

## **Curtailling Free Expression: A Barbaric Cultural Practice? A Critical Comment on Section 83.221 of the *Criminal Code***

**By: Kiran Fatima, Meagan Potier, Jordan Szoo and Stephen Armstrong**

**Case Commented On: [Section 83.221](#) of the *Criminal Code*, RSC 1985, c C-46**

Bill C-51, the *Anti-terrorism Act, 2015*, sailed through Parliament and received Royal Assent on the 18th of June, 2015, amidst much political debate. One of the more controversial provisions was a new advocating terrorism offence contained in what is now s 83.221 of the *Criminal Code*, RSC 1985, c C-46. The provision criminalizes knowingly advocating the commission of terrorism offences in general and being reckless as to whether such offences are actually carried out. This post will address the political dynamics and constitutional issues with respect to the new advocating offence and make suggestions for how the Government of Canada should move forward.

Interestingly, our group was divided on the best approach to addressing the issues with respect to the provision. Meagan and Jordan were in favour of repeal, whereas Stephen and Kiran favoured amending the provision. We present the case for both repeal and amendment below and leave it to the reader to reach their own conclusions.

The text of the provision is as follows:

83.221 (1) Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general — other than an offence under this section — while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

“Terrorism offence” is defined in s 2 of the *Criminal Code* as:

- (a) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23,
- (b) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,
- (c) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or
- (d) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (c).

### **The Politics of the Thing**

There are important political considerations that make the repeal or the reform of the advocating offence both legally important and politically smart. The current administration has recently

asked for an in-depth review of the *Criminal Code* with a particular focus on new counter-terrorism legislation:

We are moving forward on our commitment to repeal the problematic elements of former Bill C-51, the Anti-terrorism Act, 2015. Input from Canadians on this Act, and more broadly on Canada's national security framework, will help inform the development of laws and policies in this important area. Our goal is to ensure the safety of Canadians, while protecting our rights and freedoms.

(See Public Safety Canada, [Government of Canada launches public consultation on national security](#))

From a political perspective, dealing with this provision speaks to Prime Minister Trudeau's publically announced objectives. In his [Mandate Letter to the Minister of Public Safety and Emergency Preparedness](#) and his [Mandate Letter to the Minister of Justice and Attorney General](#), Prime Minister Trudeau wrote that a top priority for the Minister would be to:

work to repeal, [...] the problematic elements of Bill C-51 and introduce new legislation that strengthens accountability with respect to national security and better balances collective security with rights and freedoms.

The Prime Minister may not specifically address the advocating offence, but he draws attention to "overly broad provisions", a category within which s. 83.221 might easily fall. The advantages of repealing or reforming this provision are that it would clearly show that the government has listened to and taken seriously the feedback expected to be received through public consultation. It will also show the willingness of the government to make significant changes to legislation without sacrificing any of the important national security interests that brought about Bill C-51 in the first place. As before, and even since the creation of this provision, law enforcement will be able to continue to charge people under other provisions of the *Criminal Code* that have been successfully tested in constitutional challenges, as we discuss later.

## **Constitutional Issues**

While the advocating offence potentially creates issues with respect to the principles of fundamental justice under s 7 and freedom of religion under s 2(a), we will focus on whether the offence unjustifiably violates freedom of expression under s 2(b) of the *Charter*. We conclude that it does.

### ***Violence and Freedom of Expression***

Freedom of expression protects all non-violent activity intended to convey meaning (see *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927, [1989 CanLII 87 \(SCC\)](#) at paras 42-43 and 54). Violence and threats of violence are excluded from the scope of s 2(b), because violence subverts the values underpinning freedom of expression, namely truth-seeking, self-fulfillment and political discourse (see *R v Khawaja*, [2012 SCC 69 \(CanLII\)](#) at para 71). The *actus reus* of the advocating offence is communicating statements which advocate or promote the commission of terrorism offences in general. This is inherently expressive. The question is whether advocating terrorism offences in general constitutes violence or threats of violence such that the expression is excluded from the scope of s 2(b).

In *R v Khawaja*, the Supreme Court of Canada held that counselling, conspiracy, and being an accessory in respect of a terrorist *activity* is violent expression excluded from the scope of s. 2(b) (at para 71). Counselling violence is not far enough removed from violence itself to be included in the scope of free expression. However, counselling a terrorist activity is much different than advocating in general the commission of a terrorism offence.

The advocating offence criminalizes expression which can be multiple levels removed from the underlying violence of a terrorist act. For example, a terrorism offence includes counselling the commission of an indictable offence which also constitutes a terrorist activity. A terrorist activity includes counselling or threatening to commit a violent terrorist act (see *Criminal Code*, s 83.01(1), “terrorist activity”). The advocating offence therefore criminalizes advocating in general that a second person counsel a third person to attempt a violent act. The person criminalized is several steps removed from actual violence. Multiple such examples can be dreamt up (see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015) at 331).

Further, a *mens rea* of mere recklessness as to whether a terrorism offence is actually carried out as a result of the statement means the speaker does not need to intend for any violence to occur. Additionally, the phrase “in general” is meant to cover a statement which counsels the commission of an offence, but is unspecific as to exactly what type of violent act should be committed, or is unspecific as to the who, when or where of the offence (see Government of Canada, [Our Security, Our Rights: National Security Green Paper, 2016](#) at 42; Department of Justice Canada, [Criminalizing the Advocacy or Promotion of Terrorism Offences in General](#)). This lack of specificity and intention further distances the expression caught by the provision from violence.

Expression that is so far removed from actual violence is unlikely to be excluded from the protected scope of free expression, because that kind of expression borders on being merely upsetting or undesirable speech instead of truly violent expression. Even speech that exposes people to hatred is constitutionally protected expression (see *R v Keegstra*, [1990] 3 SCR 697, [1990 CanLII 24 \(SCC\)](#); *Saskatchewan (Human Rights Commission) v Whatcott*, [2013 SCC 11 \(CanLII\)](#)). To conclude, the advocating offence criminalizes non-violent expression. This is clearly caught within the purpose and/or effect of the provision and therefore *prima facie* infringes freedom of expression and must be justified under s 1 of the *Charter*.

### ***A Reasonable Limit?***

Without conceding the issues of vagueness, rational connection or minimal impairment, this section will focus on whether the advocating offence strikes a proportionate balance between its deleterious and salutary effects, as required by *R v Oakes*, [1986] 1 SCR 103, [1986 CanLII 46 \(SCC\)](#).

The advocating offence is a recent addition to the pre-existing *Criminal Code* framework addressing various kinds of violent speech. As such, the proportionality inquiry is properly aimed at the marginal benefit of this new offence as against its deleterious impact on individuals and society (see generally the majority’s approach in *R v KRJ*, [2016 SCC 31 \(CanLII\)](#)). The advocating offence addresses a gap in the criminal law by going after people who incite terrorist violence, but cleverly parse their words to avoid penal liability (see [Green Paper](#) at 42). However, beyond articulating the existence of a gap in the law, the government has not put forward any compelling reason for why the gap ought to be closed. Evidence must be put

forward as to the pressing need to close the gap. Unless and until this occurs, the marginal benefit of the provision is merely speculative.

The criminalization of non-violent expression that is not even intended to encourage violence is antithetical to the very idea of a free and democratic society. The breadth of speech covered by the advocating offence has the ability to significantly hinder free-wheeling debate on public issues, especially on matters of foreign policy, religious belief and injustice. To the extent that this is the case, the values underpinning free expression – political discourse, human flourishing, and truth-seeking – are undermined. The deleterious effects on society are substantial.

As the law presently stands, we are of the view that the deleterious effects of the advocating offence far outweigh its salutary ones. The offence is unconstitutional.

### **The Case for Repeal**

In its current form, the advocating offence is counter-productive due to its chilling effect on free expression. It undermines the effectiveness of counter-radicalization efforts by pushing radicalized individuals monitored and subject to these programs underground. In addition, if those convicted of this offense are jailed, further radicalization of a person who falls on the outskirts of this provision could easily occur in a prison setting (see Forcese and Roach, *False Security* at 348).

The type of speech prohibited by s 83.221 is encompassed by existing provisions. Hate propaganda is already prohibited under s 319(2) of the *Criminal Code* and s 319(2) survived *Charter* challenge in *Keegstra*. Section 83.18 of the *Code* was challenged in *Khawaja*, and the Supreme Court in 2012 found that the provision targeted acts or threats of violence, or acts connected with violence, which were not protected by s 2(b). Sections 83.18, 319(2), 264.1 (uttering threats) as well as s 83.19 (facilitating a terrorist activity), and others, could all theoretically be applied to the same type of speech captured by the advocating offence, and most of these provisions are tried and true. The case for keeping the advocating provision is difficult bearing in mind that the benefits are speculative and the harm to freedom of expression is quite clear.

Further to this argument, the use of this kind of provision could be directly counter-productive to Canada's stated counter violent extremism strategy (CVE). There is clearly a "need for a demand-reduction strategy: a holistic and evidence-based multidisciplinary approach towards CVE. Unfortunately, the new and unnecessary speech offence in Bill C-51 could be a barrier to such a strategy." (Forcese and Roach, *False Security* at 357) Empirical data shows that the internet radicalization this provision was aimed at is often a 'primer' to radicalization as opposed to a method of radicalization in itself. Radicalization more often occurs in situations where the 'radicalizer' is a close friend or personal relation of the 'radicalizee'; these people are unlikely to be stopped by a provision such as this one (Craig Forcese and Kent Roach "Criminalizing Terrorist Babble: Canada's Dubious New Terrorist Speech Crime" (2015) 53 *Alta L Review* 35 at 43).

Further, jailing people who have been 'primed' as opposed to truly radicalized can lead to further radicalization in the highly emotionally charged and societally isolated prison environment. In speaking to the goal of this type of provision, it might be better to use less intrusive methods to deal with online material, such as working with private industry to make offending material harder to find for the average person, which allows for monitoring and collecting of data which

might then be used to incite further criminal prosecution or quash terrorist plots (“Criminalizing Terrorist Babble” at 45). As Forcese and Roach explain:

...an open source electronic bread crumb trail may be the best means of unraveling conspiracies and of detecting ‘lone wolf’ terrorists in the making, and may provide both intelligence and evidence for further state action. (at 57)

### **The Case for an Amendment**

The best way to achieve a better balance between ensuring public safety and safeguarding constitutionally protected rights is to amend the advocacy provision instead of repealing it. This provision is currently overbroad and poses potential restrictions on the freedom of expression. An amendment could clean up the constitutional problems highlighted above, while maintaining law enforcement’s ability to employ this provision.

Human rights and civil liberties groups have particularly criticized this provision for being unduly restrictive of free speech (see Amnesty International Canada, [Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, The Anti-Terrorism Act, 2015](#); British Columbia Civil Liberties Association, [Submission to the Standing Committee on National Security and Defence](#); Canadian Civil Liberties Association, [Submission to the Standing Committee on Public Safety and National Security regarding Bill C-51](#)). This offence has value in that it addresses a gap in the criminal law relating to the general encouragement of violent terrorism offences, and it has a deterring and denunciatory effect on the promotion of terrorist views. Nevertheless, these public criticisms have merit and should form the basis for amendments.

There are three main elements of this provision that are problematic (1) Advocating or promoting; (2) Terrorism offences in general; and (3) Recklessness.

There is an important difference between simply advocating or promoting something that may be harmful, and actually inciting a harmful result. We believe that the latter should be criminalized and the former remain protected under our constitutional freedom of expression. To criminalize mere advocacy or promotion would be problematic because of its chilling effects on speech, especially for media reporting. The media has a professional responsibility to inform the public about terrorist threats and activities (see Toby Mendel, Organization for Security and Co-operation in Europe, [Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015](#) at 2). However, such forms of reporting could be viewed as “advocating or promoting” depending on how one might view it. Therefore, the provision should be narrowed to *incitements* of terrorism only; otherwise there is a real risk that individuals not associated with terrorism may be captured under this provision.

Terrorism offences are already defined in the *Criminal Code* as being fairly narrow, but adding the phrase “in general” creates great uncertainty for how this provision will be interpreted. It is unclear as to why legislators included this phrase or what impact they intended for it to have. One can only surmise that the phrase “in general” would capture a wider array of expression than prior existing terrorist provisions. There is a concern that this broader scope will drive more extremist dialogue underground, which will make it more difficult for the Canadian Security Intelligence Service (CSIS) and the Communications Security Establishment (CSE) to monitor such dialogue and identify developing threats. Additionally, CVE community outreach initiatives that engage local leaders involve a free-ranging discussion of radical views (Forcese and Roach,

*False Security* at 341-342). This broad interpretation of the provision could potentially criminalize such discussion and undermine these preventative measures. Given these problems, we propose that the phrase “in general” be removed from s 83.221.

Recklessness is a very low *mens rea* requirement for an indictable offence such as this. Again, given the severity of punishment, this will create a wide chilling effect for speech. Moreover, it captures people who may indirectly contribute to the activities of a terrorist group or activity, regardless of whether any terrorist activity had been carried out. Therefore, recklessness risks criminalizing expression that is multiple levels removed from actual violence. The previous example about media reporting could fall into the category of recklessly advocating or promoting terrorism, which is surely something the government does not want to capture. Therefore, only direct and intentional incitements of terrorism should be included in the provision, not recklessness.

As it stands, s 83.221 is very unlikely to survive constitutional challenge unless amendments are made to it. Legislators cannot rely on law enforcement to properly interpret and employ these provisions if the plain word meanings are not clarified. Another way to further clarify and amend this provision could be to enumerate statutory defences similar to those found in s 318(3) on hate propaganda (see [Green Paper](#) at 45).

Based on all of these recommendations, the amended provision would read as follows:

Every person who, by communicating statements, knowingly incites the commission of terrorism offences — other than an offence under this section — while knowing that any of those offences will be committed as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

## Conclusion

In conclusion, this post has laid out the case for either repealing or amending the advocating offence in s 83.221 of the *Criminal Code*. The constitutional and political issues have been considered, and what should be clear in reading this analysis is that something must be done in order to address the problematic nature of the advocating provision.

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This post may be cited as: Kiran Fatima, Meagan Potier, Jordan Szoo & Stephen Armstrong “Curtailing Free Expression: A Barbaric Cultural Practice? A Critical Comment on Section 83.221 of the *Criminal Code*” (15 December, 2016), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2016/12/Blog\\_Criminal\\_Code\\_s83.221.pdf](http://ablawg.ca/wp-content/uploads/2016/12/Blog_Criminal_Code_s83.221.pdf)

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