The *Anti-terrorism Bill* (Bill C-36): An Unnecessary Law and Order Quick Fix that Permanently Stains the Canadian Criminal Justice System*

Don STUART**

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** Professor, Faculty of Law, Queen's University, Kingston, Ontario.

SUMMARY

Professor Stuart argues that the massive new criminal law powers placed in our permanent criminal laws by Bill C-36 were not necessary to respond to the outrage of September 11. More resources for intelligence and investigation were needed but not new laws. The definition of terrorist acts and the process for listing terrorist groups is seen to be far too wide. The new offences also cut across fundamental principles that there should be no State punishment without meaningful fault and act requirements. Dragnet police and Canadian Security Intelligence Service (C.S.I.S.) powers, including extraordinary and un-Canadian powers of detention on suspicion and compelling testimony before judges, and broad Ministerial powers, are also criticised. Bill C-36 endangers freedoms of vulnerable minorities and protesters. The history of repressive regimes such as apartheid South Africa warn, suggests the author, that these powers will be abused and extended. Professor Stuart identifies a broader systemic problem of law and order quick fix politics. This is evidenced in anti-gang legislation that he sees as having been counterproductive and not narrowly targeted. He calls for vigilance in the review of the implementation of Bill C-36 and hopes for its eventual repeal.

I. NEED FOR NEW INVESTIGATIVE RESOURCES BUT NOT NEW STATE POWERS

Seeing those planes explode into the World Trade Center buildings, the towers falling and the horrifying destruction of life are memories we will always have. We all feel more vulnerable. We expected our Government to be proactive on our behalf. It is easy to support the allocation of significant sums of Government money for preventive measures such as better airport security, medicine to counteract anthrax, more antiterrorist police and C.S.I.S. personnel and even for our military assistance to the United States' uncomfortable war in Afghanistan. Those

planning or committing acts of violent terrorism should be arrested, prosecuted and severely punished.

However, the complex new criminal laws which Bill C-36 has added to our permanent laws cannot be supported. When the State turns to its power to investigate, detain, punish and imprison, the standard of justification should be high, even in extraordinary times. Basic principles of a criminal justice system that deserves the name require the state to prove both that the individual acted and was at fault, that responsibility be fairly labelled and that any punishment be proportionate to the accused's actions. As many have said since Bill C-36 was tabled,[1] the definition of terrorism in the bill is far too wide. Tinkering Government amendments tabled on November 26 did not alleviate the concerns so many have expressed. This breadth of definition of terrorist activities, combined with the pernicious manner in which the crimes in Bill C-36 were declared, cuts across fundamental principles and should have been withdrawn. There were more than sufficient *Criminal Code* offences well suited to the prosecution of violent acts of terrorism, planning for terrorism and acts aimed to aid others commit terrorist acts.

There were also more than adequate investigative powers available for police and C.S.I.S. We needed better intelligence and evidence, not new laws.

This massive new State power grab was unnecessary, will not make Canadians safer and will much more likely endanger the freedoms of the most vulnerable such as minority groups, immigrants and, especially, refugees. That is the view of a Coalition of more than 140 Muslim-Canadian Organizations, representing a sizable proportion of Canada's 600,000 Muslims. They reported to the House of Commons and Senate that their members have been increasingly targeted since September 11. The issue of racial profiling is real and complex.[2] Thus far the anti-discrimination protection in section 15 of the Charter has not protected against discriminatory law enforcement. The overly wide powers in Bill C-36 will clearly make the risk of oppression and wrongful targeting worse. The Coalition urged the Prime Minister to withdraw the

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1 This was a consistent refrain at the University of Toronto conference, *supra* first introductory note.

2 See S. Choudhry, "Protecting Equality in the Face of Terror: Ethnic and Racial Profiling and s. 15 of the Charter", in Daniels, Macklem & Roach, eds., *supra* first introductory note, 367.

bill. Instead the Government invoked closure and rejected all opposition amendments. Even the Coalition could not stop the freight train thundering on to its inevitable destination.

II. EXCESSIVE WIDTH IN TERRORIST DEFINITION

The fatal flaw in Bill C-36 is its definition of "terrorist activity" in section 83.01. It decides who can be charged as a terrorist and against whom extensive new investigative powers can be exercised. In one respect the definition may be unduly narrow. There is no wisdom in requiring proof of a motive under (b)(i)(A) of:

> "a political, religious or ideological purpose, objective or cause."

For years, criminal law has sought to avoid proof of a bad motive as a requirement for criminal responsibility. It is too hard to prove and may, as here, lead to curious results. Why should a violent terrorist with unfathomable motives not be included? On this point the Government was stubbornly adamant. Perhaps the political problem may be that if the Government had conceded that point its case for special new laws would have been even weaker. The unfortunate reality of retaining the motive clause is that there will be religious and political targeting.

A most pernicious aspect of the new definition remains the wide extension in

> "(b)(ii)(E) to those who intend to cause serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of 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)." [which include intending to cause a serious risk to the safety of the public].

At first reading, the bill purported to exempt "lawful protest". That exemption was not worth the paper it was written on, as most protesters in Canada have, if charged, been convicted of at least obstruction offences. The Government finally removed the word "lawful" from "protest". This

may afford some protection to protesters. However it refused to remove clause (E) altogether as so many, including Liberal M.P. Irwin Cotler,[3] had urged. The overbreadth dangers have been reduced but remain a serious concern.

Equally disturbing is the alternative way the legislation permits persons to be branded as terrorists. The Governor in Council, on the recommendation of the Solicitor General, is now empowered to name by regulation a list of terrorist entities (s. 83.05). This designation will be based on a determination by the Government, in private and without public debate and based merely on reasonable grounds rather than proof in a court of law. The Government amendments did include a provision (s. 83.05(5)) for after the event review by a judge but there is a power for a judge to prevent disclosure of information for reasons of national security. Now at least the Privacy Commissioner will get access for review of that secrecy determination. Expect Canada to embrace George Bush's most wanted list which excludes well established terrorist groups like the I.R.A. and those operating for Israeli and Palestine groups not because they don't fit anyone's definition of violent terrorists but for reasons of political comity and expediency.

In this definition of terrorism, there is a great difference between what the Government told Canadians it intended and what the bill says. In its original Backgrounder entitled "Highlights of *Anti-terrorism Act*" the claim was that:

> "This definition and designation framework will provide clear guidance to police, prosecutors, the courts and the public on what constitutes a terrorist group or activity while protecting the lawful activities of legitimate political or lobby organizations."

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[3] See text accompanying note 17.

III. OVERLY BROAD NEW OFFENCES

Being branded as a terrorist in one of these ways is not an offence. The bill creates new offences of Participating, Facilitating, Instructing and Harbouring.[4] I will focus critical attention on the new offence of knowingly participating or contributing to terrorist activities. Similar criticism could be advanced against the other three offences. So what on earth, some might say, is wrong with creating a crime of knowingly participating in terrorist activity? The Backgrounder gives as an example the act of knowingly recruiting into the group new individuals for the purpose of enhancing the ability of the terrorist group to aid, abet or commit indictable offences.

The problem is that Parliament, just as it did earlier in the case of the creation of a crime of knowingly participating in a criminal organisation,[5] has cynically legislated out of existence any meaningful test of knowledge or meaningful test of participating or contributing. Here again, the devil is in the detail.

The definition section is section 83.18(1):

> "Every one who 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 is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."

So there is here a fault requirement of actual knowledge plus a purpose of enhancing the terrorist group's ability to facilitate or carry out a terrorist activity. Yet consider the next subsection, which had a strange and revealing heading "Prosecution" in the original bill:

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[4] For a full analysis and similar perspective see K. Roach, "The New Terrorism Offences and the Criminal Law" in Daniels, Macklem & Roach, eds., *supra* first introductory note, 151. See also M. Shaffer, "Effectiveness of Antiterrorism Legislation: Does Bill C-36 Give Us What We Need?" in Daniels, Macklem & Roach, eds., *supra* first introductory note, 195, who also called for withdrawal of the bill.

[5] See *infra* note 24.

> "(2) An offence may be committed under subsection (1) whether or not
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> (a) a terrorist group actually facilitates or carries out a terrorist activity;
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> (b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
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> (c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group."

Then we find a definition of participating or contributing which includes acts as vague as:

> "(b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group and
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> (d) [...] remaining in any country for the benefit of, at the direction of or in association with a terrorist group."

Canadian Bar Association representatives pointed out to the Parliamentary committee that clause (b) is inconsistent with the proper legal representation of those affected by these new terrorist laws. The Government did not bother to respond. Clause (d) is particularly stunning. It establishes guilt by association wherever you are in the world and whatever you are doing! Finally the maximum sentence on conviction for such knowing participation in terrorism is 10 years (s. 83.18). This must be served consecutive to a sentence for any other offence (s. 83.26).

When such criminalisation is read in conjunction with the wide ways you can be branded as a terrorist, there would be good arguments that such provisions violate section 7 Charter protections requiring meaningful act and fault requirements. The Supreme Court has held that you cannot substitute elements to avoid fault standards[6] and that minimum fault standards established by the Court cannot be watered down.[7] Excluding a mistaken belief defence respecting an essential

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[6] *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636.

[7] *R.* v. *Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154.

element of a crime has been held to be unconstitutional.[8] The Court has recently also re-asserted as a fundamental principle that the State prove a voluntary physical act[9]. In Bill C-36 there is often no real act requirement and there is no clear requirement that the accused knew that the group is involved in the acts which constitute terrorism. Other Charter arguments would be vagueness and overbreadth and disproportionate punishment contrary to the cruel and unusual punishment protection of section 12.

Even if these new provisions are Charter-proof, the larger issue is whether the new offences risk injustice in the form of unfair labelling and huge and dangerous overreaching of State power. They clearly do.

IV. POTENTIAL TARGETS UNDER BILL C-36

In an earlier response to the original bill,[10] I invoked in aid a list of activities which, under Bill C-36, were in jeopardy of being investigated, charged and punished as terrorism:

1. Aboriginal groups' blockading of logger roads to assert aboriginal title.

2. Anti-globalisation protests such as those occurring in Québec City.

3. Disruptive passive resistance inspired by Mahatma Gandhi.

4. Labour union stoppages of many types.

5. Sending aid to an Afghanistan refugee group later determined to be involved in terrorist activity.

6. A Community group's sponsoring Muslim immigration into Canada where an immigrant is allegedly involved in terrorist activities in the country of origin, even if this was some time in the past.

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8 *R.* v. *Hess and Nguyen*, [1990] 2 S.C.R. 906.

9 *R.* v. *Ruzic*, [2001] 1 S.C.R. 687. The Court also speaks of no criminal responsibility where there is "moral involuntariness."

10 University of Toronto paper, *supra* first introductory note.

7. A person claiming refugee status in Canada has to establish fear of political persecution from his or her country of origin. It would not be difficult for opponents in that country to provide intelligence to Canada that the refugee had participated in terrorism. So now the risk for the refugee is not merely that of deportation but of being charged with a terrorist offence.

8. Gangs of bikers or even a couple of youths out to disrupt the town could certainly be charged. The anti-gang legislation may already be redundant.

It is unlikely that the Government's removal of the word "lawful" from protest has removed the jeopardy of all such groups. Yes, the permission of the Minister is required for prosecution. That should not be the only protection against unfair labelling as a terrorist. The Government has shown little recent restraint in proceeding against protesters.

V. DRAGNET AND EXTRAORDINARY STATE POWERS TO INVESTIGATE

Bill C-36 has put into our permanent laws a huge and complex new web of dragnet and extraordinary police and C.S.I.S. powers. We already had likely the widest electronic surveillance powers in the Western World. They were more than enough and should not have been extended again as they are in Bill C-36. Especially troubling are extraordinary un-Canadian powers to detain without charge (s. 83.3) and to compel testimony in "investigative hearings" before judges (s. 83.28).

We should not have had to parse what my colleague Gary Trotter has called the "Trojan horse" section 83.3, entitled "Recognizance with Conditions", to divine that it is not a release mechanism but a new power to detain without charge. As well expressed in an Editorial in the Globe and Mail,[11] "among slippery slopes this is the Swiss Alps." Detention for questioning on reasonable suspicion was hitherto unknown in Canadian criminal law other than for brief stop and frisk purposes.[12] Release under section 83.3 is only possible if imposed conditions are accepted;

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[11] *The Globe and Mail* (November 22, 2001).

[12] See the carefully circumscribed reasons of Doherty J.A. in the leading decision of *R.* v. *Simpson* (1993) 20 C.R. (4th) 1 (Ont. C.A.).

otherwise detention can be for a year. The bill does not address the critical issue of whether the 72-hour detention can be in a police cell.[13]

Judicial compulsion of reluctant witnesses has seldom proved successful, as long evidenced in the context of domestic assault prosecutions. There is an apparent intent in the investigative hearings provision section 83.28 to set up a new intelligence gathering mechanism. This may also encourage the use of jailhouse informants, given that there is a power of arrest (s. 83.29). Justice Cory's recent Sophonow Inquiry Report carefully documents how a wrongful conviction occurred through false reliance on such testimony. Practically speaking, investigators might well wish to avoid such investigative hearings from which any evidence cannot be used. An officer who has reasonable ground for suspecting a terrorist offence may well be much better off to arrest and charge, afford the suspect his 10(b) rights and then interrogate using the coercive methods authorised by the Supreme Court in *R.* v. *Oickle*.[14] That way the evidence could also be used to convict.

These extraordinary new powers may not be as bad as such provisions in other countries. They expressly cannot be triggered without the consent of the Attorney General. But that does not mean that they are not repressive or that they are needed.

Bill C-36 also enacted a number of largely unfettered Ministerial powers. These include:

i. the power of the Minister of Defence to authorise electronic surveillance of international communications without the need to go before a judge;

ii. the power of the Minister of Justice to issue a fiat to ensure that "sensitive information" is kept secret;[15] and

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[13] "The *Anti-terrorism Bill* and Preventive Restraints on Liberty" in Daniels, Macklem & Roach, eds., *supra* first introductory note, 239.

[14] [2000] 2 S.C.R. 3.

[15] Under the present *Canada Evidence Act*, R.S.C. 1985, c. C-5, there are three forms of public interest immunity:

1. Section 37: claim of "specified public interest" against production;
2. Section 38: claim disclosure would be "injurious to international relations or national defence";
3. Section 39: certification that the matter involves Cabinet secrecy.

iii. the power of the Government to promulgate a list of terrorist entities.

Chief Justice Dickson, in extolling the virtues of a strong value of "openness" for judicial acts, relied on Jeremy Bentham:

> "In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in the proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice."[16]

This is a value little reflected in Bill C-36. The Government also has shown little respect for the standard of prior authorisation by an independent judge. At a late stage the Government reluctantly allowed amendments for partial judicial review of some but not all Ministerial powers.

VI. THINKING WITHIN THE BOX

Irwin Cotler, the Liberal M.P. who should take considerable credit for trying to get the Government to soften the bill,[17] has urged that we should "think outside the box."[18] He urges that we should embrace the international criminal justice model. We should reject the "domestic criminal law/due process model" in favour of an "international criminal

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The first two types of public interest immunity are reviewable by courts. The section 39 certificate is not. The constitutionality of s. 39 was upheld in *Westergard-Thorpe* v. *Canada (Attorney General)* (2000) 183 D.L.R. (4th) 458 (F.C.A.).

Under Bill C-36, section 38 of the *Canada Evidence Act* would be greatly extended in a highly complex nine-page regime to allow for Ministerial protection of matters of "security" and "sensitive information". A judicial review under section 37 or 38 could also be stopped by the Attorney General of Canada issuing a "fiat" under s. 38.15. Like the existing certificate of Cabinet secrecy, this new fiat is not to be reviewable by the courts. H. Stewart, "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity" in Daniels, Macklem & Roach, eds., *supra* first introductory note, 217, has cogently argued that President Nixon would have got away with Watergate and the Elsberg affair had he been able to rely on such protections.

16 As quoted in *A.G. (Nova Scotia)* v. *MacIntyre*, [1982] 1 S.C.R. 175.

17 His success was moderate. Six of his ten proposed amendments were accepted by the Government before Third Reading: *The Globe and Mail* (November 21, 2001).

18 "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in Daniels, Macklem & Roach, eds., *supra* first introductory note, 111.

justice system counteracting a transnational and existential threat." The debate should not be between national security and civil liberties. Instead, Cotler argues, antiterrorist legislation should be seen as human security legislation for us all.

The problem here is that the debate over Bill C-36 was not whether Canada should support the United Nations antiterrorism initiatives, the worldwide consensus that measures must be taken against terrorism, or the International Criminal Court. These all appear to be laudable imperatives. The issue was and is what standards should be applied when people are investigated and punished within our own borders. In our context, "the box" is a Canadian police or prison cell or a home in Canada that receives a knock from C.S.I.S. or the police investigating a suspicion of terrorist involvement. Here the threats to freedoms are not merely existential; they are very real. In our domain we do not need to dilute our hard-fought standards of criminal justice for the sake of international comity or the international law and order agenda. Many Canadians, and certainly the Supreme Court, would surely not support George Bush's order to bypass the Geneva Convention standards for the treatment of prisoners of war. We should not be handing over prisoners to US military tribunals, which are to be held in secret, without provision for proper legal representation and which may impose the death penalty.

VII. FEEDING FRENZY FOR LAW AND ORDER QUICK FIXES

The passage of this massive bill raises an important systemic problem. That our federal politicians would respond so quickly with a quick fix law and order solution should have come as no surprise. At least this time, the N.D.P., the Bloc Québécois and some other MPs voted against the bill at Third Reading. Although Parliament enacted our *Charter of Rights and Freedoms* in 1982, which set out new protection for those accused of crime, politicians of all stripes have been unable to resist the lure of courting votes by being tough on crime. In the last 20 years or so, the *Criminal Code* has been getting ever more punitive and ever more complex. Successive Ministers of Justice have been largely content to listen and respond to *ad hoc* pleas of police and prosecutors, victims associations and womens' groups, that the Government counteract Supreme Court rulings, respond more punitively to particular problems

and/or remedy various law enforcement concerns. Constructive and detailed pleas[19] for a more restrained principled approach or to make the criminal law less complex and comprehensible have fallen on deaf ears. There are no votes there. Consider this example. For the last 25 years, it has been clear that the law of self-defence is in an incomprehensible mess. Every criminal lawyer and judge knows that. Calls for reform by the Law Reform Commission, judges including Chief Justice Lamer, the Ratushny Inquiry and many academic writings have not produced a *Criminal Code* amendment.[20] There is time to draft many omnibus Criminal Code amendments every year and this mammoth bill but there is no interest in any agenda that is not law and order.

There has often been strong criticism of the activism of the Supreme Court. The activism of Parliament in its remorseless enactment of new state powers and tougher provisions in the *Criminal Code* and other statutes has largely escaped critical review. The lively public debate about the excesses of Bill C-36 may at least leave a legacy of healthy scepticism. At the very least, we should doubt the wisdom of bills that are such a complex melange of tortuous legalistic sections and exceptions which can only serve to encourage expensive litigation. Remember though that some of those targeted under Bill C-36 will have their assets frozen and will lack the money to mount challenges.

We need a Minister of Justice with a better sense of balance and one who standsfirm against the overuse of the blunt instrument of the criminal sanction. I think of former Solicitor General Warren Almand who, in 1976, lead the fight in the country to abolish the death penalty, even though many Canadians were retentionists.

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[19] See most recently, D. Stuart, R.J. Delisle & A. Manson, eds., *Towards a Clear and Just Criminal Law* (Toronto: Carswell, 1999).

A law reform conference was held in Kingston in November, 1998, involving 58 academics, practitioners and judges from across the country. The published papers contain many specific proposals for streamlining every aspect of the criminal justice system. To my knowledge the Department of Justice has not given serious thought to any of these ideas.

[20] *Supra* note 7.

In November 2001, the Supreme Court was unanimous in holding that the press should have been allowed to publish details of an elaborate undercover sting operation involving a bogus criminal organisation.[21] "Canada is not a police State" pronounced Justice Iacobucci for the Court. We may well have been too hasty in predicting that Bill C-36 will withstand Charter review. The bill certainly has many secrecy provisions, especially in the *Security of Information Act*. This is to be a new name for the Act formerly more aptly named the *Official Secrets Act*.

So too Bill C-36 critics may take comfort from the remarks of Chief Justice McMurtry who, in the course of a recent speech entitled "The Role of the Courts in Turbulent Times",[22] said the following:

> "Courts are not representative bodies in that they do not represent specific or special interests. They are impartial bodies that must reflect the basic values of a just society. Courts are not necessarily democratic institutions as they are not bound by the majority of public opinion. However I believe that when the majority takes away the rights of a minority, that is not democracy. Democracy is, therefore, a delicate balance between majority rule and individual rights."[23]

VIII. LESSONS FROM ANTI-GANG LEGISLATION

We should not have been placated when the former Minister of Justice petulantly asserted that Bill C-36 does not target minorities. The record of the enactment and subsequent application of the anti-gang measures is instructive and puts the lie to such ministerial assurances.

In 1997 the *Criminal Code* was amended to include a wide variety of anti-gang measures. A wide crime of participating in a criminal organisation was created and police powers, including wiretapping laws, were extended. The immediate context was the eve of a federal election and the perceived need to respond to a plea by the Québec Minister of Justice General and Québec mayors for measures to address a violent and

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[21] *R.* v. *Mentuck*, 2001 SCC 76; *R.* v. *O.N.E.*, 2001 SCC 77.

[22] The speech was published by the Ontario Bar Association: see (2002) 2 *Constitutional* 1.

[23] *Ibid*., at 13.

protracted fight between two biker gangs: the Hell's Angels and the Rock Machine. We were told at the time that the bill was narrowly targeted.

That it was not is well demonstrated in the fiasco of the prosecution of the Manitoba Warriors in Winnipeg.[24] By laying extra charges of gangsterism, a routine drug conspiracy case was conflated into a high security affair with a special new courthouse built at the cost of millions. Young aboriginal accused spent many extra months in high security pre-trial custody before the trial was aborted by a number of plea negotiations. Almost all the gangsterism charges were withdrawn. At best, the new law was applied in a counterproductive and unjust way, made matters way too complicated and wasted precious State resources. The extra millions could have been far better spent on social programmes.

On September 12, 2000, a Montreal crime reporter was shot several times the day after he published an expose of organised crime. By September 14, 2000, a Québec Minister, Serge Ménard, usually moderate in his respected views about the criminal justice system, was calling for new and clearer organised crime laws to prohibit mere membership in criminal gangs like the Hell's Angels and the Rock Machine and the use of the notwithstanding clause to trump any Charter claim of freedom of association.

It is stunning that this initiative came from a province in which the invocation of the *War Measures Act* in 1970 and the banning of the *Front de libération du Québec* (F.L.Q.) terrorist group lead to the arrests of hundreds of innocent Québécois. Canada does not need laws of guilt by association or any overriding of Charter rights. Biker violence in Québec and elsewhere may well require considerably more police investigative resources to gather evidence but no new laws were ever needed or likely to be effective.

On the eve of another Federal election, a Parliamentary Sub-committee on Organised Crime held in-camera hearings and released a hastily drafted report. I testified in an uncomfortable secret session about the outcome of the Manitoba Warriors prosecution. Some M.P.'s seemed troubled by the account. But no M.P. subsequently saw this test case as pointing to the dangers of Parliament's overbroad anti-gang quick fix.

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[24] For a fuller account see D. Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2001) 28 *Man. L.J.* 89.

During the 2000 federal election, all politicians agreed that something more needed to be done about gangs. No politician dared to raise questions.

The Department of Justice Backgrounder explained that a new and much broader definition of criminal organization was drafted to respond to concerns expressed by police and prosecutors that the current definition was "too complex and too narrow in scope". So, once again, the consultation was completely biased in favour of listening to those who enforce the law. By this time, convictions had been registered in Québec under the new gangsterism laws against members of the Hells Angels and Rock Machine. Parliament just pressed on. It also snuck in an unconscionable Ministerial power to designate police officers to break the law, whether or not the target was organised crime. This power to designate can even be delegated to other police officers and is general rather than case specific. It is the antithesis of the rule of law. Despite the opposition of the C.B.A. and others, it became law. Critics were fobbed off on a promise of a Parliamentary review.

Bill C-36 piggy-backed on the "success" of the anti-gang initiative and went much, much further both in terms of State power and who can be targeted.

IX. DO NOT BE BEGUILED BY PHONEY SUNSET CLAUSES AND PROMISES OF PARLIAMENTARY REVIEW

At Third Reading of Bill C-36, five-year sunset clauses (s. 83.32) were added for two of the most egregious measures of:

i. detention without charge (s. 83.3) and

ii. compelling testimony at investigative hearings (s. 83.28).

Opposition M.P.'s pointed out that this was not a real sunset clause, as the provisions can be simply extended on a Government vote. The five year period is clearly meant to avoid the heat of an election. Nevertheless these clauses must be seen as a Government acknowledgement that these extraordinary powers are suspect.

We should also not be lulled into complacency by the new provisions in s. 83.31 for annual review of these extraordinary powers. Parliament is not good at reviewing itself. Section 83.31 appears to contemplate merely statistical reports. The annual one page reports on electronic surveillance authorisations tabled since 1974 have been a cynical joke. It took the Supreme Court to point out that so-called consent authorisations by police were entirely beyond any review.[25]

X. REMEMBER SOUTH AFRICA

Nelson Mandela and at least two thirds of the present South Africa Legislature were once branded and punished as terrorists, especially after the A.N.C. renounced its policy of non-violence. The line between a freedom fighter and a terrorist often depends on your political allegiance. Apartheid South Africa had a well-documented record of torture and death at the hands of police interrogation of those detained without charge. Once a country embraces forms of preventive detention for interrogation, the history of repressive regimes warns that the power will likely be extended and abused.

CONCLUSION

Canada today is not South Africa in 1968. However, repression is a matter of degree. Canada did declare the *War Measures Act* in 1970. The accompanying justification in a speech by Pierre Elliott Trudeau about suspending civil liberties to address terrorist threats was a speech about which any South African Minister of Justice of the day would have been proud. We know that many innocent people were arrested in Montreal and across Canada. We replaced that Act with the carefully drafted *Emergencies Act* of 1988.[26] It specifies numerous remedies for those wrongfully targeted. None of that balance and sensitivity is evident in Bill C-36.

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[25] *R.* v. *Duarte*, [1990] 1 S.C.R. 30.

[26] S.C. 1988, c. 29.

Bill C-36 confers permanent, unnecessary, dragnet and dangerous State powers. There is a serious risk that political dissenters and innocent vulnerable groups can be investigated, detained, interrogated and prosecuted with broad offences which cut across normal Canadian criminal law protections. South African history warns against the risk of escalating oppression. Bill C-36 should have been withdrawn. One can only hope that Canadians will be vigilant in their review of this extraordinary and massive State power grab. If the legislation proves to have been huge overkill or harmful to freedoms, it should be purged from the twelve Federal statutes it amends. Unless the current law and order orgy is reversed by a Minister of Justice worthy of that title, Bill C-36 will remain a permanent stain on our criminal justice system.