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Anti-Terrorism Law Reform: Required Changes to the Terrorism Financing Provisions

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Case Commented On: Sections 83.02, 83.03 and 83.04, *Criminal Code*, RSC 1985, c C-46

Editor's Note: This is the third in a series of three posts on Reviewing Canada's National Security Framework.

This law reform proposal is focused on the "Financing of Terrorism" provisions in the *Criminal Code of Canada*, RSC 1985, c C-46. The government is currently engaged in public consultations and substantive review of the controversial aspects of Bill C-51, the *Anti-terrorism Act, 2015*. The purpose of this post is to consider the structural problems within the *Criminal Code* and the current anti-terrorism financing regime, discuss the apparent shortcomings in bringing prosecutions under this regime and provide recommendations to improve the efficacy of these provisions.

The particular provisions of the *Criminal Code* which prohibit terrorism financing – sections 83.02, 83.03 and 83.04 – were neither enacted nor varied by Bill C-51. These provisions came into force as part of the *Anti-terrorism Act*, SC 2001, c 41, in response to the terrorist attacks of September 11, 2001 and the following UN Resolution 1373 on the financing of terrorist acts. Despite the fact that the provisions are not anchored to Bill C-51, it is still a good opportunity to revisit these provisions and restructure this part of the *Code*.

Why the Need to Review Terrorist Financing Laws?

The financing of terrorist organizations and terrorist activities is foundational to the development of terrorism as a viable pursuit. With access to money, terrorists' organizations can provide support and training to recruits, provide safe houses and execute attacks. Restricting the flow of money into terrorist organizations is arguably one of the most effective counter-terrorism measures, providing that the state can effectively do so. The recruiting, training, communication resources and support leading up to a terrorist attack costs terrorist groups money. Terrorist attacks have been questionably labelled "inexpensive" when you do not calculate those external costs (see Shima D. Keene, *Threat Finance: Disconnecting the Lifeline of Organised Crime and Terrorism* (Burlington: Gower Publishing Company, 2012) at 96).

Attacks therefore become more difficult to plan and execute when resources are limited and monitored appropriately by the state.

Further to the government's desire to review and address Bill C-51, there are other political aspects which indicate an interest in this issue:

1. Government of Canada's National Security Green Paper, 2016: *Our Security, Our Rights, Background Document* – the Background Document provides information for public engagement and highlights the importance of both Terrorist Financing (pages 51-54) and Procedures for Listing Terrorist Entities (pages 47-50);

2. Minister of Justice and Attorney General of Canada Mandate Letter – the mandate letter from Prime Minister Trudeau which instructs the Minister to review the *Code* to ensure *Charter* compliance, identify duplicitous provisions, and propose amendments if courts have rendered a provision unconstitutional;

3. The Financial Action Task Force (FATF) recent publication of their Guidance on Criminalising Terrorist Financing (Recommendation 5) – Canada is a member of the FATF (an inter-governmental body established to promote effective implementation of legal measures for combating terrorist financing, *inter alia*), and their paper shows that the international community is concerned and engaged on the topic of preventing terrorist financing. Canada, as a partner to some of the most powerful nations on the planet and a key member in international politics, should be able to meet international standards and recommendations as found in this FATF publication.

Financing Terrorism

Terrorist organizations are often compared to other organized criminal groups, such as mobs and gangs. But the financing of terrorism is different from traditional crimes. Terrorists collect money and property and use it in order to execute their crimes, but the crime itself yields no personal benefit. Traditional crimes executed by other organized criminal groups, such as fraud or the sale of drugs, results in 'proceeds of crime' whereby the purpose of the crime is to obtain money. Historically, Canada has not prosecuted the accumulation of money unless the money was obtained by criminal means. It is now our political and international obligation through UN Resolution 1373 to have criminalization specific to the funding of terrorism. This key difference in the crime requires specific criminal provisions in the *Criminal Code*, which address the accumulation of materials to support tactical terrorist activities.

Unfortunately, prosecutions have been limited in regards to terrorism financing. The current *Criminal Code* provisions which prohibit financing of terrorists, terrorist groups or terrorist activities are ineffective and are in part unconstitutional. If we can change these provisions so that our police and investigative services can effectively intercept funds going to terrorist groups, it affects the ability of the group to recruit and radicalize individuals and prevents them from being able to plan, prepare *and* execute terrorist attacks.

Jurisprudence in Canada

The limited history of jurisprudence in Canada is indicative of an issue with the current anti-terrorism financing regime. This is due to a plethora of issues, from jurisdictional problems with tracking money, to lack of resources, oversight and investigative capabilities, to a burdensome amount of financial information to review.

In the fifteen years since the "Financing of Terrorism" section of the *Criminal Code* was established, there have been two successful terrorism financing cases:

R v Khawaja, 2012 SCC 69 (CanLII), A Canadian Muslim became associated with a terrorist cell in the United Kingdom and provided financial support, *inter alia*, for their activities. Convicted at trial under section 83.03(a) in 2009.

R v Thambaithurai, 2011 BCCA 137 (CanLII), A Canadian of Tamil (Sri Lankan) origin was fundraising and collecting money for the World Tamil Movement that was destined for the Liberation Tigers of Tamil Eelam (a "listed entity", part of the definition of "terrorist group" in section 83.01). Plead guilty to an offense under section 83.03(b) in 2010.

After review of the provisions and the case law, we have identified two key areas of concern in particular which contribute to a poor prosecution record in Canada for terrorism financing.

(1) Investigations by FINTRAC

The *Financial Transactions and Reports Analysis Centre of Canada* (FINTRAC) is the financial intelligence unit in Canada responsible for investigating, *inter alia*, terrorism financing. FINTRAC reports disclosing 287 cases related to terrorist financing between 2007 and 2011, increasing regularly to 337 disclosures in the 2014-2015 year according to their 2015 Annual Report. Although FINTRAC is increasing their efforts to track funds and disclose concerning financial details, the results of these efforts seem to be non-existent or at best simply difficult to discern due to lack of transparency (see Vassy Kapelos, Why so few terror financing charges and convictions? Good luck finding out). Despite vast amounts of investigative detail, Canada's investigative structure through FINTRAC has not yielded any traceable, successful prosecutions. The lack of prosecutions is key, as that is one way for the public to be able to measure outcomes of FINTRAC's mostly secretive work. Criminal prosecution is also often relied upon as deterrence mechanism (see Government of Canada, Mandatory Minimum Penalties: Their Effects on Crime Sentencing Disparities, and Justice System Expenditure), which is obviously unable to work if any interception by FINTRAC is of a secretive nature. Of the two cases listed above, it appears neither had investigative material sourced from FINTRAC. And it is not possible to ascertain whether any other benefit has arisen from these disclosures.

FINTRAC and police services work in close cooperation, but that close cooperation should be working to ensure disclosures are resulting in charges that can be prosecuted. There should be more transparency and collaboration between these institutions so we – the public – can identify how these investigations are contributing to Canadian security, and so that we can ensure that our government is addressing the crime of terrorist financing as a foundational issue to all terrorism activities. These details should also be used to validate the ongoing work of FINTRAC, who – for at least the purposes of this review – has shown to be of no evidentiary value.

(2) Drafting Language of the *Criminal Code* Provisions

The main criticisms of the language of sections 83.02 to 83.04 is that they are ineffective, lacking clarity, duplicitous or redundant, and partially unconstitutional, all of which arguably contribute to how rarely they are used. In their current form they create hurdles for police and investigative bodies to be able to bring charges that can be prosecuted. The text of these provisions is as follows:

Providing or collecting property for certain activities

83.02 Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

> **(a)** an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of *terrorist activity* in subsection 83.01(1), or
> **(b)** any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

Providing, making available, etc., property or services for terrorist purposes

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

> **(a)** intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
> **(b)** knowing that, in whole or part, they will be used by or will benefit a terrorist group,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

Using or possessing property for terrorist purposes

83.04 Every one who

> **(a)** uses property, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity, or
> **(b)** possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

Section 83.03(b) of the Criminal Code

Key to the discussion of the modernization of the *Criminal Code* and the review of anti-terrorism laws is a consideration of the definition of "terrorist group". "Terrorist group" is an essential element of the section 83.03(b) offense and is defined in section 83.01(1). Terrorist group

includes in its definition "a listed entity". The listing of an entity means that the entity is regarded as a terrorist group.

The process of how a group becomes a listed entity is explained in section 83.05. In theory, deeming an entity to be a terrorist group through the listing process simplifies investigations and prosecutions under section 83.03 because the prosecutor does not need to independently prove that the individual or group is a terrorist group. However, currently listings are not required to be proven on a beyond a reasonable doubt standard. The standard to have an entity listed is "reasonable ground to believe". This is a much lower standard than the standard for criminal conviction and yet is being applied to an essential element of terrorist offences to seek criminal convictions, thereby sidestepping the high standard of proof that would otherwise be required.

The process for listing also has no procedural requirement to notify the group or individual, and as a result they also have no opportunity to respond. In the September 2016 Green Paper on National Security, the Government defended its approach to listing, maintaining that the secrecy involved in the listing process prevents the entity from removing its Canadian assets from Canada before they are frozen by the listing (at 48). This is also problematic, as it bristles against constitutional rights to liberty and the potential for infringement of section 7 *Charter* rights (see Craig Forcese & Kent Roach, "Yesterday's Law: Terrorist Group Listing in Canada" (2016) WP2016-34 Social Science Research Network 17). To mitigate potential impacts of the listing process on the *Charter* rights of individuals and groups, the government permits the listed entity to apply to be de-listed. In the event that the de-listing application is refused, the listed entity may seek judicial review. This redemption is impractical and disproportional, and harks of guilty until proven innocent.

The Green Paper seemed to indicate that the government does not view a serious issue with the listing of terrorist entities (at 48). Canada can continue to risk an unconstitutional finding by the courts and rely on the listing to streamline prosecutions and strengthen other Acts outside of the *Criminal Code*, but including the "terrorist group" term in the "Financing of Terrorism" provision leaves this area of the *Code* at greater risk in an area already fraught with failure. In the present era when Canada is under scrutiny for unnecessarily curtaining civil liberties under Bill C-51, continued commitment to the listing of entities will likely create ongoing criticisms of the government in addition to the prosecutorial issues.

To ensure a better chance of success with prosecutions, the unconstitutional elements of section 83.03(b) should be removed. However, simply removing the term "terrorist group" from this one section does not address the ramifications a wrongfully listed group would face once their name has been tarnished by the listing, and does not adequately protect *Charter* rights elsewhere.

We expect that the government will be very hesitant to remove the listing of terrorist entities, but there is nothing in our current jurisprudence that shows we should keep the listing, especially within the terrorism financing provisions. In the *Thamabaithurai* terrorist financing case, the funds were going to a listed entity, but Thambaithurai plead guilty – there was no streamlining of the prosecution and likely the Tamil Tigers would have been admitted in the Agreed Statement of Facts as a terrorist group if that was a required element. Similarly, in *Khawaja*, the prosecutor did not rely on the listed entity option either. Certainly, it cannot be argued that it is a high burden on the Crown to prove that established terrorist groups are actually terrorist groups. And logically, most of the financial dealings will be with third parties that are unlisted as it was in *Thambaithurai* with the World Tamil Organization. Generally, in all of the 26 terrorism prosecutions to date in Canada, only six have relied on listings (Forcese & Roach, "Yesterday's

Law" at 8). This means that the listings are used rarely and do not provide a great strength to our prosecution service from an efficiency standpoint, and the prosecutors are relying on a low threshold of proof to prove their case which is contrary to our rule of law and constitution. There is not a strong argument for keeping the listings and a very worrisome constitutional question to answer if reliance continues.

Section 83.02 of the Criminal Code

Section 83.02 includes a higher *mens rea* requirement of specific intent in the *chapeau* of the provision, which increases the burden on the Crown:

> **83.02** Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out…

This includes two *mens rea* or mental element components – that the accused "willfully" provided the property and that the accused knew it was to be used for a terrorist activity, etc. The issue of knowing how the property would be used (also found in sections 83.03 and 83.04) has been identified in American jurisprudence as an obstacle to prosecuting terrorism financing provisions. There have been cases in the United States where courts have interpreted statutory language that is very similar to ours to mean that the provision of property had to be given with a specific intent to facilitate a terrorist activity (i.e. "in order to carry out"). It has been recommended by scholars on the subject that the language be amended so that "the government is not required to prove that the defendant intended to further the aims of a foreign terrorist organization by the provision of material support" (see Jimmy Gurule, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (Massachusetts: Edward Elgar Publishing, Inc, 2008) at 387). This does not mean that terrorism financing must be a strict liability offense, but restructuring the language to ensure courts do not interpret a higher level of intent than what the legislature really intends to be the threshold.

If it is easier to prove the *mens rea* element of the offense, it is more likely that we will be able to bring more successful prosecutions to court. It could also strengthen the bargaining power of the police and investigative bodies when disrupting financing activities, even if they are not seeking a prosecution, since the risk of a successful prosecution will be greater. Further, the *mens rea* component is different and of a higher level in section 83.02 than the following two sections, meaning that it would be foolish to charge under section 83.02 where the burden is greater on the prosecutor. There seems to be no reason to create this distinction. The provisions should thus be drafted to be more consistent in the *mens rea* component.

Section 83.03 of the Criminal Code

The final issue with the current terrorist financing provisions is the duplicity surrounding three supposedly discrete offenses. Besides the difference in *mens rea* between sections 83.02 and 83.03, these provisions would seem to capture the same criminal activity (notwithstanding the inverse of "provide" and "collect" between the two sections). Consider you are a terrorist and have property available for use for your terrorist cell. Should the Crown proceed under section 83.03, which is collecting/providing property, or under section 83.04, which is using/possessing property? We assume they will not proceed under 83.02 due to the higher *mens rea* burden, but

likely it would be difficult and confusing and require judicial acrobatics to determine whether or not the activity is captured by the criminal offense of providing or using the property. Consideration should also be made as to whether you could convict someone under both provisions for likely the same activity and whether this would an issue of "double jeopardy", contrary to section 11 of the *Charter*. The confusion and redundancy of these provisions do not help prosecutions. Certainly there is a counter argument here that these provisions capture discrete activities, but the fact that it is questionable provides doubt and confusion in an area already fraught with prosecutorial hurdles. Clarity surrounding these charges is required so that prosecutions can be clear and linear.

These provisions should be re-drafted to maximize the likelihood of prosecutorial success.

Recommendations

The Standing Committee on Finance, under the previous Conservative government, released a review of Terrorist Financing in Canada and Abroad: Needed Federal Actions in June 2015. That committee review yielded 15 recommendations. In coordination with our above analysis, we would recommend that the new Liberal government consider many of these recommendations. Particularly, we find it important to continue working on strengthening the terrorism financing prosecutorial process from investigation to conviction, acknowledging that terrorism financing is a serious concern in our society. Further to the recommendations provided, we believe it is essential to create new criminal provisions which give police the ability to lay charges against individuals who have been investigated and disclosed by FINTRAC. Key to success is a full review by government of FINTRAC's service to assist them in making disclosures which can be prosecuted, removing the unconstitutional listing of entities, creating a consolidated terrorism financing provision which has a reasonable level of *mens rea* to capture the offense, is consistent in its use of language and is constitutional. An effective anti-terrorism financing regime requires an ability to enforce laws and collect and share real-time intelligence evidence (see Anne L. Clunan, "US and International Responses to Terrorist Financing" in Jeanne K. Girald and Harold A. Trinkunas eds, *Terrorism Financing and State Responses* (California: Stanford University Press, 2007) at 261). This is something for Canada to strive for in creating new laws to combat terrorism financing but certainly not where we stand today.

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