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Editorial

The Toronto Terrorism Arrests

The arrest of twelve adults and five youths on terrorism charges in Toronto has resulted in world-wide attention. The arrests followed an extensive two-year investigation by the combined forces of the Canadian Security Intelligence Service, the Royal Canadian Mounted Police and various police services in the Toronto area. All of these organizations are represented in an Integrated National Security Enforcement Team created in 2002.

The men have been charged with a variety of crimes under the Anti-Terrorism Act, S.c. 2001, c. 41, that was added with considerable controversy to Canada's Criminal Code in late 2001. Only one other person, Mohammad Momin Khawaja, has been charged under the new law. He was charged in March 2004 and his trial is scheduled to start in January 2007, but defence lawyers have raised concerns about the adequacy of disclosure. The result is that the new Anti-Terrorism Act remains untested.

Prior to these charges, Canada had mainly used the Immigration and Refugee Protection Act, S.C. 2001, c. 27, against suspected terrorists, including five non-citizens suspected of terrorism. Security certificates can apply to non-citizens if there are reasonable grounds to believe they were a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism. They also prohibit disclosure of information to the detainee that would injure national security or the safety of any person and the constitutionality of these procedures is under reserve by the Supreme Court. The majority of the seventeen persons charged in Toronto, however, who are mainly teens and in their early twenties, grew up in Canada and are Canadian citizens so the immigration law approach was not an option that could be used.

All twelve adults face charges under s. 83.18(1) of the Criminal Code, which makes it a crime punishable for up to ten years to knowingly participate in or contribute to any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to carry out a terrorist activity.
This crime was created as an alternative to crimes of membership in a terrorist organization that exist in the United Kingdom.

The participation offence is defined broadly under s. 83.18(3) of the Criminal Code to include both providing and receiving training and also recruiting a person to receive training and offering to provide training. At the same time, the prosecution has a double intent requirement that requires proof of (1) knowing participation in the terrorist group and (2) acting for the purpose of enhancing the ability of the terrorist group to carry out a terrorist activity.

Terrorist activities are defined under s. 83.01 of the Criminal Code to include the intentional causing of death or serious bodily harm by violence, the intentional endangering of life and the intentional causing of substantial property damage that is likely to cause death, serious bodily harm or endanger life. Importantly, a terrorist activity includes a conspiracy, attempt, threat or counselling of any action that if completed would constitute a terrorist activity. In this way, people can be guilty of terrorist activities that involve threats, attempts, conspiracy or counselling, but not the actual commission of an act of terrorism. In essence, the definition of terrorist activities incorporates other inchoate offences in the Criminal Code including the concept of a threat.

In addition, a terrorist activity must be committed for a political, religious or ideological purpose and must be done with the intention of intimidating the public with regard to its security or compelling a person, government or organization to act. This will require the prosecution to introduce and prove evidence about the religious or political motives of the accused, all of whom are Muslim. This will require the judge to admit evidence about the accused's politics and religion regardless of the prejudicial effect it may have on the jury.

In determining whether an accused has participated in or contributed to a terrorist group, the court under s. 83.18(4) may also consider a variety of factors including the use of a name or symbol associated with a terrorist group, frequent association with any person in a terrorist group, receipt of a benefit from the terrorist group or repeatedly engaging in activities at the instruction of the terrorist group.

Finally, a terrorist group is defined either as an entity that has been listed by the government or as an entity that has the facilitating or carrying out of terrorist activities as one of its purposes or activities. If there are no links between the accused and listed terrorist groups, the government will have to prove the existence of a terrorist group.

Should the accused elect trial by jury, the jury charge on the participation offence will be quite complex and will require the prosecutor to prove various forms of intent and participation both in relation to the offences and the included and complex concepts of a terrorist activity and a terrorist group.

Two of the men arrested, including one who is a landed immigrant from Somalia, were already in prison serving two-year sentences for attempting to smuggle firearms into Canada. Some of the men also face charges of providing prohibited weapons as a form of property with the intent or knowledge that they be used to facilitate or carry out a terrorist activity or knowing that they will be used by or will benefit a terrorist group. As with the participation charge, the providing property offence under s. 83.03 of the Criminal Code incorporates the definition of terrorist activities and terrorist groups under s. 83.01 and this offence also carries a maximum of ten years' imprisonment.

Finally, some of the men, including the alleged ringleader, face explosive and importing weapons offences that have been charged under s. 83.2 of the Criminal Code, which provides a separate offence of committing an indictable offence for the benefit of, at the direction of, or in association with a terrorist group. This offence is significant because it is subject to a maximum penalty of life imprisonment.

The prosecutors have decided to test the new Anti-Terrorism Act with these arrests and charges. Both the s. 83.03 providing property and the s. 83.18 participation offence could be challenged under the Canadian Charter of Rights and Freedoms on grounds of vagueness and overbreadth, but courts have upheld the vast majority of laws challenged on this basis. This offence should also survive Charter scrutiny because of its clear intent requirement.

The s. 83.2 offence could be challenged on the basis that it does not on its face require intent beyond the intent required for the underlying explosive and weapons offence. The accused could argue that because of the stigma and punishment of this terrorism offence, the prosecutor should have to establish that the accused intentionally or knowingly committed the offence for purposes of terrorism and may point to other cases that have required such fault levels for murder and war crimes. The prosecutor could argue that terrorism defences do not require such a high level of fault and may point to other cases in which the courts have not required fault in relation to all elements of the offence for offences such as manslaughter and unlawfully causing bodily harm.

It is also possible that the accused could raise an entrapment defence in relation to a reported controlled purchase of ammonium nitrate, but they would have to establish either that the police did not have a reasonable suspicion that they were engaged in criminal activity or were not conducting a bona fide inquiry when they offered the accused an opportunity to commit a crime or that the police actually induced the commission of the crime. On the known facts, an entrapment defence seems unlikely to succeed.

The case may not raise the issue of whether electronic surveillance conducted by the Canadian Security Intelligence Service or the Communications Security Establishment is admissible in a criminal trial because the RCMP was brought into the case in November 2004 and the crimes are alleged to have occurred in 2005 and 2006. In other words, electronic surveillance conducted in this case was likely authorized by a judge on reasonable grounds under the Criminal Code. If security intelligence
intercepts were used, however, this will raise the question of whether electronic surveillance obtained on a standard below the Criminal Code standard is admissible in a criminal trial.

It is not known whether the accused have been subject to interrogation or have made statements. Any statements provided to the police could be challenged on grounds that they were involuntary or that the accused had not been provided a reasonable opportunity to contact counsel. There are extra requirements under s. 146 of the Youth Criminal Justice Act with respect to the admissibility of any statements taken from the five suspects who are under eighteen years of age. Lawyers for the accused have raised concerns about lack of access to their clients and detention conditions.

Another factor in the prosecution will be the accused's right to disclosure of all relevant evidence in the possession of the prosecutor. One terrorism prosecution was stopped in Canada after the courts held that the accused were entitled to disclosure of the identity of a key informer: R. v. Khela (1998), 126 C.C.C. (3d) 341 (Que. CA.).

The Attorney General of Canada who is prosecuting the case can oppose the disclosure of evidence on the basis that its disclosure would be injurious to international relations, national defence or national security. Disclosure issues will be more complex in cases with international connections, as in the Khawaja case and apparently this case. National security confidentiality claims will not be decided by the trial judge but rather in the Federal Court of Canada, which can balance the public interest in disclosure or non-disclosure and can prohibit or place conditions on disclosure. The Attorney General of Canada can also issue a certificate to block disclosure even if disclosure is authorized by the Federal Court.

Any restrictions on disclosure, however, will eventually return to the trial judge who under s. 38.14 of the Canada Evidence Act, R.S.C. 1985, c. C-5, can make any order he or she considers necessary to protect the rights of the accused to a fair trial so long as it respects the restrictions that either the Federal Court or the Attorney General has placed on disclosure. This order can include a stay of proceedings.

The prosecution process will likely be long and challenging. There will be extensive publication bans on pre-trial proceedings. Little is known about the Khawaja prosecution that was started with an arrest in March 2004 but has no trial scheduled until January 2007. The defence lawyers in that case have announced their intent to challenge the terrorism offences under the Charter. The resolution of the Toronto arrests are not likely to be known for some time.

K.R.