under section 2 of the *Charter* or vagueness, overbreadth or lack of a voluntary act under section 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. It could, however, be argued that section 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 section 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 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.[34] There may be activities caught in the extremely broad offence of participating or contributing to terrorist groups that are so far removed from actual facilitation of terrorism that the courts may strike them down.[35] In such a case, a Court may well sever or read down those portions of section 83.18 that it finds to be overbroad while allowing other parts of the offence to remain in place.

In determining the constitutionality of section 83.18, however, the courts will pay attention to the fault requirements of the offence in addition to its very broad prohibited act. Section 83.18 requires 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

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[34] *R.* v. *Heywood* (1994), 94 C.C.C. (3d) 481. See M. Shaffer, "Effectiveness of Antiterrorism Legislation: Does Bill C-36 Give Us What We Need?" in R.J. Daniels, P. Macklem & K. Roach, *supra* note 2 at 201-203.

[35] 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.

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*.

B. Section 83.19: Facilitating a Terrorist Activity

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. Section 83.19(2)(a), however, then qualifies the fault element 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."[36] 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 section 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 qualifying and watering down the fault element to obliterating it. It is difficult 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 willful blindness[37] 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 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. Courts may want to consider reading down or even

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

[37] D. Paciocco, "Constitutional Casualties of September 11", *supra* note 26.

invalidating this section in order to preserve the fault element of knowledge in section 83.19(1).

C. Section 83.21: Instructing Activities That Enhance the Ability of Terrorist Groups to Commit Terrorist Activities

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. As I have stated elsewhere this offence "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."[38] 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.

D. Section 83.22: Instructing the Carrying Out of Terrorist Activities

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."[39] Such instructions would not fall under the exemption in section 83.01(1.1) even if they were an "expression of a political, religious or ideological thought, belief or opinion" because they could under section 83.01 constitute a threat or counseling of a terrorist activity. An instruction to commit a terrorist activity could constitute expression

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[38] K. Roach, *supra* note 2 at 164.

[39] *Ibid.*

under section 2 of the *Charter*, but the prohibition of such communication would probably be justified under section 1 of the *Charter*.

E. Section 83.23: Harbouring or Concealing Known Terrorists

The new offence in section 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". This offence can apply both before and after a terrorist activity and may be a functional substituting for both the parties and the accessory after the fact provisions of the *Criminal Code*. 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 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*[40] 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.

IV. OTHER NEW OFFENCES

Bill C-36 adds other new offences to the *Criminal Code*. Unlike the offences discussed above, the consent of the Attorney General would not generally be required to commence prosecutions under these offences.

A. First Degree Murder under Section 231(6.01)

Bill C-36 follows a recent trend of expanding first degree murder to include more offences in response to horrific and well-publicized crimes. A new section 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

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[40] H.R. 3162 s. 803 amending s. 2339 of the United States Code.

terrorist activity." This adds an indeterminate number of offences to the constructive first degree murder provisions of the *Criminal Code* so long as the indictable offences also constitute a terrorist activity and satisfy the requirements for a murder conviction. The causation requirements of section 231.(6.01) track those of section 231(5) of the *Criminal Code* so that an accomplice would have to play "an essential, substantial and integral part of the killing of the victim".[41]

B. New Offences Relating to Internationally Protected Persons and Explosive and Lethal Devices

Section 424 of the Code relating to threats against internationally protected persons is expanded to include threats of more crimes. Sections 424.1 and 431.1 cover threats and attacks against United Nations personnel.

Section 431.2(2) is an important new indictable offence punishable by life imprisonment for those who deliver, place, discharge or detonate an explosive or lethal device (including biological agents, toxins or radioactive 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 differentiate between the intent to harm people and property, but it nevertheless requires subjective fault. This offence also demonstrates that the reference in the definition of terrorist activities to the disruption of essential services could have been more precisely defined with less fear of overbreadth.

C. Mischief to Religious Property under Section 430(4.1)

A new offence of hate motivated mischief to religious property is provided in section 430(4.1) of the *Criminal Code* that is punishable on indictment by up to ten years and on summary conviction by up to 18 months. This represents a crime in which a hate motive is an essential element of the offence and marks a departure from only using hate as an aggravating factor at sentencing under section 718.2 of the *Code*. The new

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[41] *R*. v. *Harbottle* (1993), 84 C.C.C. (3d) 1 at 13 (S.C.C.).

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." Requiring a hate motive to be proven departs from traditional criminal law principles that motives are not essential elements of crimes. The inclusion of motive in this part of Bill C-36 could perhaps be distinguished from the requirement of political or religious motive for terrorist activities in section 83.01 on the basis that the ordinary crime of mischief (as opposed to the ordinary crime of murder or kidnapping etc) does not adequately reflect that gravity of hate motivated mischief to religious property.

The new offence of hate motivated mischief to religious property could in some respects be criticized as underinclusive. Mischief to religious property motivated by bias against gays and lesbians in the congregation would not be covered under this new offence. Other crimes motivated by hate based on religion, national or ethnic origin that did not involve mischief to religious property would also not be covered. Nevertheless, the hate motivation of the above offences could be considered at sentencing under the existing section 718.2 of the *Code*.

D. Failing to Enter into or Obey a Recognizance

Bill C-36 adds two new peace bond provisions to the *Criminal Code*[42] and there are related offences for refusing to enter into a peace bond or recognizance or for breaching its terms. The most controversial provision (now subject to a 5 year renewable sunset) is section 83.3 which also provides for preventive arrests. Under section 83.(9), a provincial court judge may commit a person to jail for a term not exceeding 12 months if they fail or refuse to enter into a recognizance. The recognizance will be issued on the grounds that a peace officer has reasonable grounds to suspect that its imposition is necessary to prevent the carrying out of the terrorist activity.[43] A terrorist activity as defined in

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[42] See generally G. Trotter, "The *Anti-terrorism Bill* and Preventive Restraints on Liberty" in R.J. Daniels, P. Macklem & K. Roach, *supra* note 2 at 263; D. Paciocco, "Constitutional Casualties of September 11."

[43] Section 83(8) only refers to "reasonable grounds for the suspicion" but s. 83(2)(b) further defines the grounds as when the peace officer "suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of a terrorist activity."

section 83.01 may be broader than a terrorist offence defined in section 2 of the *Code* because it can be committed in or outside of Canada and is not limited to indictable offences. Under section 811 of the *Code* (as amended by Bill C-36), a person who breaches a recognizance under section 83.3 is guilty of a summary conviction or an indictable offence punishable by up to two years.

The peace bond provisions enacted with respect to criminal organization offences are also amended and unlike section 83.3, no sunset provision applies. Under section 810.01 (as amended by Bill C-36), a person may be committed to prison for a term not exceeding 12 months for failing or refusing to enter into a recognizance on the basis that there are reasonable grounds to fear that he or she will commit "a terrorism offence" defined in section 2 as including the new terrorism offences in sections 83.04 to 83.06 and 83.18 to 83.23, an indictable offence committed for the benefit of, at the direction of, or in association with a terrorist group, an indictable offence that would constitute a terrorist activity under section 83.01 or a conspiracy, attempt, counselling or being an accessory after the fact in relation to any of the offences mentioned above. Again, under section 811, a person who enters into a recognizance, but then breaches one of the conditions is also guilty of summary conviction or an indictable offence punishable by up to 2 years.

V. PUNISHMENT AND THE NEW OFFENCES

A significant feature of Bill C-36 is the extent to which it provides for increased and 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.

A. Life Imprisonment under Section 83.2

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." 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 section should be interpreted to require the prosecutor to establish fault in relation to all its element so that that the accused should intend to benefit or follow the directions of a known terrorist group. This provision also raises the issue discussed above of whether the listing of a group as a terrorist group under section 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 or individual is in fact a terrorist group.

B. Life Imprisonment under Section 83.27

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 punishable under Bill C-36 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 section 83.01.

C. Consecutive Sentences under Section 83.26

Section 83.26 provides that sentences other than life imprisonment for the new offences created in Bill C-36 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. The mandatory nature of the requirement that sentences be consecutive could result in disproportionate punishment given the overlapping and multiple nature of crimes that could result from terrorist acts and the possible requirement of multiple minimum penalties for offences involving the use of firearms.[44] In determining the quantum of punishment for each crime, judges should also advert to section 718.2(c) of the *Code* which requires that "where consecutive sentences are

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[44] Given the Court's decision in *R.* v. *Morrisey*, [2000] 2 S.C.R. 29, it is unlikely that a s. 12 *Charter* challenge to either the mandatory minimum sentences for offences committed with firearms or the mandatory imposition of consecutive punishment will be successful.

imposed, the combined sentence should not be unduly long or harsh". 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.[45]

D. Statutory Aggravating Factor and Increased Parole Ineligibility

Section 718.2(a) is amended to include evidence that an offence was a terrorism offence as an aggravating factor at sentencing. This mirrors the common law jurisprudence on sentencing for terrorism which stresses the need for denunciation and general deterrence when sentencing someone for crimes that constitute acts of terrorism.[46] Section 743.6 is amended to provide that when an offender receives a sentence of imprisonment for two years or more for a terrorist offence, the court "shall" order that the offender not be released on full parole until he or she has served the lesser of 10 years or one half of the sentence unless the court is satisfied that having regard to the crime and the offender, the sentencing purposes of denunciation and specific and general deterrence would be adequately served by the normal rules for parole eligibility.

CONCLUSION

The debate about whether Bill C-36 was necessary or wise is over.[47] This paper has sought to outline the way it expands offences and increases punishment under the *Criminal Code.* Many of the new offences added to the *Criminal Code* incorporate the expansive definition of terrorist activities and terrorist groups in Bill C-36. The way 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 the present jurisprudence on subsection 7 and 1 of the *Charter*, most direct *Charter* challenges to the new offences and punishments whether on the basis of vagueness, overbreadth, failure to require fault, unreasonable infringement of expression or the imposition

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45 *R*. v. *Belmas* (1985), 27 C.C.C.(3d) 127 (B.C.C.A.)

46 *R.* v. *Maltby,* (1985) 30 C.C.C. (3d) 317 (Ont.C.A.); *R*. v. *Atwal* (1990), 57 C.C.C. (3d) 143 (B.C.C.A.).

47 There will, however, be a three year Parliamentary review of the legislation and there is a renewable five year sunset on the provision for investigative hearings and preventive arrests.

of cruel and unusual punishment will likely fail. Nevertheless, I have argued that courts should interpret the new offences in a manner that requires 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 of the Governor in Council 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. Nevertheless, it should be remembered that the criminal law that existed before September 11 may still be used to prosecute terrorists.