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Editorial

Listing and the Law

The *Anti-Terrorism Act* enables the Cabinet to list terrorist groups. There are provisions in ss. 83.05 and 83.06 of the *Criminal Code* for executive and judicial review of these listing decisions. So far, however, there have been no attempted judicial reviews. This is not surprising. Those who would represent a listed group may never see the secret material presented to the judge to support the government's decision and they may fear prosecution for participating in the listed group.

The ATA attempts to prevent collateral challenges to listing decisions in terrorism trials. This is done through a legislative sleight of hand in which a terrorist group is defined in s. 83.01 to include a listed entity. This means that the Cabinet's decision to list a group is substituted for proof beyond a reasonable doubt that the group is actually a terrorist group.

The constitutionality of the listing provisions have yet to be challenged in part because the Khawaja and Toronto terrorism prosecutions have not relied on listing. The terrorist groups alleged in the Toronto case and proven in the Khawaja case were ad hoc groups of named individuals that were not listed. Listing may lag behind developments on the ground.

Listing is a problematic legal procedure. It attempts to remove issues about whether a particular group satisfies the broad legal definition of a terrorist organization from dispute in court. It substitutes a list prepared by the executive for a judicial decision.

The Federal Court has recently held that the state-driven and secretive U.N. process of listing those affiliated with Al Qaeda offends natural justice in part because "the accuser is also the judge" and because it assigns guilt on the basis of an "unspecified crime": *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580 (F.C.) at paras. 51 and 53.

Listing can be seen as a partial bill of attainder. Bills of attainder are laws that punish specific individuals. They are an abuse of executive power and the separation of powers. They, along with *ex post facto* laws, are specifically

prohibited in the American Bill of Rights and they would be contrary to the principles of fundamental justice in Canada.

Despite its problematic nature, the use of listing in Canadian law may soon expand. The Standing Committee on Justice and Human Rights is studying whether criminal organizations should be listed. It is not clear who would make such listing decisions or whether and how they would be subject to judicial review.

The study of listing criminal organizations is an attempt to respond to real concerns about the length of some gang prosecutions. Even if a listing decision precluded judicial consideration of the issue, however, the state would still have to prove that the individuals committed an offence for the organization or participated in the organization. Listing would, at best, be a partial shortcut for the prosecutor.

It is by no means clear that listing would make life that much easier for prosecutors. Legislation to list criminal organizations would be challenged under the Charter and at a time when many courts have confirmed the constitutionality of the existing organized crime legislation: *R. v. Lindsay* (2004), 182 C.C.C. (3d) 301, 70 O.R. (3d) 131, 20 C.R. (6th) 376 (Ont. S.C.) and *R. v. Terezakis* (2007), 223 C.C.C. (3d) 344, 405 W.A.C. 74, 51 C.R. (6th) 165 (B.C.C.A.).

Listing may offend the principles of fundamental justice and the presumption of innocence by substituting a Cabinet decision for proof of an essential element of an offence.

It would be possible for the government to argue that no substitution takes place if, following s. 83.01 of the *Criminal Code*, a criminal organization was defined to include a listed entity. Such an approach, however, places form over substance. This is underlined by the reality that the commission of an offence for a criminal organization is in essence a factor that aggravates the crime. Under s. 724(3)(e) of the Code, the prosecutor would have to establish the existence of a criminal organization by proof beyond a reasonable doubt as an aggravating factor at sentencing. In the end, listing remains a legislative and an executive shortcut around the fundamental reasonable doubt proposition.

The relation between listing and trials has yet to be tested. Would a criminal trial be delayed and fragmented in a case where a prosecutor relies on a listing decision and the accused seeks judicial review of the reasonableness of a listing decision in the Federal Court? This procedure is contemplated in ss. 83.05(6) and 83.05(11) of the Code, but the fragmentation of trial issues has been recognized as anathema to trial efficiency. The appeal of judicial review decisions presents another potential obstacle that could delay and fragment terrorism and gang trials that rely on listing.

The government would have to justify the use of listing as a reasonable limit on freedom of association. One possible problem is that there may be more proportionate means to address the problem of long gang trials.

The better approach would be to deal with the mega trial issues directly. The recent report by Justices Lesage and Code is an excellent starting point and it calls for legislation to facilitate electronic disclosure, case management powers under s. 645, and the elimination of bifurcated procedures between the trial and federal courts. See *Report of the Review of Large and Complex Criminal Case Procedures* (2008).

The use of listing would represent an undesirable seepage of novel and problematic concepts used in anti-terrorism law into other parts of the *Criminal Code*. British incursions on the right to silence started in anti-terrorism legislation but soon spread throughout the criminal law. Exceptions to basic legal principles come with a legal price. There is much complicated jurisprudence on the British right to silence exception. Rather than enact such a problematic feature as listing, Parliament would be much better advised to address the problems of all prolonged criminal trials more directly.

Bill C-35, which is designed to facilitate lawsuits against terrorists and state sponsors of terrorism, also incorporates the terrorist list. It also contemplates that the State Immunity Act will be amended so that the only foreign states that could be sued are those listed by the Cabinet on the basis that there are reasonable grounds to believe that they supported or support terrorism.

The use of listing in Bill C-35 cannot be opposed on the basis of seepage because the bill is explicitly designed to deter and prevent acts of terrorism. Leaving aside the question of why private lawsuits are seemingly preferred to government action in the form of freezing, forfeiture and terrorism financing prosecutions, Bill C-35 represents a departure from the provisions of the ATA that contemplate the possibility of judicial review of listing.

The list of terrorist states contemplated by Bill C-35 would only be reviewed by the Minister of Foreign Affairs and not by the courts. Although such an approach avoids thorny problems about the protection of intelligence that may support the listing decision, it reveals the essential political nature of the listing process.

In a sense, Bill C-35 is more honest than the ATA provisions. It unmasks listing as a political process that is in tension to the aims of the rule of law. To be specific, listing offends the core principle of fundamental justice that there should be one universal law for all and that disputes about the meaning and application of the law should be resolved in courts, not Cabinet rooms.

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