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Editorial

The Combatting Terrorism Act and the Via Terrorism Arrests: Two Steps Forward, One Step Back

Terrorism is back on the agenda and in the news with a vengeance. Parliament has enacted the *Combatting Terrorism Act* and criminal charges have been laid in both the Boston bombing case and an alleged plot to bomb rail routes between Canada and the United States.

There are quite a few positives in these events. The two men charged in Canada, Chiheb Esseghaier and Raed Jaser, are not Canadian citizens. Nevertheless no attempt was made to detain them under the national security provisions of our immigration law.

The use of criminal charges against the two men is a positive development for all concerned. It means that they will be presumed innocent and guilt will have to be proven beyond a reasonable doubt on the basis of public evidence. If guilty, Canadian society will legitimately and powerfully be able to expose, denounce and punish the alleged attempt to do violence against innocent civilians.

As with the calls to subject the alleged surviving Boston bomber to military custody and trial, the use of immigration law against the two men would have been wildly misguided. Canada's use of immigration law security certificates since 2001 against five men alleged to be affiliated with al Qaeda has been a disaster for all concerned.

Some of the certificates have been quashed as unreasonable. Others have been abandoned to prevent the disclosure of secret evidence. The legislation is scheduled to make its second trip to the Supreme Court to review its constitutionality later this year. Attention has been diverted from guilt or innocence to the unfairness of evidence not disclosed to the detainees. Canada may have been unprepared to use the criminal law against the security certificate five when they were first detained between 2001 and 2003, but it is a positive sign that the criminal law is being used today.

The new *Combatting Terrorism Act* passed by the House of Commons is also a positive development to the extent that it creates four new criminal

offences that would apply to those who leave Canada with the intent of committing a terrorism offence. The new offences build on existing offences of participating, facilitating or committing an indictable offence for the benefit of a terrorist group. The new s. 83.202 also applies to those who would go abroad to commit an indictable offence that would satisfy the broad definition of terrorist activities already in the Code and upheld by the Supreme Court in *R. v. Khawaja* (2012), 290 C.C.C. (3d) 361, 97 C.R. (6th) 223, 356 D.L.R. (4th) 1 (S.C.C.), as consistent with the Charter.

The only flaw in these provisions is their reliance on some of the overly broad definition of terrorist activities and offences first created by Parliament months after 9/11. It is notable that the lead charges against Esseghaier and Jaser do not rely on these broad provisions. They go with old stand-by that everyone understands: conspiracy to commit murder. The charges also allege a violation of s. 248 of the Code in relation to transportation facilities.

The new offences, if actually charged, are preferable to allowing suspected terrorists to leave Canada and then sharing information with countries that do not share our commitment to human rights, as was done in the case of Maher Arar and the other Canadians tortured in Syria after 9/11.

The criminal law is not without risks. A failure to prove guilt beyond a reasonable doubt will rightfully result in an acquittal. This is what happened in the case of an Afghan national who was acquitted in late 2011 of attempting to possess explosives, uttering threats and incitement in relation to an alleged plan to bomb CFB Petawawa.

Another risk is the disclosure of secret information, especially information that may have originated from American and other foreign officials. Canada uses an awkward system where government claims of secrecy must be reviewed in the Federal Court, and not before the trial judge.

The Air India commission called for the two court approach — which was avoided in the Toronto terrorism prosecution — to be streamlined, but the government has refused to act. The Supreme Court has held in *R. v. Ahmad*, [2011] 1 S.C.R. 110, 264 C.C.C. (3d) 345, 81 C.R. (6th) 201 (S.C.C.), that the existing two court system is consistent with the Charter but only at the potentially steep price of having trial judges permanently halt prosecutions if they have any doubt whether secret information not disclosed to the accused is needed for a fair trial.

Criminal prosecutions require co-operative and courageous witnesses. The RCMP reportedly received vital assistance from the Muslim community in the recent investigation, as was the case in the Toronto terrorism prosecutions. In both cases, the RCMP briefed representatives of the Muslim communities before publicly announcing arrests. This sort of outreach is the right and the smart thing to do. It rejects discriminatory

attitudes of guilt by association. It helps keep open vital lines of communication.

Legitimate, transparent and sensitive counter-terrorism is good news. But there is some bad news. The government will re-enact investigative hearings, albeit subject to reporting requirements and another five year sunset. Investigative hearings allow a judge legally to compel those who have information about terrorism to answer questions. Such coercive tactics can alienate those with information. The Air India acquittals illustrate what happens when witnesses feel forced to testify and when CSIS and the RCMP poorly handle and transfer sources and witnesses.

The police say they want and need investigative hearings, but one wonders when they would be appropriate. Given the open court presumption affirmed in *Vancouver Sun, Re*, [2004] 2 S.C.R. 332, (*sub nom.* R. v. Bagri) 184 C.C.C. (3d) 515, 21 C.R. (6th) 142 (S.C.C.), investigative hearings may risk premature public disclosure of investigations.

If witnesses are not co-operative, they may either be scared or hiding something. If they are scared, witness protection may be the answer, but as discussed in our last editorial, the government has stopped reforming the system as recommended by the Air India commission.

If witnesses are hiding guilt, it may be impossible to prosecute them given the broad use and derivative use immunity provisions in the Code. Although ignored by Parliament, the Supreme Court in *Application Under s. 83.28 of the Criminal Code, Re*, [2004] 2 S.C.R. 248, (*sub nom.* R. v. Bagri) 184 C.C.C. (3d) 449, 21 C.R. (6th) 82 (S.C.C.), expanded these broad immunity provisions to also apply to immigration and extradition proceedings. Investigative hearings are not technically executive measures because of the involvement of the courts, but like executive measures such as British control orders, they can make it more, not less, difficult to conduct criminal prosecutions. Investigative hearings are consistent with the Charter, but that does not mean that they are wise policy.

The preventive arrest provisions never used after 9/11, will also be re-enacted. A preventive arrest that turns into a real arrest with a real trial may do little harm. Canada's provision is more restrained than even ramped down British versions. They are better than the American practice of abusing material witness warrants or using "Al Capone" type charges.

Nevertheless, preventive arrests are still worrying. The provisions still do not address where a person will be detained and how they will be treated during the possible 72 hours of preventive arrest. A person subject to preventive arrest who is subsequently released will likely be subject to much adverse publicity and stigma.

A preventive arrest can result in a year-long "recognizance" without proof of guilt but on the basis of a judicial confirmation of a reasonable fear

that such a recognizance is necessary to prevent the carrying out of a terrorist activity.

Recognizances could look disturbingly similar to control orders imposed on the remaining security certificate detainees under our immigration law. They could undermine the legitimacy and co-operation that is won by relying on fair criminal processes and trials.

The recent arrests and Combatting Terrorism Act are positive to the extent they re-affirm our faith in criminal processes to resolve allegations of involvement in terrorism. Nevertheless, the Act is troubling to the extent that it re-introduces departures from regular criminal processes that have not been proven to be necessary and that could, in some circumstances, be counter-productive.

K.R.