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Editorial

Responding to Terrorism and the Proposed *Public Safety Act*

Recent acts of terrorism in Bali and Moscow, as well as recent reports about the terrifying possibility of nuclear and biological terrorism, underline that we should not be complacent about terrorism, even though more than a year has passed since the terrorist attacks on New York and Washington.

In general, the federal government should be congratulated for the introduction of a third version of the *Public Safety Act* for first reading on October 31, 2002. If at first you do not succeed, try, try again. Some parts of the massive 23-part Bill may be more important in preventing terrorism than the new terrorism offences and investigative powers added to the *Criminal Code* last year — offences and powers that have generally not been used even though they have been in force for close to a year.

The *Public Safety Act* deals with administrative powers relating to the screening of air passengers and security clearances for those who work in airports and it provides increased powers to Ministers with mandates over transportation, the environment, health, food and drugs, energy and hazardous biological, chemical and explosive substances. It relies less on the heavy and reactive hand of the criminal sanction and more on the gentler and proactive hand of administrative regulation. It tries to prevent terrorism before it occurs rather than punish and investigate it after it happens.

Instead of deeming politically motivated and intentional interference with essential public and private services as a terrorist offence as is now done in s. 83.01(1)(b)(E) of the *Criminal Code*, Part 14 of the *Public Safety Act* contemplates the practical approach of allowing the National Energy Board to require corporations to take steps to protect critical infrastructure such as pipelines. The protection and surveillance of sites vulnerable to terrorism is an effective and less coercive strategy than relying on broad and tough crimes of terrorism.

By placing tight licensing controls on some hazardous substances, the *Public Safety Act* hopefully will prevent biological terrorism in a more effective manner than the increased penalties and mandatory consecutive

sentencing for terrorist offences that were added in the post-September 11 amendments to the *Criminal Code*. The Minister of Health can make emergency orders in response to terrorism that may affect food safety. There is increased sharing of information in the fields of financing terrorism and maritime security.

Some of the more controversial parts of previous versions of the *Public Safety Act* have been changed. The Minister of Defence's power to declare a military security zone has been scrapped. Ministers making emergency orders must return to Parliament sooner.

But there still are problems. A new offence relating to hoaxes of terrorist activities may be unnecessary and unfair. To be sure, this proposed offence requires fault in the form of knowledge that a warning is false and intent to cause any person to fear death, bodily harm, or damage or interference with property. Nevertheless, it also includes dramatically different penalties depending on the perhaps unintended harm that is caused. For example, a person may knowingly send a false alarm of a terrorist activity in an attempt to disrupt the use of property for a political event. Panic ensues. A person is trampled to death. Under proposed s. 83.231(4) of the *Criminal Code*, the hoaxer could be punished by up to life imprisonment simply on the basis of an intent to interfere with property and actual harm to life.

This offence may be Charter-proof. The Supreme Court in *R. v. Creighton*, [1993] 3 S.C.R. 3 has distinguished between the ideal requirement of fault in relation to harm and the minimum requirements of compliance with s. 7 of the Charter. The unfortunate hoaxer who caused death would not be without fault. There is no Charter requirement that the accused's fault must relate to the harm caused and punished. Nevertheless, this proposed offence is not in accord with common law principles about the importance of fault and it may result in disproportionate punishment. In addition, it is not clear whether the new offence (like the non-financing terrorism offences added to the *Criminal Code*) is even necessary given present Code offences.

The new Bill responds to previous criticisms by requiring that the RCMP only request access to airline passenger lists for reasons of transportation security. Under proposed s. 4.82(11) of the *Aeronautics Act*, R.S.C. 1985, c. A-2, however, this information could then be disclosed to a police officer for the purpose of executing an arrest warrant. The government has explained that "if the RCMP incidentally discovered a criminal wanted for a serious crime", it should, in the interest of "public safety", be able to use the information to make an arrest.

The federal Privacy Commissioner is not impressed. He has suggested that the idea that the RCMP might "incidentally" match a passenger's name with its wanted list "insults the intelligence of Canadians". Somewhat melodramatically, he has predicted that this could lead to general powers to check the identification of those who travel by any means.

The use of passenger lists for general crime control purposes may, however, be Charter-proof. The Supreme Court held in *Smith v. Canada*

(Attorney General) (2001), 210 D.L.R. (4th) 289 that travellers do not have a reasonable expectation of privacy that their custom declaration forms would not be used by the government to catch those cheating on unemployment insurance. The court allowed for information obtained by government for one reason (customs) to be used for another (unemployment insurance). It appeared to balance any privacy invasion of the innocent against the government's interest in catching cheaters. Following this, it is not clear that airline passengers will have a reasonable expectation of privacy in having their name on a passenger list. The fact that the new provision may be Charter-proof, however, should not deter the Privacy Commissioner.

Another problem is the difficulty of asking police officers to ignore information obtained for anti-terrorism purposes when it is relevant to their other law enforcement duties. This speaks more to the decision already taken to make the police the lead agency in investigating terrorism. This, along with the broad definition of terrorism, may result in terrorism-related information and powers being used with respect to other crimes.

But the Privacy Commissioner is surely right when he appeals to the general principle that anti-terrorism powers should not be used for general crime control purposes. As he argues: "If the police were able to carry out their regular *Criminal Code* law enforcement duties without this new power before September 11, they should likewise be able to do so now. The events of September 11 were a great tragedy and a great crime; they should not be manipulated into becoming an opportunity . . . to expand privacy-invasive police powers for purposes that have nothing to do with anti-terrorism."

There is a danger that the extraordinary investigative powers and new criminal offences introduced after September 11 will be used for other crime control and governmental purposes. This would be unfortunate. Especially when there are so many other uncontroversial powers in the *Public Safety Act* that may help prevent terrorism without relying on the criminal sanction.

K.R.