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CONSTITUTIONAL CASUALTIES OF SEPTEMBER 11: LIMITING THE LEGACY OF THE *ANTI-TERRORISM ACT*

David M. Paciocco^{*}

The Anti-Terrorism Act is necessary legislation. The desire to defend against the obscenity of random acts of mass violence has, however, supported the abridgement of civil liberties. Indeed, it has ushered in the creation of provisions that, in my opinion, should be found to violate the Charter in a manner that cannot be saved by section 1. Included among those sections are the following:

(1) The definition in section 83.01(b) of “terrorist group” enables the Crown to secure conviction of persons of a variety of offences relating to aiding terrorist groups, without ever having to prove that the group aided is in fact a “terrorist group.” All that must be proved is that the group assisted has been listed in regulations through an administrative act. This makes the definition of terrorist group “overbroad” and contravenes the presumption of innocence. Courts should strike section 83.01(b) of the statute. This will not render the aiding offences unconstitutional but will make it necessary for the Crown, if it wishes to secure a conviction for one of those offences, to prove that an alleged “terrorist group” is in fact engaged in terrorist activities or is associated with a group that is.

(2) The preventative detention and recognizance provisions, while not unconstitutional per se, do not, in my opinion, impose a sufficiently high standard of proof on the Crown to satisfy principles of fundamental justice related to the presumption of innocence. All the Crown need prove before detaining someone or securing recognizance conditions is that there are reasonable grounds to suspect that the accused is involved in terrorist activity. Based on precedent and principle, the standard of reasonable suspicion should not be enough to deprive someone of his or her liberty in this way. Moreover, the absence of a power in the judge to release detainees on conditions when matters have been adjourned could contravene the Charter.

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(3) *The investigative detention provisions, while not per se contravening self-incrimination protections, will be used unconstitutionally if employed in an effort to require persons to provide incriminatory information about themselves. Section 7 may be available in such cases to prevent the investigative detention from being undertaken. More importantly, the provisions are, in my opinion, unconstitutional per se because, through the co-option of judges in the process of investigation, fundamental principles of judicial impartiality and independence are hopelessly compromised.*

There will be tremendous incentive for courts to find ways to uphold these provisions, and they could well survive Charter challenge given the open-textured nature of constitutional adjudication. If this happens, the biggest threat to civil liberties emerging from the Anti-Terrorism Act may not be the operation of these sections; it could well be “creeping incrementalism.” If these and other exceptional measures are woven into the fabric of Canadian criminal law, our tolerance for such practices can be expected to lead to similar initiatives being undertaken in other contexts. If impugned provisions in this legislation are indeed upheld, they must be upheld grudgingly, and because the context is exceptional — not because they reflect acceptable law enforcement initiatives. If the impugned provisions of this legislation are upheld on any other basis, Canadian civil liberties and the Charter can be counted in the collateral damage from September 11.

I. INTRODUCTION

That Canada would pass an Anti-Terrorism Act was inevitable, even before September 11.¹ Terrorism is a global problem that has for some time been the subject of international dialogue and government commitment. It is true, of course, that long before this statute was passed, there was a surfeit of offences that made acts of terrorism illegal,² as well as an imposing array of investigative powers. Still, it is understandable that the government perceived our law to be inadequate.

First, our criminal law institutions developed primarily on the assumption that crime would be committed by individuals or small domestic, non-political groups. Terrorism, by contrast, is a highly political, organized activity. The *Anti-Terrorism Act*³ attempts to adapt the criminal law to deal with this reality

¹ See the comments of Mosely in “Concluding Comments from the Department of Justice” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 436.

² See Roach, “The New Terrorism Offences and the Criminal Law” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 152-54.

³ S.C. 2001, c. 41.

in a more comprehensive way than the anti-gang legislation did, by creating a broad range of what are, in truth, association-based offences.

Second, keeping with traditions of restraint and respect for individual liberty, criminal law in this country has, for the most part, been reactive. The criminal law tends to kick in only after crime has occurred. It uses two central strategies. It encourages law-abiding values by denouncing criminal conduct through the trial process and the ceremony of sentencing, and it attempts to deter by punishing offenders as examples to others. These are self-defeating strategies to use for those who will not attorn to our societal norms, who will not be deterred, who believe they are at war and who are prepared to die in acts of spectacular and numbing destruction. The felt need for more proactive legislation is understandable.

Third, our criminal law process was designed on the assumption that criminal acts were discrete, historical acts. In such a milieu, subject to collateral concerns about protecting the identity of complainants, or in rare cases, the constrained protection of police investigative methods,⁴ it is possible to have open and candid processes in which all available information is put on public display. In the terrorism context there is apt to be ongoing criminal investigation, and an international exchange of information. These differences require special rules relating to the preservation of confidential information.

In these circumstances, the *Anti-Terrorism Act* is not merely superfluous legislation. Its focus on association, planning, assistance, financing, espionage, investigative method, and on the protection of investigations by preventing the disclosure of some information, was both predictable and appropriate.

Having said all of this, there are many things in the *Anti-Terrorism Act* that are troubling. Of lesser note, we see the government using techniques and tools that are probably not constitutionally objectionable but which are decidedly contrary to the values that helped make our criminal justice system an enviable one. The government is growing too comfortable, in my opinion, with things like imposing consecutive sentencing requirements, giving statutory emphasis to select aggravating sentencing factors in an effort to increase sentencing ranges, and taking measures to delay parole.⁵ Given the probable inability to

⁴ See *R. v. Mentuck* (2001), 205 D.L.R. (4th) 512 (S.C.C.).

⁵ Section 743.6 of the *Criminal Code*, R.S.C. 1985, c. C-46, as am. is amended to require judges to order no release until the lesser of half the sentence of ten years has been served, unless the judge is satisfied that this is *not* needed to meet the principles of sentencing. I am on record as opposing a parole system in preference to real-time sentencing, so one might think that I would like provisions that delay parole. I am not, however, in favour of longer sentences, nor of measures that either require or encourage judges to take steps to be harsher than they otherwise would be. The treatment of parole in the *Anti-Terrorism Act* perpetuates the unrealistic belief that getting tough on crimes that already expose actors to lengthy penalties will deter those crimes. This discreditable

effectively deter terrorism by threatening punishment, these provisions seem pointless, at the cost of perpetuating a bad habit of “getting tough on crime” by attempting to ratchet up sentencing.

We again see the use of reverse onuses during bail hearings, and the use of a presumption to convenience the government case, even though it is better able to prove the presumed fact than an accused person will be to disprove it.⁶ Regrettably, the government continues its practice of attempting to Charter-proof⁷ legislation by littering enactments with self-serving preambles.⁸

Other matters, several of which will be the subject of this paper, are not merely troubling; they rise to constitutional significance. This should be disturbing not just to defence lawyers but to all Canadians, altogether apart from ultimate questions of Charter validity. The price Canadians have paid for the modicum of security the *Anti-Terrorism Act* will be able to provide is great. Without question, we have breached fundamental principles of criminal law, compromised liberty and freedom, conferred increased power on state agents to invade privacy and to deprive persons of liberty, hampered the freedom to associate,⁹ and increased the risks associated with racial or religious profiling and discrimination. Even those of us who choose to endorse this legislation must therefore do so with a deep sense of regret. We should lament the reality that to the marginal extent that we have clothed ourselves in security, we have done so by altering, if not renting, the fabric of our law, and by refashioning it into a decidedly unflattering robe. We have increased the risk of abuse of power.

It is true what the stauncher defenders of the *Anti-Terrorism Act* say. It could have been worse. It is obvious from reading the Act that the Charter has already

assumption is indulged at the cost of increasing the costs of incarceration and, more importantly, of pointlessly denying liberty.

⁶ Subsection 3(4) of the *Anti-Terrorism Act* is a mandatory presumption that will enable the Crown to establish jurisdiction in a Canadian court by filing a certificate that purports to verify the identity of victims as UN personnel or internationally protected persons.

⁷ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁸ It was contrary to the principle of legality to incorporate by reference, as offences, things not described in the legislation but rather spelled out in 10 different international covenants that most Canadian lawyers have never even heard of. Others will be troubled by s. 38.01 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as am., which requires “every participant,” including defence lawyers, to notify the Attorney General as soon as possible of any information that she “believes is sensitive information.” This is, in some measure, a defence disclosure obligation.

⁹ See Roach, “The New Terrorism Offences and the Criminal Law” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 152. While membership in a terrorist group is not criminalized, participation is, as are acts that would fund the group. This is *de facto* criminalization of membership.

made a significant contribution.¹⁰ It has slowed what otherwise may have been the impetus to be forceful and effective at all costs. We should not take too much comfort, however, in the fact that things could have been worse. After all, that an earthquake is generally a greater natural disaster than a volcano eruption does little solace for those who are ankle-deep in the lava.

Apparently unlike the government of Canada, I see this legislation as exceptional. It deals with a different kind of threat than the criminal law is accustomed to addressing, and with different tools. Whether legislation was on the cards or not, the *Anti-Terrorism Act* was passed in an atmosphere of crisis that created deep public approval, enabling the government politically to do almost anything it willed. I, for one, would have been much more comfortable had this statute been presented as exceptional. I wish it had remained a self-contained enactment, “*The Anti-Terrorism Act*,” even replete with its stirring call-to-arms preamble. Then we would have known it was an unfortunate and unique aberration from our customary legal restraint, wrought only by unspeakable acts. Instead, by design, its provisions are woven into other statutes, including the *Criminal Code* of Canada, and the *Canada Evidence Act*. Its tools — including things like investigative detention,¹¹ pre-offence detention and conditions of recognizance,¹² the criminalization of acts of preparation,¹³ the use of regulations to absolve the Crown of the need to prove essential elements of offences,¹⁴ ministerial certificates preventing meaningful judicial review¹⁵ — all these

¹⁰ See, for example, the certificate provisions that enable the Minister to prevent disclosure of certain information during criminal trials. Parliament has provided expressly that the cost of doing so could be the staying of the charges against the accused. While this alone is not a guarantee that these provisions are constitutional, it is obvious that some consideration that might not otherwise have been expected was given to full answer-and-defence considerations.

¹¹ The “sunset clause” arguably does paint this provision as exceptional. Its inclusion could deter this kind of initiative from being taken up elsewhere.

¹² Again, s. 83.3, the most visible pre-offence detention and recognizance provision, is also subject to a sunset clause. Its precedential impact will not be blunted by this, since a little known amendment in the *Anti-Terrorism Act* to s. 810.01 of the *Criminal Code*, which is not subject to the sunset clause, permits preventative detention and the imposition of recognizance orders, altogether apart from s. 83.3 This is discussed in detail below.

¹³ See the amendment creating s. 22 of the *Official Secrets Act*, which makes preparation to engage in a broad array of vague offences, criminal.

¹⁴ I am referring to the way the “terrorist list” is used in the legislation. This is discussed in detail below.

¹⁵ Although amendments to Bill C-36 permit claims of public policy immunity to be reviewed, the procedure where s. 38.13 certificates are issued may be too circumscribed, and thereby constitutionally infirm. The judge cannot balance competing interests. Once a judge has determined that the information was received in confidence from a foreign entity, or that it is “related to national defence or security,” the review is done and the certificate must be upheld. This provision

things and others risk becoming part of the fabric of Canadian law when they should stand isolate and exceptional. Kent Roach expressed this same fear eloquently:

The criminal law has a tendency to replicate itself . . . We can expect that the incursions on fundamental values in Bill C-36 will be a model the next time another menace becomes pressing, especially if they are found to be Charter-proof. The minimum standards of conduct in the Charter are quickly becoming the maximum standards of restraint that we can expect from our governments.¹⁶

Roach is absolutely right. There is “creeping incrementalism” at work in the development of the criminal law, one that is disrespectful of a tradition of restraint in using crime as a solution to our social problems. One can see it in the tendency of commentators who support even the more problematic aspects of this legislation to justify them by finding analogies for having done it before, as though previous acts of disrespect for fundamental principle validate subsequent acts of disrespect. As for the future, I was not in the least surprised to hear on CBC Radio, the day after the first draft of the legislation was announced, a peace officer from Quebec saying that if similar powers were provided in the “war against gangs,” they could put an end to the gang problem. That those charged with public security will covet these kinds of initiatives to deal with other law enforcement problems is to be expected in a legal system grounded on precedent. It is even more to be expected, as Roach notes, when a Charter challenge to an adopted practice is brought and fails. The government should worry when a Charter challenge is beat back that perhaps it is legislating on the periphery of what is acceptable and should retreat a bit; instead, the constitutional victory tends to be seen as a vote of approval for the impugned technique or measure. This statute, especially in those provisions that will survive constitutional challenge, therefore poses a deep risk of causing further creeping incrementalism as new threats, real or exaggerated, capture the popular imagination. Even those things in this statute that survive constitutional challenge should be handled with care and treated as legal aberrations, not as precedents for future legislative initiative.

There are, indeed, a number of potential constitutional challenges relevant to criminal law.¹⁷ I cannot treat all of them adequately, even in a paper of such

does not create review. It creates the facade of review. It would have been better were the review process to have been omitted, for it is a disingenuous one.

¹⁶ “The Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill*, (2001), at 137.

¹⁷ I will not attempt to deal with those complaints that fall more fully into other branches of civil liberty, such as whether the definition of “terrorist activity” will impede social protest, or whether the *Access to Information Act*, R.S.C. 1985, c. A-1, has been improperly compromised, or

unseemly length as this one.¹⁸ I have therefore chosen to concentrate on three general issues I perceive to be of particular importance and of general interest to criminal lawyers: the “terrorist group” offences, the “recognizance with conditions” and the “investigative hearings.”

It is not possible, in a system of shifting constitutional ground created by notions of deference and dialogue, to be dogmatic about whether a provision is unconstitutional,¹⁹ but I will accept the invitation that has been extended to me and nonetheless venture a personal opinion:

- I think that the use of a “terrorist list” to define whether an element of the terrorist group offences has been met, is unconstitutional, and I doubt it can be saved using section 1.
- I think that one of the “recognizance with conditions” provisions, section 83.3, might be unconstitutional, at least in part, because of the paltry standards of proof that it uses to empower peace officers to arrest,

whether freedom of association is limited unconstitutionally, or with the treatment of charitable status.

¹⁸ For example,

- there are serious issues surrounding the obligation imposed on lawyers to report suspicious financial transactions by their clients, or to disclose information about terrorist property (see Canadian Bar Association, *Submissions on Bill C-36 Anti-Terrorism Act* (2001), at 29-30);
- it has to be wondered whether amendments to permit wiretap orders to be issued even when other methods of investigation have not been tried, and then to have those orders last for up to a year without renewal, violate s. 8;
- it has to be wondered whether the power of the mysterious Communications Security Establishment to wiretap without warrant, calls that originate in or terminate in Canada if directed at foreign entities located outside Canada, is acceptable. See Friedland, “Police Powers in Bill C-36” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 274-76.
- There may be void for vagueness or overbreadth issues, or *mens rea* or even *actus reus* challenges to some of the offences. See Stuart “The Dangers of Quick Fix Legislation in the Criminal Law: The Anti-Terrorism Bill C-36 Should be Withdrawn” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 276.

I will say as an aside that there is one provision that has attracted great criticism on the *mens rea* front that I do not believe to be problematic. It appears in at least two sections, 83.18 and 83.21, which are essentially aiding and abetting offences. This provision makes it an offence to engage in conduct for the purpose of assisting in a terrorist activity, “whether or not . . . the accused knows the specific nature of the terrorist activity that may be facilitated or carried out.” This caveat was inserted to prevent individuals from claiming ignorance by not inquiring into the precise nature of the activity that they intend to assist. These provisions are, in my opinion, unobjectionable on the basis of “wilful blindness” reasoning. It is enough if the accused knows the possible range of offences he has agreed to assist without having to know the precise activity that is being intentionally assisted. See *DPP for Northern Ireland v. Maxwell*, [1978] 3 All E.R. 1140 (H.L.).

¹⁹ See Paciocco, “Competing Constitutional Rights in an Age of Deference: A Bad Time to be Accused” (2001), 14 S.C.L.R. (2d) 111.

and to enable Crown Attornies to obtain restraints on liberty in the form of conditions.²⁰ I also think that the failure to provide for interim release during adjournments could be unconstitutional.

- I think that “investigative detentions” will survive self-incrimination challenges, although their utility will be limited by self-incrimination considerations. The government will be disallowed from using this process if its purpose in doing so is to obtain self-incriminating information from a suspect. There is, however, a more imposing, general problem. I think the investigative hearing provisions should be found unconstitutional in their entirety because they co-opt judges in criminal investigations, undermining the appearance of their impartiality and independence.

II. THE TERRORIST LIST IN THE “TERRORIST GROUP” OFFENCES

1. The Problem Summarized

Imagine that Parliament were to pass a statute directing courts to accept as having been proved beyond a reasonable doubt for the purpose of a criminal prosecution, any fact that the government proclaims by regulation to be true. Such a statute would obviously be unconstitutional. This is, in substance, what Parliament has done with several new offences which have, as one of their essential elements, dealing with or supporting terrorist groups.²¹ In order to

²⁰ As explained below, there are two such provisions, s. 83.3 and amendments to s. 810.01.

²¹ A number of these provisions appear to be designed to cripple the “group” by depriving it of services or support. These provisions include no ulterior *mens rea* components for persons aiding the group. Those sections are subs. 83.03(b) (making property or financial services available to a terrorist group); s. 83.08 (a provision largely redundant to subs. 83.03(b), making it an offence to deal in property owned or controlled by a terrorist group or to facilitate such a transaction); s. 83.1 (failing to disclose possession of property belonging to a terrorist group, or information in one’s possession relating to transactions involving property belonging to a terrorist group); and s. 83.11 (failing to comply with the audit requirement on listed financial organizations relating to property owned or controlled by “listed entities”). Section 83.2 is a particularly troubling illustration. It elevates any indictable offence committed on behalf of a “terrorist group” to a terrorist offence punishable by life in prison, whether the offence is connected with terrorist activities or not.

Other terrorist group offences created by the Act focus more on the actor than the group, requiring an ulterior *mens rea* that would make the conduct inherently blameworthy. These offences make criminal those relations with a “terrorist group” that are undertaken for the purpose of assisting that group in its terrorist activities. See, for example, s. 83.03(b) (“knowing that [the finances or services] will be used . . . by a terrorist group”); s. 83.18 (“knowingly” participating in or contributing to any terrorist activity “for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”); s. 83.21 (“knowingly” instructing persons to

prove that the entity dealt with or supported is a “terrorist group,” the Crown need not call evidence to establish this fact beyond a reasonable doubt; all the Crown need do is prove that the Governor in Council has included that group on its “terrorist list.” This contravenes the presumption of innocence, and creates, in my opinion, a regime that suffers from unconstitutional overbreadth.

To be clear, the many offences that are implicated in this way are not *per se* unconstitutional. What is unconstitutional, in my opinion, is the *definition* in subsection 83.01(b), the provision that effectively enables the Crown to use a government list as a substitute for proving an essential fact. If subsection 83.01(b) is struck down, the implicated offences could survive, but the Crown would be forced to prove beyond a reasonable doubt that the group that has been aided or supported in fact has as one of its purposes engaging in terrorist activities.

2. The Impugned Provision — Section 83.01(b)

With emphasis added, the suspect definition in section 83.01 states:

“terrorist group” means

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, *or*
- (b) a listed entity

and includes an association of such entities.²²

To illustrate the impact of this provision more precisely, consider subsection 83.03(b) and how it could be prosecuted. Subsection 83.03(b) provides:

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

...

- (b) knowing that, in whole or in part, they will be used or will benefit a terrorist group,

is guilty of an indictable offence and is liable for imprisonment for a term of not more than 10 years.²³

assist a terrorist group “for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”).

²² *Criminal Code*, R.S.C. 1985, c. C-46, as am.

In proving the essential element of this offence — that the group being given property or financial or other related services is a “terrorist group” — the Crown can use either the section 83.01(a) definition and prove in court that the group is in fact “an entity that has as one of its purposes facilitating or carrying out any terrorist activity,”²⁴ or the Crown can rely on the section 83.01(b) definition and simply prove that the group has been listed by the government.²⁵ The result of this latter option is that subsection 83.03(b) does not confine itself to acts of financing groups that have been involved in terrorist activities. The section catches acts of financing any groups that the government fears on reasonable grounds *may be* terrorist groups.²⁶ The heart of the matter is that, because of the way “terrorist group” is defined, persons stand the risk of being convicted of this offence without proof ever being offered of the actual activities of the group, and without anyone ever having to establish beyond a reasonable doubt that the group really is a terrorist group. Through indirection and complicated drafting, the government has attempted to lower its standard of proof, and to save itself from discharging its full burden of proof with respect to each of the “terrorist group” offences.

²³ *Criminal Code*, R.S.C. 1985, c. C-46, as am. As an aside, this particular section is likely in *prima facie*, but justifiable, violation of s. 2(a), freedom of association.

²⁴ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

²⁵ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

²⁶ Section 83.05 describes the scheme for creating “listed entities.” Groups are “listed” by the Governor in Council by regulation, on the recommendation of the Solicitor-General of Canada. Groups can be “listed” according to subs. 83.05(1) on the simple basis that “the Governor in Council is satisfied that there are reasonable grounds to believe” either “(a)” that those groups have knowingly carried out, participated in, or facilitated terrorist activity, or “(b)” acted on behalf of a group referred to in “(a).” [Forget, for the moment, that this definition is broad enough to permit law firms to be listed for having acted on behalf of groups that the government believes have facilitated terrorist activities.] Reasonable grounds to believe, of course, is the standard typically used for obtaining a search warrant, not for establishing facts during trial.

While groups can challenge their listing, it is not a true appeal — it is a review, in which the most deferential review process known to law is engaged: the judge must simply determine “on the basis of the information available to the judge” whether it was reasonable for the Governor in Council to conclude that there were reasonable grounds to believe the group was involved in terrorist activity (s. 83.05(6)(d)). The review of the information can be done in private, on the basis of inadmissible evidence, which is summarized for the applicant in enough detail to enable the applicant to understand the reasons for decision. The section does not therefore require enough detail for the applicant to respond to the listing. A hearing will only be held if requested, and it is contemplated that the process can take up to 120 days to reach a hearing (s. 83.05).

3. The Constitutional Foundation for the Challenge

(a) *The Presumption of Innocence*

In my view, this technique offends the presumption of innocence guaranteed in section 11(d) of the Charter. The Supreme Court of Canada has held that one of the corollaries of that provision is the obligation on the Crown to bear the burden and to prove guilt beyond a reasonable doubt.²⁷ That the statutory scheme obviates the need to prove an element of the offence in a fashion that comports to these basic constitutional requirements is obvious.

To reinforce my concern that section 11(d) is violated by the kind of definition used in section 83.01, consider the test used to determine whether a legal presumption violates section 11(d). A provision will do so in any case where it permits the conviction of the accused in the face of a reasonable doubt, including doubt about one of the elements of the offence.²⁸ Imagine that the Crown presents its case to a jury in a subsection 83.03(b) prosecution. It proves that the accused intentionally provided financing to Co. A., knowing that Co. A. is a listed group,²⁹ but leads no evidence that Co. A. has as one of its purposes engaging in terrorist activities. Instead, all the Crown does is to file the government list. Would a responsible jury not be left in a reasonable doubt about whether Co. A. really was engaged in terrorist activities, particularly given that the list was compiled on a standard well below proof beyond a reasonable doubt or even the balance of probabilities? A reasonable jury would have a

²⁷ See *Dubois v. R.* (1985), 48 C.R. (3d) 193 (S.C.C.).

²⁸ See *R. v. Whyte* [1988] 2 S.C.R. 3.

²⁹ I am not entirely certain that proof that the accused knows the group to be listed is required, although I believe so. The relevant provisions tend to require the accused to knowingly engage in various acts of support or assistance to terrorist groups, but to what exactly does the “knowledge” requirement relate? Does it relate to knowingly engaging in an act that assists a group, or does it relate to knowing that the group assisted is a terrorist organization? Using ordinary principles of criminal law, the answer would be “both,” even in the absence of the word “knowing,” as the *mens rea* of knowledge with respect to conditions of an offence, like the status of the group dealt with, is implied in the case of a true crime. What causes me concern, however, is the fact that the “terrorist list” is published in the *Canada Gazette*. Once incorporated in a regulation, a group attains the status of a “terrorist group” through the operation of law, and the function of the *Canada Gazette* is not only to publish information, but to enable knowledge of the law to be deemed. To deem knowledge of the status of a group, however, would be entirely insensitive to the realities of commerce, even with respect to the s. 83.01(a) definition. Anyone dealing with an organization would have to confirm that it does not support terrorist activities, or risk conviction. With respect to the s. 83.01(b) definition, it would require anyone who engages in any financial dealings to become avid readers of a publication that has not yet made the best sellers list. The insertion of the word “knowingly” should be taken to relate not only to the act of assistance, but also to the status of the group assisted.

doubt on that matter, yet section 83.01(b) would require a conviction. Section 11(d) is offended by the use of an administrative edict as replacement for proof.

The government response to this argument will be highly technical. It will urge that I am misunderstanding the elements of the offences, and that what is prohibited by these sections is not only dealing with a group that has “as one of its purposes or activities facilitating or carrying out terrorist activities,” it also prohibits dealing with a group that is listed. In a formal sense this is true, but if all that is needed in order to avoid the burden of proving a central factual premise for an offence, is for the Governor in Council to deem that fact to exist, then form has triumphed over substance. To accept the legitimacy of this kind of technique would be to empower the government to deem by regulation that any fact normally central to an offence can be proved by simply pointing to legislation in which the government accepts that alleged fact to be so. This cannot be right.

(b) *Unconstitutional Overbreadth*

Even if this formalistic argument were to find favour with a court, it could not save this provision from a related but distinct challenge. The Supreme Court of Canada held in *R. v. Heywood* that criminal provisions violate section 7 where they threaten liberty, and where they suffer from overbreadth:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.³⁰

The purpose of the terrorist group provisions is decidedly to prevent individuals from interacting with groups which are engaged in terrorist activities. Definition “(a)” of “terrorist group” captures precisely and exhaustively what the legislation is intended to address. It catches any “entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, and includes an association of such entities.” The only additional groups that definition “(b)” would add are groups the Crown cannot prove to be involved in facilitating or carrying out terrorist activities. Unless the presumption of innocence is suspended, adding such groups to the definition can do nothing to

³⁰ [1994] 3 S.C.R. 761, at 792-93.

advance the “legitimate objective” of the terrorist group offences, and must therefore be constitutionally overbroad. If a proposition suffers from overbreadth, *ex hypothesi* it cannot satisfy the minimal impairment requirement of section 1 and it is hopelessly unconstitutional.

(c) *The Long-Term Risk*

It is evident that the desire by the government to “err on the safe side” in terms of security caused it to adopt a technique to combat terrorism that “errs on the dangerous side” in terms of criminalizing conduct. If the technique employed in subsection 83.01 is accepted as constitutionally valid, it will present itself again in the future in other legislative initiatives. Assailable propositions of fact will be convertible into unassailable propositions of law in order to reduce burdens of proof. If this is allowed to happen, one of the cross-border casualties of September 11 will be the presumption of innocence in Canada. Courts can rectify this without disabling valid government objectives. All that would be required is to ensure, before individuals are convicted, hopelessly stigmatized and subjected to the risk of significant punishment, that their guilt can be proved according to those minimum standards that are acceptable and integral to Canadian criminal law.

III. RECOGNIZANCE WITH CONDITIONS

The new provision, section 83.3 of the *Criminal Code* of Canada created by the *Anti-Terrorism Act*, is one of the statute’s more controversial initiatives. Formally, the section has two functions. Its primary one is to empower provincial court judges to impose conditions in order to prevent persons from carrying out apprehended terrorist activities. Its second function is to permit temporary arrest and detention, in order to prevent the carrying-out of terrorist activities, and to facilitate the making of recognizance orders.

Section 83.3 is not the only provision in the legislation empowering courts to impose pre-offence recognizance conditions or to authorize pre-offence detention. Section 133(19) of the *Anti-Terrorism Act* has amended section 810.01 of the *Criminal Code* so that it, too, can be used to impose recognizance conditions on suspected terrorists. Although section 133(19) has received virtually no public attention and is not subject to a sunset clause, for reasons discussed below it is in some respects more dangerous to civil liberties than section 83.3.

In understanding the practical implications of these provisions, one should view them against the backdrop of the “inchoate offences” that are created by

the Act.³¹ The *Anti-Terrorism Act* is so aggressive in defining inchoate offences that it is almost impossible to conceive of a person who has not yet committed an inchoate offence, being central enough to a pending terrorist activity that a recognizance is needed to prevent that offence from occurring.³² In practice, then, these provisions will function to enable the apprehension of those who are suspected of having committed inchoate offences like conspiracy or encouragement, where there is not enough evidence available to charge them. Seen in this way, the provisions are intuitively offensive. They undermine the presumption of innocence, and “punish” without cause. They are a way to extend the reach of criminal consequences where the requirements of full proof cannot be met.

This is not how courts are likely to view these provisions. Courts will likely see them as “preventative” and not “punitive,” and this will prevent a finding that preventative detention and pre-offence recognizance conditions are *per se* unconstitutional.

It is conceivable that section 83.3 could be struck down, not because it provides for pre-offence detention and the imposition of conditions, but rather because of the way in which it provides for pre-offence detention and pre-offence recognizance. Its standards for detention and the imposition of recognizance conditions may be too low to satisfy the Charter, but whether this is so is impossible to predict with any confidence. It may also be that a form of interim release on conditions will be built into section 83.3 to limit situations in which judges will use their powers of temporary detention. Even if these things happen, section 810.01 will likely remain available for use.

1. The Scheme of Section 83.3

In the ordinary course, the section 83.3 process will commence with the laying of an information by a peace officer, on the consent of the Attorney General. Once an information is laid, a provincial court judge *may* cause the person to appear.³³ The judge can either issue a warrant for the arrest of the subject so that he will attend the section 83.3 hearing, or the judge may issue a sum-

³¹ “Inchoate offences” are complete before the harm is done, and include attempts.

³² For a comment on the nature of the inchoate offences in the Act, see Roach, “The New Terrorism Offences and the Criminal Law” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 159-60.

³³ It has been held with respect to section 810.01 of the *Criminal Code*, another recognizance provision, that the Charter requires the word “shall” to be read as “may” in order to permit the judge to exercise the discretion whether to issue process against the subject: *R. v. Budreo* (2000), 32 C.R. (5th) 127, at 147-48 (Ont. C.A.), leave to appeal denied (2001), 271 N.R. 197 (note) (S.C.C.). The drafters of the *Anti-Terrorism Act* have accommodated this requirement in section 83.3.

mons.³⁴ In exceptional circumstances, peace officers are empowered to arrest subjects without warrant, and without the consent of the Attorney General,³⁵ but if the peace officer does so, she must either lay an information prior to the hearing, or release the subject.³⁶

Where an arrest does occur, whether pursuant to a judicial order or as a warrantless arrest by a peace officer, the subject must either be released or brought before a provincial court judge within 24 hours if one is available, or as soon as possible thereafter. When the subject is brought before the judge, it appears that the judge has two options. The judge may conduct the hearing at that first appearance and make a decision on whether to require the recognizance to be entered, or the judge may adjourn the proceedings and order the detention of the subject for up to 48 hours.³⁷ The judge can order the detention of the subject during the adjournment period only if the Crown shows cause as to why the accused should not be released.³⁸

Significantly, no provision is made in section 83.3 for interim release on conditions pending the hearing. Moreover, it appears that no resort can be had to section 515, the general interim release provision of the *Criminal Code*,³⁹ to

³⁴ Section 83.3(3) empowers a provincial court judge to “cause the person to appear before the provincial court judge.” Although, given the purpose behind the hearing, an arrest warrant will likely be the usual response, the language is broad enough to include a summons. Section 83.3(4) specifically contemplates the use of summonses. In keeping with the power to issue arrest warrants under the *Criminal Code* of Canada, where the purposes of the Act can be fulfilled by summons, arrest warrants should not be used (s. 507(4)).

³⁵ There must be exigent circumstances making it impracticable to lay an information, and the peace officer must suspect on reasonable grounds that detention is necessary to prevent a “terrorist activity.” Alternatively, a peace officer can arrest, notwithstanding that an information has been laid and a summons issued, where the peace officer suspects on reasonable grounds that detention is necessary to prevent a “terrorist activity” (subss. 83.3(4)(a) and (b)).

³⁶ Subsection 83.3(5). If the peace officer fails to lay an information and the subject is brought before a provincial court judge, the judge shall order his release (subs. 83.3(7)(a)).

³⁷ Subsection 83.3(7)(b). The legislation therefore contemplates holding a subject for up to 72 hours. Indeed, the period could be moderately longer than 72 hours if a provincial court judge is not available within 24 hours for first appearance, as the 48-hour adjournment can be ordered by the judge only after that first appearance occurs.

³⁸ Detention can be ordered on the primary ground (to ensure attendance) or tertiary ground (to prevent offences) that is ordinarily applicable in “show cause” hearings, or on the general ground that “detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the peace officer’s grounds under subsection (2), and the gravity of any terrorist activity that may be carried out.”

³⁹ R.S.C. 1995, c. C-46, as am. A s. 515 bail hearing applies where an accused “is charged with an offence.” Exceptionally, s. 515 bail hearings are available in s. 810 recognizance proceedings, even though the subject is not charged. This is because the s. 810 sections incorporate by reference all of the provisions relating to summary conviction offences, *mutatis mutandis*, including s. 795, which in turn makes the provisions of Part XVI of the Code (which contain the bail release

find a source for the authority to release on conditions. The net effect could be that subjects are either released unconditionally, or held in custody.

In order to lay an information under section 83.3, the peace officer must:

- (a) believe on reasonable grounds that a terrorist activity⁴⁰ will be carried out; and
- (b) suspect on reasonable grounds that the imposition of a recognizance of a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.

After the hearing, the provincial court judge may, "if satisfied by the evidence adduced that the peace officer has reasonable grounds for suspicion," order a recognizance of up to 12 months. Conditions include an undertaking to keep the peace and be of good behaviour, as well as any reasonable conditions that the provincial court judge considers desirable for preventing the carrying-out of a terrorist activity. If the subject fails or refuses to enter the recognizance, he can be imprisoned for up to 12 months.⁴¹ If he enters the recognizance and breaches it, he will have committed an offence contrary to section 811 of the *Criminal Code*,⁴² a hybrid offence providing for up to two years' incarceration.

2. Understanding and Respecting the Impact of Section 83.3

The utility of section 83.3 has been questioned by some because of the intuitively preposterous underlying assumption that conditions of release can somehow affect the resolve of terrorists to commit terrorist acts.⁴³ Professor Trotter

provisions) applicable to Part XXVII of the Code (dealing with summary conviction offences, including s. 810 proceedings): *R. v. Cachine* (2001), 154 C.C.C. (3d) 376 (B.C.C.A.). Section 83.3 has no *mutatis mutandis* reference, and is not in Part XVI of the Code. It is in Part II, dealing with offences against public order. The reasoning used in *Cachine* and other cases to make s. 515 hearings available for s. 810 arrests cannot therefore be used for s. 83.3 arrests.

⁴⁰ This provision uses the term "terrorist activity" even though one might have expected reference to "terrorist offence," another term used in the Act. Professor Trotter infers, probably with good reason, that this choice was made because Parliament gives "terrorist activity" a broader compass than "terrorist offence," as the definition of "terrorist offence" includes but is not restricted to indictable offences "where the act or omission constituting the offence also constitutes a terrorist activity" (s. 2): Trotter, "The Anti-Terrorism Bill and Preventative Restraints on Liberty" in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 242.

⁴¹ Subsection 83.3(9).

⁴² R.S.C. 1985, c. C-46, as am.

⁴³ See, for example, Schaeffer, "Effectiveness of Anti-Terrorism Legislation: Does Bill C-36 Give Us What We Need?" in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 200.

coined the engaging phrase, a “peace bond for terrorists,” to signal the likely futility of expecting terrorists to abide by court orders.⁴⁴

While it is true that terrorists will not be intimidated from engaging in terrorist activities by the penalties associated with breaching recognizance terms, it would be wrong to judge the constitutional validity of these provisions on the supposition that they are pointless. As Trotter also points out, the heading “recognizance with conditions” is something of a “Trojan horse.”⁴⁵ The section provides not only for release on conditions, but, as described above, detention of up to 72 hours. That detention is not looked at solely as a means of facilitating the recognizance hearing, but is treated, in its own right, as a method of preventing offences.

Even with respect to the imposition of recognizance conditions, Parliament was not so guileless as to believe that imposing conditions will really deter terrorist activity by intimidating terrorists. Recognizance conditions can serve two more realistic purposes. First, they provide a mechanism for disrupting and delaying terrorist activity by demonstrating that the heat is on. Second, and, more importantly, they serve as a prelude to longer-term detention. Anyone who is placed under a section 83.3 recognizance will invariably be subjected to intense surveillance, and, if a breach is detected, arrest will occur and efforts will be made to obtain interim as well as punitive detention.

It is therefore more realistic in assessing the implications of this provision from the point of view of Charter compliance to look at it not as an ineffective compromise, but rather as a scheme that contemplates detaining persons who have not committed offences, not only in the short term, but in the long term as well. This better highlights both its potential as a law enforcement tool, and its full and sobering implications for civil liberties, factors that must be appreciated if the section is to be given fair constitutional treatment.

3. The Constitutional Validity of Section 83.3

(a) *Detaining, and Imposing Conditions on, Persons Who Have Not Committed Offences*

On its face, this regime appears aberrant, a departure from basic criminal law principles. Permitting arrest, detention and the deprivation of liberty by placing persons under conditions of release prior to events even maturing to the point where an inchoate offence has occurred, violates the principle of an “act,” one

⁴⁴ “The Anti-Terrorism Bill and the Preventative Restraints on Liberty” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 241.

⁴⁵ *Id.*, at 242.

of the “two traditional pillars of substantive criminal law.”⁴⁶ It also challenges the presumption of innocence by predicting the criminality of the subject before criminality even occurs. Unfortunately, those of us who see the section in this way are apt to be disappointed for two reasons.

(i) This Section Is Not a Departure from Past Practice

First, this provision is not as aberrant as some might think. Preventative arrest and detention is not unknown to our law. Indeed, we are becoming frighteningly comfortable with it. Subsection 495(1)(a) of the *Criminal Code* has long authorized peace officers to arrest without warrant persons whom they believe, on reasonable grounds, to be about to commit an indictable offence, and the common law permitted arrests to prevent apprehended breaches of the peace.⁴⁷ Moreover, there are a number of provisions related to section 810 of the *Criminal Code* (I will call them the section 810 offences) that permit restraints on liberty in the form of recognizance orders⁴⁸ in order to forestall anticipated, even non-imminent, criminal conduct. These include the original provision, section 810 itself (fear on reasonable grounds that a person will cause personal injury or damage to property),⁴⁹ section 810.01 (fear on reasonable grounds that a person will commit a criminal organization offence),⁵⁰ section 810.1 (fear on reasonable grounds that a person will commit a sexual offence against a child),⁵¹ and section 810.2⁵² (fear on reasonable grounds that a person will commit a serious personal injury offence).⁵³ Persons who are the subject of section 810 complaints can be arrested and even detained pending

⁴⁶ Stuart, *Canadian Criminal Law* (4th ed., 2001), at 80. A challenge based on the principle of an act failed with respect to s. 810 in *R. v. Baker*, [1999] B.C.J. No. 681 (B.C.C.A.), online: QL (B.C.J.) for the reasons described below.

⁴⁷ This power is discussed in *Brown v. Durham Regional Police Force* (1998), 21 C.R. (5th) 1 (Ont. C.A.).

⁴⁸ The imposition of restrictions on movement or conduct is a restraint on liberty, within the meaning of s. 7: *R. v. Heywood*, *supra*, note 3.

⁴⁹ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

⁵⁰ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

⁵¹ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

⁵² *Criminal Code*, R.S.C. 1985, c. C-46, as am.

⁵³ The original s. 810 differs in nature and function from the subsequently enacted s. 810 processes. Original s. 810 was intended to provide comfort to a particular person, who was in fear of another. It was a statutory provision formalizing a common law power courts had long claimed, and it was as close to a private remedy as the criminal law provided for. The successor provisions are intended not to provide comfort at the behest of a particular person who is living in fear, but rather to target potential offenders and make it harder for them to offend. The language of “fear” is borrowed and inserted into these provisions, but it is not at all their focus. General crime prevention is.

their hearing, as both the powers of arrest by warrant under section 507(4) of the *Criminal Code* and the bail review provisions of the *Criminal Code*⁵⁴ have been held to apply to the section 810 proceedings.

The existence of pre-existing powers similar to section 83.3 does not, of course, assure the constitutional validity of section 83.3, but it does mean that the ground ploughed by section 83.3 has already been broken by the section 810 sections and is thereby more fertile for compromising constitutional values than might otherwise have been the case. The climate in which any constitutional challenge to section 83.3 will be undertaken is not as commodious, therefore, as might be believed. When considering section 83.3 challenges, courts will not be faced with some unheard-of arrogation of state power that will have to be justified as an exceptional measure in a time of crisis. They will be faced with a familiar arrogation of state power. As Professor Friedland remarked, “it is not a great stretch to carry the techniques over to fear of a terrorist offence.”⁵⁵

(ii) That There Is No Offence Actually Helps Preserve Constitutional Validity

The second thing that will disappoint those of us who are instinctively offended by a provision that undermines what are thought to be fundamental precepts of the system, is that we tend to provide less Charter protection to preventative restraints on liberty than we do in the case of punitive restraints on liberty. Section 810 provisions have been upheld in a fashion that will go a long way to preserving section 83.3. So too, has the use of pre-trial detention.

In general terms, in *R. v. Budreo* the Ontario Court of Appeal accepted that:

The criminal justice system has two broad objectives: punish wrongdoers and prevent future harm. A law aimed at the prevention of crime is just as valid an exercise of the federal criminal law power under s. 91(27) of the *Constitution Act*, 1867, as a law aimed at punishing crime.⁵⁶

This observation does more than to simply dispense with any phantom “division of powers” argument that might be made. It gives clear *imprimatur* to the preventative use of the criminal law power. It was in this welcoming context that the Ontario Court of Appeal accepted a submission that could put an inglorious end to the application of the most obvious principles of fundamental justice in pre-charge recognizance cases. Speaking of the section permitting recognizance orders against pedophiles, the Court held, “[Section] 810.1 does

⁵⁴ See *R. v. Cachine*, *supra*, note 39; *R. v. Budreo*, *supra*, note 33; and *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115 (Sask. C.A.). This interpretation has survived Charter scrutiny.

⁵⁵ “Police Powers in Bill C-36” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 279.

⁵⁶ *Supra*, note 33, at 138.

not create an offence. It is a preventative provision not a punitive provision.”⁵⁷ It therefore need not conform to the same norms that offences must, such as the presumption of innocence in its full flower, or the requirement of an act.

Budreo is not an isolated case in using the reason for the restraint on liberty as a basis for diminishing Charter protection. Consider the bail release provisions of the *Criminal Code*. Those provisions permit detention, prior to an adjudication of guilt, in order to prevent the person arrested from committing further offences.⁵⁸ They also permit the imposition of recognizance conditions. In *R. v. Pearson* the Supreme Court of Canada held that these powers do not violate the presumption of innocence in spite of this. It explained that, while the presumption of innocence supports the principle under section 7 that “the starting point for any proposed deprivation of . . . liberty . . . of the person of anyone charged with or suspected of an offence must be that the person is innocent,”⁵⁹ this principle has a different, less intense meaning where the “process does not involve a determination of guilt.”⁶⁰ The presumption of innocence is not offended, therefore, by pre-conviction detention, nor is the Crown required by the Charter to prove an offence beyond a reasonable doubt to obtain pre-trial detention.

The distinction between preventative and punitive detention as a means to give lesser Charter protection in the case of preventative detention is unsettling for at least three reasons. First, as a matter of substance, pre-conviction or even pre-offence deprivations of liberty are as intrusive as post-conviction deprivations of liberty. Second, using this approach gives greater constitutional protection to those who are alleged to have caused harm than to those who are not. This is intuitively troubling. Third, the distinction between “preventative” and “punitive” deprivations of liberty is capable of being used instrumentally. In *R. v. Lyons*, long-term detention under the dangerous offender provisions was challenged as contrary to section 7 of the Charter on the basis that the detention was preventative and not punitive, enabling accused persons to be detained because of fear or suspicion relating to their criminal proclivities. Contrary to the view expressed in *Budreo*, the Supreme Court of Canada suggested that if this were so, there would indeed be a violation of section 7. It upheld the dangerous offender provisions of the *Criminal Code*, in part because they were punitive and *not* preventative.⁶¹

⁵⁷ *Id.*, at 138.

⁵⁸ Section 515(10)(b) [replaced 1999, c. 25, s. 8].

⁵⁹ *R. v. Pearson*, [1992] 3 S.C.R. 665, at 683.

⁶⁰ *Id.*, at 685.

⁶¹ *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, at 21-22 (S.C.C.). Similar reasoning would be used to deflect challenges to the “long-term offender” regime in s. 753.1. The “long-term offender” regime, which permits persons to be placed on recognizance for up to 10 years, is seen to be

It is possible to craft intelligent arguments against section 83.3, relying on the authority of *Lyons*. What emerges from all of this, however, is the pragmatic and legal reality that Charter adjudication is invariably influenced by context, and even implication. Had the Court in *Pearson* accepted, for example, that any detention without conviction violates the Charter, long-standing and necessary powers of pre-trial detention would have been imperilled. The Court therefore accepted that context and purpose will have an impact on the meaning and role given to fundamental principles. The reality is that courts will reserve the right to apply principles in a flexible, contextual manner so that they do not unsettle important and “reasonable” initiatives. This undermines certainty and predictability and permits subjective decision making. While this kind of instrumental reasoning makes it hard to predict outcomes, one thing it does make crystal-clear is that the generic claim that pre-conviction detention or pre-conviction recognizance is *per se* unconstitutional is untenable. It can be expected that courts will balance competing considerations to determine whether the choices that have been made are “reasonable” ones.⁶²

It is to be hoped that in undertaking this assessment, courts will be influenced by the fact that pre-offence detention and pre-offence recognizance conditions do have the same impact on liberty as when those methods are used punitively, and it is to be hoped that courts will bear in mind the excruciatingly serious stigma that would befall anyone subjected to a section 83.3 order. Three things, more than any others, will probably make the use of pre-offence detention attractive in spite of all of this. First, the period of detention is tightly circumscribed, unlike denying bail release, which can result in months of pre-trial detention. Second, the outcomes in the section are discretionary. The decisions of peace officers to arrest are subject to review within the same reasonable delay that is used for bail hearings, and the judge has authority to either deny the request for an order or to tailor conditions to the needs of the case. Courts are apt to see the section as allowing for tailored denials of liberty, and not overly broad or arbitrary deprivations of liberty. Third, the function that this process serves is apt to commend itself to courts. The powers in section 83.3 will be judged according to whether they are useful and rational measures for societal protection, and a great deal of deference will be given to Parliament in this regard.

analogous to a “lesser included offence on a dangerous offender application”: *R. v. Turley* (1999), 136 C.C.C. (3d) 426, at 433 (B.C.C.A.).

⁶² In *R. v. Budreo*, *supra*, note 33, the issue came down to a “reasonableness” inquiry, under the auspices of the overbreadth doctrine. The Court found the choices made by Parliament to have been reasonable ones.

There is more than a little irony in all of this; the “preventative/punitive” distinction sends the message to the government that if it strikes before an offence occurs, it need worry less about the Charter. Still, a challenge premised on the simple fact of pre-offence or pre-act restraints on liberty will run directly into pragmatic resistance, our traditions in bail release settings, our growing affinity to using restraint to prevent offences such as in section 810, and the technical assistance provided by the authority in *R. v. Budreo*.⁶³ This may be too imposing an array of obstacles to overcome.

(b) *The Standards for Detention*

While the general use of pre-offence detention and recognizance orders is not apt to violate the Charter *per se*, the treatment in section 83.3 of standards for arrest and detention could. Those standards are lower than one might expect. Indeed, the standard for detaining someone under this provision is lower than the usual standard for issuing a search warrant.⁶⁴

(i) Arrest and Detention by the Peace Officer

With good reason, Trotter calls the treatment of standards in section 83.3 “beguiling.”⁶⁵ In order to lay an information, a peace officer must turn her mind to two criteria, the first relating to whether a terrorist activity will be carried out, and the second relating to the involvement of the subject. Inexplicably, the standard of belief that will satisfy the second of these criteria is lower than the standard needed to meet the first. In particular, with respect to the vaguer and more easily satisfied criterion of whether a terrorist activity will be carried out, the peace officer must believe that this will occur “on reasonable grounds.” This is the same standard used in the section 810 recognizance provisions, and requires an objectively valid belief that a terrorist activity will probably occur.⁶⁶

⁶³ *Id.*

⁶⁴ But see *R. v. Golub* (1997), 117 C.C.C. (3d) 193, at 202 (Ont. C.A), leave to appeal denied (1998), 128 C.C.C. (3d) vi (S.C.C.), which takes some of the sting out of this observation. Justice Doherty was not speaking of legislated standards, but rather their application, but he did say that less demanding standards of reasonable grounds have to be applied in cases of *warrantless* arrests than in assessing judicial decisions to grant search warrants, because of the volatile and rapidly changing conditions in which warrantless arrests occur.

⁶⁵ “The Anti-Terrorism Bill and Preventative Restraint on Liberty,” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 242.

⁶⁶ See *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, at 114-15 (S.C.C.), interpreting “reasonable ground to believe” in a search provision as requiring “reasonable and probable grounds,” and see *R. v. Storrey* (1990), 75 C.R. (3d) 1 (S.C.C.), and *R. v. Golub*, *supra*, note 64, where the courts treated implicitly the deletion of the term “and probable” from “reasonable and

As for the second criteria, relating to the involvement of the subject, it is enough if the peace officer “suspects on reasonable grounds” that the subject is involved, and that detention or the imposition of conditions is needed to prevent the carrying-out of the terrorist activity. Reasonable suspicion is a lower standard than “reasonable grounds to believe.”⁶⁷ One can reasonably suspect something long before one comes close to reasonably believing it.

It is more than a little troubling that, under section 83.3, less certitude is needed with respect to the participation of the subject who will be detained than with respect to the general existence of a terrorist threat. It is this lower standard that will attract Charter attention. No other arrest provision in the *Criminal Code* turns on so low a standard.⁶⁸ Even the ability to arrest under subsection 495(1)(a) in order to prevent an imminent indictable offence requires reasonable grounds. This means that a man who is only reasonably suspected of being about to murder his wife cannot be arrested, but if subsection 83.3 survives, a man who is reasonably suspected of planning to make a donation to a listed organization at some indeterminate point can be.

Juxtaposing implications in this way can give a general flavour of whether the provision strikes one as reasonable, but it does not answer the constitutional question. Approaching the matter more technically, then, what does Charter jurisprudence tell us?

(A) Section 11(d) Is Not Offended Directly But Section 7 Could Be

Where a person is charged with an offence, section 11(d) of the Charter does not permit punitive detention without proof beyond a reasonable doubt, but, as indicated, section 83.3 does not provide for punitive detention and it does not charge persons with offences. Section 11(d) and the standard of proof beyond a reasonable doubt does not therefore apply. In *R. v. Pearson* the Court did hold, however, that section 7 of the Charter supplements this provision to enable the

probable grounds” dealing with s. 495 powers of arrest, as an inconsequential amendment. In *R. v. Debot* (1986), 30 C.C.C. (3d) 207, at 219 (Ont. C.A.), Martin J.A. described the standard of “reasonable grounds to believe” as “one of reasonable probability.” This passage was specifically approved in the Supreme Court of Canada, (1989), 52 C.C.C. (3d) 193, at 213.

⁶⁷ In *Hunter v. Southam Inc., id.*, at 114-15, Dickson J. defined “reasonable grounds to believe” by noting that where reasonable grounds to believe exist, “credibly-based probability replaces suspicion.” In *R. v. Lindsay*, dealing with the “reasonably suspects” standard used for roadside detentions, the Ontario Court of Appeal suggested that reasonable suspicion does not require definition and means what it says, and that it does not require “belief”: (1999), 134 C.C.C. (3d) 159, at 160 (Ont. C.A.).

⁶⁸ On the other hand, the *Official Secrets Act*, *supra*, note 13, has permitted arrest based on reasonable suspicion since its enactment in 1911. The provision has not been challenged under the Charter.

presumption of innocence to operate in non-trial contexts; this general principle provides the “starting point” that anyone who is about to face the loss of liberty is presumed innocent.⁶⁹ As indicated, the intensity of that principle will vary according to context. Interestingly, in citing examples of cases where the presumption of innocence does not require proof beyond a reasonable doubt, including bail release, searches and seizure, and detentions, Lamer C.J. noted: “Each of these specific examples is consistent with the view that certain deprivations of liberty and security of the person may be in accordance with the principles of fundamental justice where there are reasonable grounds for doing so.”⁷⁰

To be more precise, each of the examples requires reasonable grounds to believe, or in the case of bail, even proof on the balance of probabilities.⁷¹ Subject to the unpredictable, context-based tampering that can occur under section 7, this provides authority for the proposition that the meager “reasonable grounds to suspect” standard in section 83.3 violates section 7.

(B) Section 9 Might be Offended

Section 9, dealing with arbitrary detention, could also be used to challenge the standard of proof. The typical or familiar standard for a non-arbitrary detention requires only that there be “articulable cause” for a detention, a constellation of discernable factors that are related to the purpose of the detention.⁷² If this is the standard applied to section 83.3, it will be satisfied because the requirement of reasonable suspicion, when met, will provide “articulable cause.” Cases using the “articulable cause” test, however, involve extremely non-intrusive or short-term detention, such as a stop related to the enforcement of the rules of the road,⁷³ or customs stops,⁷⁴ or the transient stop of a suspicious

⁶⁹ *Supra*, note 59, at 683.

⁷⁰ *Id.*, at 684.

⁷¹ *R. v. Julian* (1972), 20 C.R.N.S. 227 (N.S.T.D.), and see Trotter, *The Law of Bail in Canada* (1999), at 204.

⁷² See *R. v. Hufsky* (1988), 63 C.R. (3d) 14, at 23 (S.C.C.), where it was said that “the random stop for the purposes of the spot check procedure . . . resulted . . . in an arbitrary detention, because there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure.” The phrase “articulable cause” is now employed to describe the existence of criteria related to the purpose for the stop. See *Brown v. Durham Regional Police Force*, *supra*, note 47, at 19-20.

⁷³ See *R. v. Hufsky*, *id.*, and *Brown v. Durham Regional Police Force*, *id.*

⁷⁴ See *R. v. Jacques* (1996), 1 C.R. (5th) 229 (S.C.C.), involving the stop of a motor vehicle suspected of crossing, at a non-controlled border crossing.

person for investigative purposes,⁷⁵ not arrests and detention for hours on end. There is good reason to believe that more than “articulable cause” is required to justify detentions amounting to full-scale arrest.

In *R. v. Storrey*⁷⁶ the Supreme Court of Canada overturned the decision of a trial judge, who had considered the arrest of Mr. Storrey to be arbitrary, in violation of section 9 of the Charter. The trial judge had found a section 9 violation because he believed that the officers did not have reasonable and probable grounds to arrest Mr. Storrey. The Supreme Court of Canada disagreed, finding there were, in fact, reasonable and probable grounds for the arrest. The Court did not, therefore, have to address overtly the question of whether an arrest short of reasonable and probable grounds is “arbitrary” within the meaning of section 9. Justice Cory did say, however:

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist.⁷⁷ [Emphasis added.]

While not an overt proclamation that the standard for non-arbitrary arrest is the existence of reasonable and probable grounds, the passage does provide some support for that proposition.

Support for the view that an arrest without reasonable and probable grounds is “arbitrary,” particularly when it involves arrests related to apprehended as opposed to consummated crimes, can also be found in the common law. In *Brown v. Durham Regional Police Force*,⁷⁸ Doherty J. was asked to accept the submission that at common law, the police had the power to arrest or detain persons in order to preserve the peace, based solely on the belief that they are persons who are generally engaged in criminal conduct. That submission was rejected because the common law authority to arrest at common law was more limited than that:

Two features of the common law power to arrest or detain to prevent an apprehended breach of the peace merit emphasis. The apprehended breach must be imminent and the risk that the breach will occur must be substantial. The mere possibility of some unspecified breach at some unknown point in time will not suffice. . . . To properly invoke [this] power, the police must have reasonable

⁷⁵ See *R. v. Johnson* (2000), 32 C.R. (5th) 236, at 238 (B.C.C.A.). A brief detention to question the suspect based on reasonable suspicion was not arbitrary.

⁷⁶ *Supra*, note 66.

⁷⁷ *Id.*, at 8-9.

⁷⁸ *Supra*, note 47.

grounds for believing that the anticipated conduct . . . will likely occur if the person is not detained.⁷⁹

Although Doherty J. was not, at this point in the judgment, expressing a view on whether a less restricted power of arrest for apprehended harm would be arbitrary contrary to section 9, the fact that the common law imposed these requirements is useful data that would support a constitutional challenge to the standards embodied in section 83.3.

Again, the sliding nature of constitutional protection according to context could undermine the claim that section 9 is *prima facie* offended by the reasonable suspicion standard. In *R. v. Jacques* the fact that the traffic stop and search that took place was related to customs control and not simply to the enforcement of driving regulations gave comfort to the Court in denying the application of sections 8 and 9 of the Charter.⁸⁰ The high state interest in controlling its borders supported a greater range of “reasonable” or “non-arbitrary” conduct than would be acceptable in other contexts.

The use of variable standards for constitutional scrutiny is in keeping with the approach taken to the presumption of innocence in *R. v. Pearson*.⁸¹ It is also the approach taken in *Hunter v. Southam Inc.* with respect to search and seizure.⁸² As the Supreme Court of Canada said in *R. v. McKinlay Transport Ltd.*, “[t]he standard of review of what is ‘reasonable’ in a given context must be flexible if it is to be realistic and meaningful.”⁸³ Indeed, speaking specifically of state security, Dickson J. said: “Where the State’s interest is not simply law enforcement as, for instance, where State security is involved . . . the relevant standard [required by the *Charter*] might well be a different one [than the usual warrant requirement of reasonable and probable grounds].”⁸⁴

This, of course, is what the government is counting on generally with respect to the anti-terrorism legislation, and specifically, in this context. They will urge that even if reasonable and probable grounds for arrest are normally required to avoid a section 9 violation, that standard is not required by the Charter where a preventative arrest power is intended to forestall monstrous tragedies such as occurred on September 11, whether in Canada or elsewhere.⁸⁵

⁷⁹ *Id.*, at 26.

⁸⁰ *Supra*, note 74, at 238, and the cases cited therein.

⁸¹ *Supra*, note 59.

⁸² *Supra*, note 66, at 115.

⁸³ [1990] 1 S.C.R. 627, at 645.

⁸⁴ *Hunter v. Southam Inc.*, *supra*, note 66, at 115.

⁸⁵ Consideration of context in this way permits the double counting of those contextual factors that militate against liberty, once in determining whether there is a *prima facie* violation and again, if it gets that far, in deciding whether there is a s. 1 justification.

As noted, context-driven determinations defy prediction. It will ultimately be a matter of choice. For his part, Professor Friedland noted: “Is a lower standard of proof acceptable to arrest a person who is suspected of being about to commit a terrorist offence? That depends on the threat. My own view is that it is clearly acceptable for terrorist offences under a restricted definition of terrorism.”⁸⁶

Others, myself included, disagree. It is not as if requiring reasonable and probable grounds before denying liberty will disable the police from maintaining vigilant surveillance on subjects. All it will do is prevent a serious erosion in criminal law standards.

(ii) Judicial Decisions to Extend Detention

There are a number of problems relating to the judicial power to extend detention for up to 48 hours.

(A) Detaining to Preserve Confidence in the Administration of Justice

First, there is a possible challenge to the legitimacy of judges denying release to subjects who pose no flight risk, or no threat to the public safety or to any witness. This power, housed in subsection 83.3(7)(b)(C),⁸⁷ permits detention to be ordered for “any other just cause . . . [including] in order to maintain confidence in the administration of justice.” In making the determination of whether detention can be justified on this ground under subsection 83.3(7)(b)(C), the provincial court judge is to have regard to all circumstances, “including the apparent strength of the peace officer’s grounds under subsection (2), and the gravity of any terrorist activity that may be carried out.”

A similar broad ground for detention was added to section 515(10)(c),⁸⁸ the general bail provision, in response to the striking of the “public interest” because of its vagueness in *R. v. Morales*.⁸⁹ This innovation has itself been challenged unsuccessfully in the Ontario Court of Appeal, and is currently before the Supreme Court of Canada in *R. v. Hall*.⁹⁰ The outcome of *Hall* may well determine the fate of subsection 83.3(7)(b)(C).⁹¹

⁸⁶ Friedland, “Police Powers in Bill C-36” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 279.

⁸⁷ *Criminal Code*, R.S.C. 1985, c. C-46, as am.

⁸⁸ [*Criminal Code*; en. 1997, c. 18, s. 59].

⁸⁹ (1992), 17 C.R. (4th) 74 (S.C.C.).

⁹⁰ (2000), 35 C.R. (5th) 201, leave to appeal granted (2001), 151 C.C.C. (3d) vi (S.C.C.).

⁹¹ [*Criminal Code*; en. 2001, c. 41, s. 4]. For my part, I do not think that the problem is so much one of vagueness. I think it is arbitrary, contrary to s. 9, and contrary to the presumption of

(B) No Interim Release on Conditions

There is another problem relating to the judicial detention power. Where the ordinary bail provisions of section 515 apply, a step-ladder approach is used that enables the release of the accused where the interests that would otherwise be protected by detention can be served, short of detention, by the imposition of conditions of release. Strangely, as described above, there is no power to release on conditions pending an adjourned section 83.3 hearing. This gap harms the liberty interests of those who are subjected to requests for further detention. If a court considering a detention request was to conclude that a person cannot be released without conditions, but could be released safely with conditions, that court, having no power to impose interim release conditions, would have to keep that person in custody pointlessly.⁹² This makes the scheme vulnerable to successful Charter challenge because the state has no legitimate interest in keeping someone in custody who can be released safely on conditions. The detention is arbitrary, and in my view, altogether apart from section 9, violates the principle of fundamental justice, protected by section 7, that was recognized in *Rodriguez v. British Columbia (Attorney General)*: “Where the deprivation of [liberty] does little or nothing to enhance the state’s interest (whatever it may be), . . . a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose.”⁹³

(c) *Judicial Recognizance Standards May Also Be Too Low*

When it comes to the power of judges to impose conditions of recognizance, the standard is also lower than we are accustomed to, even with respect to the section 810 provisions. Each of the section 810 provisions requires “evidence adduced that the informant has reasonable grounds” before recognizance conditions can be imposed. By contrast, for the imposition of conditions under subsection 83.3(8)(a),⁹⁴ the judge must merely be satisfied that “the peace officer has reasonable grounds for the suspicion.”⁹⁵

innocence founded in the principles of fundamental justice under s. 7, to detain a person who poses no threat of flight or harm, essentially because the public thinks he should be locked up before trial.

⁹² A possible solution would be for the judge to deny the adjournment, regardless of how meritorious it would otherwise be. This could prejudice the ability of the Crown to prove a meritorious case by forcing the Crown on before it is ready. The section should either be struck down and recrafted to solve this problem, or the Charter should be used to read in the interim release process provided for in s. 515 of the *Criminal Code*.

⁹³ (1993), 24 C.R. (4th) 281, at 301 (S.C.C.).

⁹⁴ [*Criminal Code*; en. 2001, c. 41, s. 4].

⁹⁵ As a preliminary point, the subsection is not clear on exactly what the judge is to attend to in making that decision, the peace officer’s state of mind relating to a terrorist activity, or the peace

This provides a remarkably low standard for ordering a recognizance. In subsection 507(4) (issuance of a warrant for arrest), subsection 515(10) (interim detention at a bail hearing), and section 487.01⁹⁶ (the general warrant provision), the issue is whether the judge who is considering making the order is herself satisfied on the evidence that there are “reasonable grounds to believe.” The section 83.3(8)(a) standard is lower than that used in these sections in two respects. First, under subsection 83.3(8)(a) the judge need merely be satisfied that there are reasonable grounds to suspect; there is no need for reasonable grounds to believe. Second, the inquiry is an attenuated one; the judge is not to inquire into her own opinion about whether there are reasonable grounds to suspect but much in the fashion of a judicial review, subsection 83.3(8)(a) asks the judge’s opinion on whether the peace officer had reasonable grounds to suspect.⁹⁷ When combined with the ordinary standard of proof applicable in such cases, the balance of probabilities,⁹⁸ what the judge is really being asked to decide, then, is whether the peace officer probably had reasonable grounds for his suspicion.⁹⁹ It is on this minimal and attenuated inquiry that liberty of individuals is deprived through the imposition of conditions.

Again, it is difficult to say whether this contravenes the Charter. The ultimate question will be the entirely speculative and value-laden one of whether the supposed benefits of this scheme justify the detrimental impact it will have on the liberty interests of potentially innocent persons. For my part, I say no.

officer’s state of mind relating to the need to impose conditions on the subject. The use of the term “reasonable grounds for *the* suspicion” could suggest that the judge need attend only to the latter, since the reference to “the suspicion” is not apt to describe the state of mind contemplated in subs. 83.3(4) relating to the apprehension that a terrorist activity will be carried out. On that matter the officer must have more than suspicion; she must have reasonable and probable grounds to believe. Notwithstanding this hurried drafting, common sense would suggest that the provincial court judge must consider both of the prerequisites to swearing an information.

⁹⁶ [Criminal Code; en. 1993, c. 40, s. 15; am. 1997, c. 18, s. 42, 1997, c. 23, s. 13].

⁹⁷ I doubt this was some nefarious choice. The wording is modeled on the 810 sections, which also focus on the complainant’s state of mind. As described in footnote 48, *supra*, looking at whether the fear of the complainant is reasonable makes sense for s. 810 itself, because a s. 810 restraining order is intended to ameliorate that complainant’s fear by keeping the respondent away. It makes no sense to look at the fear of the complainant, as opposed to whether there *are* grounds for concluding that the respondent does pose a general danger, under ss. 810.01, 810.1 and 810.2. Unfortunately, those provisions pointlessly mimic the s. 810 model.

⁹⁸ See *R. v. Giardino*, [1997] O.J. No. 1073 (Gen. Div.), online: QL (O.J.), relating to s. 810.

⁹⁹ In a case where not all of the evidence that the police officer was privy to is shown to the judge, it is at least hypothetically possible for a judge to make a finding that the peace officer had reasonable suspicion, even if the judge herself would not be able to conclude on the evidence presented that she, too, would have reasonable suspicion.

(d) *The Section 810.01 Amendment*

As described above, section 810.01 of the *Criminal Code* of Canada is amended by the *Anti-Terrorism Act* to include any terrorism offence. This amendment means that any person who fears that another may commit a terrorism offence, can, with the consent of the Attorney General, apply for a recognizance order. This essentially duplicates section 83.3, save for three important distinctions.

First, the standard for applying requires that the fear be based on reasonable grounds rather than reasonable suspicion.¹⁰⁰ Second, the section 515 bail provisions apply to section 810.01 applications,¹⁰¹ and section 515 does not permit 48-hour adjournments. In truth this provides cold comfort to the accused because under the section 515 regime, the subject can be held until the hearing, which can be scheduled at any point within a reasonable time. This will almost invariably be longer than the 48 hours imposed by section 83.3. Third, section 810.01 does not contain a sunset clause. In five years, regardless of what happens to section 83.3, section 801.01 will continue in force. For these reasons, it may be that the defence bar should be more concerned about this incidental amendment to section 810.01 than about section 83.3.

IV. INVESTIGATIVE HEARINGS

1. The Statutory Provisions

(a) *The General Scheme*

Section 83.28 enables a peace officer, with the prior consent of the Attorney General, to apply *ex parte* to a provincial or superior court judge for an order for “the gathering of information.”¹⁰² “Gathering of information” involves the compelled testimony and production of relevant documents and items before a judge, under pain of potential incarceration for refusing to attend,¹⁰³ threat of contempt of court for refusing to answer, or the risk of criminal conviction and punishment for providing false testimony. This kind of order can be used both

¹⁰⁰ The fact that a reasonable and probable grounds standard was deemed sufficient by the government for the purposes of s. 810.01 will aid in demonstrating that the reasonable suspicion standard in s. 83.3 is too low. On the other hand, it also means that should the power of judges to make s. 83.3 recognizance orders be struck down, the government could simply employ s. 810.01 in its stead.

¹⁰¹ See the text accompanying note 54.

¹⁰² [*Criminal Code*; en. 2001, c. 41, s. 4].

¹⁰³ Section 83.29 provides for a special warrant for the arrest and potential detention of anyone who is evading service, absconding or failing to attend or remain in attendance.

as a strategy for obtaining information to forestall anticipated attacks and as an investigative technique to help solve criminal investigations relating to offences already believed to have occurred.

To make an order for “gathering of information” in order to assist peace officers in preventing an anticipated terrorist offence, the judge must be satisfied there are reasonable grounds to believe that

- a terrorism offence will be committed;
- the person to be questioned has “direct and material information” about the offence or the whereabouts of suspects who the officer suspects may commit a terrorism offence; and
- reasonable attempts have already been made to get information from that person.¹⁰⁴

To make an order for “gathering of information” to assist peace officers investigating offences already believed to have occurred, the judge must be satisfied there are reasonable grounds to believe that

- a terrorism offence has been committed, and
- information concerning the offence or the whereabouts of suspects is likely to be obtained as a result of the order.¹⁰⁵

All questions must be answered and all information provided, unless protected by privilege or “any law relating to non-disclosure of information,”¹⁰⁶ what I will refer to below as “near-privilege.” Subsection 83.28(10) provides, however, that

- (a) no answer given or thing produced . . . shall be used or received against that person in any criminal proceedings against that person, other than a prosecution [for perjury (s. 132) or the giving of contradictory evidence (s.136)]; and
- (b) no evidence derived from the evidence obtained from the person shall be used . . . against the person in any criminal proceedings, other than a prose-

¹⁰⁴ Subsection 83.28(4)(b).

¹⁰⁵ Subsection 83.28(4)(a).

¹⁰⁶ Subsection 83.28(8). The reference to “any law relating to non-disclosure” was added because there are essentially three kinds of rules that can justify non-disclosure of information from compellable witnesses: “class privilege” like solicitor-client privilege, “case-by-case privilege” in which information imparted in confidence is tested on an *ad hoc* basis using the four-part “Wigmore test,” and other mechanisms like s. 278.1 of the *Criminal Code*, which erect processes and preconditions that must be met to access confidential information but which are not, strictly speaking, privileges.

cution [for perjury (s. 132) or the giving of contradictory evidence (s.136)].¹⁰⁷

(b) *Are These Proceedings Open?*

There seems to be no provision in the *Anti-Terrorism Act* indicating whether “investigative questioning” will occur in open court. It is unlikely that, given its function, the government would want it to be. While there is a presumption at common law that court proceedings will be open,¹⁰⁸ it is difficult to predict how a court would react to an application to exclude the public. This is not a trial, and it was held in *Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)* with respect to a statutory board of inquiry that the proceedings need not be open because the Board had no decision-making role. The Court said: “before any ‘right’ of access . . . can be asserted it is necessary to ask what it is to which access is sought. Where . . . access is sought to an inquiry or investigation it is proper to look to its function and purpose.”¹⁰⁹

The fact that section 83.28 contemplates the use of judges rather than appointed commissioners could well distinguish this decision, requiring that investigative questioning before a judge take place in open court.

(c) *Do the Rules of Evidence Apply?*

The section is also silent about the application of the rules of evidence. Since this is an evidence gathering and not adjudicate function, it seems clear that, privilege and near privilege aside, rules of evidence would not apply.

2. The Constitutional Validity of the “Investigative Hearing”

(a) *Overall Assessment*

There are serious constitutional issues raised by section 83.28. To put the matter into context, section 83.28 exists in unprecedented disregard of long-standing traditions that are central to our conception of justice. It is remarkable in two respects. First, it is an assault on basic concepts or principles related to

¹⁰⁷ [Criminal Code; en. 2001, c. 41, s. 4].

¹⁰⁸ See *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175.

¹⁰⁹ *Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)* (1994), 171 N.R. 158, at 159 (Fed. C.A.).

self-incrimination. Those principles are not apt to invalidate section 83.28, but they will limit its utility. Second, it threatens the integrity of the judicial function by co-opting judges, who in our tradition are neutral, impartial and independent triers of law and fact, as participants in the investigation. It casts Canadian judges in an unflattering and ill-suited role, and in a fashion that should be found to contravene the Charter.

(b) *This Power Is Unprecedented*

In an effort to give legitimacy to this provision, defenders of section 83.28's "investigative hearings" argue that the section does nothing unique or unprecedented. They refer, for example, to provisions requiring witnesses, including suspects, to testify at public inquiries and coroner's inquests.¹¹⁰ In truth, those regimes provide no analogy. We permit compelled testimony by suspects before inquiries precisely because those inquiries are not investigations into criminal conduct.¹¹¹

Defenders refer, as well, to statutes like the *Competition Act*¹¹² and provincial securities legislation where witnesses, including suspects, can be made to furnish answers.¹¹³ These regimes provide no analogy either. We permit compelled answers before such bodies as part of their regulatory function. In fact, when those regulatory powers are used for the purpose of aiding a criminal investigation, we find those regulatory powers to have been abused. Statements

¹¹⁰ See, for example, Cotler, "Thinking Outside the Box: Foundational Principles for Counter-Terrorism Law and Policy" in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 127, and the comments of Cohen in "Concluding Comments from the Department of Justice" in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 444. Reference is also made by each of these commentators to the *Mutual Legal Assistance and Criminal Matters Act*, R.S.C. 1985 (4th Supp.), c. 30, with its requirement that persons in Canada answer questions with respect to foreign criminal proceedings. This is done as a matter of comity because persons in Canada cannot be compelled to be witnesses in a foreign proceeding. That we are prepared to support other countries in obtaining evidence in the only practical way possible for foreign proceedings, is completely distinguishable from the investigative hearing provisions in s. 83.28.

¹¹¹ See *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440. Commissions have no authority to determine criminal liability. They do not exist as part of a criminal investigation, but rather to make generic recommendations. The function of s. 83.28 is very different.

¹¹² R.S.C. 1985, c. C-34.

¹¹³ Cotler, "Thinking Outside the Box: Foundational Principles for Counter-Terrorism Law and Policy" in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 127, and the comments of Cohen in "Concluding Comments from the Department of Justice" in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001), at 444.

made in response to statutory powers that are conferred for regulatory purposes but used improperly for investigative purposes connected to criminal offences are excluded from evidence because self-incrimination principles are contravened.¹¹⁴ Indeed, even where answers are compelled for both a regulatory purpose and as part of a criminal investigation, self-incrimination principles are contravened.¹¹⁵

It has been said that section 83.28 is analogous to the statutory power to compel testimony at a preliminary inquiry.¹¹⁶ It is not in the least. A preliminary inquiry is a judicial hearing before a neutral, impartial adjudicator to determine whether the Crown can discharge its evidential burden of proof. The judge is not co-opted as an arm of the investigation. She is performing a decidedly judicial function. Indeed, it is an abuse of the preliminary inquiry for the Crown to attempt to use the preliminary inquiry as an investigative tool.¹¹⁷

These “precedents” therefore give no support to the philosophy and spirit of section 83.28. The lines of jurisprudence they develop actually contradict its spirit and philosophy. The “investigative hearing” process in which judges are used as part of the investigative arm of the state, and in which compelled testimony is obtained in aid of criminal investigations or even public protection, is unprecedented, and we should be clear about that if we are to make an honest assessment of the constitutional validity of the provision.

(c) *Self-Incrimination and the Right to Remain Silent*

(i) Third Party Witnesses

When applied to third party witnesses to obtain information about the actions of others, section 83.28 does not give rise to self-incrimination questions. As the term “self-incrimination” suggests, it arises where individuals are obliged to

¹¹⁴ See, for example, *R. v. Jarvis*, [2000] A.J. No. 1347, at para. 35, online: QL (A.J.), leave to appeal to S.C.C. granted [2001] S.C.C.A. No. 86.

¹¹⁵ See *R. v. White* (1999), 24 C.R. (5th) 201, at 224-25 (S.C.C.). Self-incrimination principles were held to be compromised in that case because although the statutorily compelled statement was coerced for a regulatory purpose, the person demanding production, a peace officer, was also investigating a crime. The remedy in the case was “use-immunity” against having the statement admitted at a criminal trial to incriminate the accused, something already provided for in s. 83.28, but the current point is the general one: obtaining information for investigatory purposes is decidedly different in law than obtaining it for regulatory purposes.

¹¹⁶ Cotler, “Thinking Outside the Box: Foundational Principles for Counter-Terrorism Law and Policy” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 127.

¹¹⁷ See, for example, *R. v. Z. (L.)* (2001), 155 C.C.C. (3d) 152 (Ont. C.A.). The Court did not stay the trial of the accused because a preliminary inquiry had been used abusively and improperly as a means to investigate a suspect, but the Court did exclude evidence obtained as a result.

betray themselves. Although it is an intrusion into the liberty of any person to be forced to attend to give witness, there are no principles of law that enable persons to resist on this account. Indeed, even though it is contrary to our general tradition of not imposing legal obligations on citizens to cooperate with the police, it is possible to create offences for failing to do so, even with respect to reporting crime.¹¹⁸

(ii) Interrogating a Suspect

When a suspect is being subjected to “investigative hearings,” or where a person is forced to disclose his or her own criminality during questioning, section 83.28 disrespects basic self-incrimination principles. It is a section that overtly contemplates hauling suspects into court and forcing them to speak, on pain of punishment, not for a civil purpose or to aid in the operation of a regulatory scheme, or to help dispose of a matter before the court, but rather for investigative purposes relating to crimes they may have committed, or are about to commit.¹¹⁹ In some measure the face of this provision is vaguely familiar, albeit with a decidedly more civil visage than the last time it was seen in the Anglo-Canadian legal tradition — in the accursed Courts of Star Chamber and High Commission.¹²⁰ Without question, the provision contravenes the principle against self-incrimination.

¹¹⁸ See s. 50(1)(b) of the *Criminal Code* of Canada making it an offence not to report treason. For this reason, the new provision, s. 83.1 of the *Criminal Code*, created by the *Anti-Terrorism Act*, which makes it an offence not to disclose the existence of terrorist property in one’s possession or information about a transaction involving terrorist property, is not offensive save insofar as it might purport to compel self-incrimination or breach of solicitor-client privilege or confidentiality.

¹¹⁹ Since inchoate offences are so aggressively defined in the *Anti-Terrorism Act*, disclosures by persons about their planned offences would involve disclosure of the commission of an offence.

¹²⁰ I am not attempting to be hyperbolic by making this allusion. The processes of the Courts of Star Chamber and High Commission were far worse than the most fanciful conception of the *Anti-Terrorism Act*. The processes of those courts violated virtually every precept of justice known to the contemporary criminal law, including having judges acting as an arm of the King, persons being brought forward on mere suspicion without a specific allegation against them having been made, and then being forced to speak, if necessary with the aid of torture in closed proceedings conducted in the absence of counsel, where the inquisitors acted as the judges. See Paciocco, *Getting Away with Murder: The Canadian Criminal Justice System* (1999), at 154-60 for a discussion of the Court of Star Chamber and the Court of High Commission, and see Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination* (1968) and Ratushny, *Self-Incrimination in the Canadian Criminal Process* (1979). Still, the *Anti-Terrorism Act* in general, and s. 83.28 in particular, replicate, in more moderate form, some of the characteristics of this sorry period of history, including arrest on suspicion, compelling answers for investigative purposes, and co-opting judges as agents to assist in the investigation of crime, possibly behind closed doors.

This does not mean, however, that it violates the Charter. It is not possible to be dogmatic on that account because constitutional self-incrimination protection, like most Charter protection, is unpredictable. As Iacobucci J. has explained, “the principle against self-incrimination may mean different things at different times and in different contexts.”¹²¹ To anticipate where the following discussion is going, it is my opinion that where subsection 83.28(4)(b) is being used to investigate an apprehended attack, the self-incrimination principles in the Charter will not be violated, even where a suspect is being questioned. If this legislation is used to interrogate suspects about criminal conduct by them that has already occurred, however, its use will contravene section 7 of the Charter. This will not cause the provision to be struck, but will limit its already limited utility.¹²²

(iii) Contravening Self-Incrimination Principles

To aid in understanding the impact of this provision on self-incrimination principles, it is useful to imagine for a minute that section 83.28 did not involve the intercession of a judge.¹²³ Imagine that the provision required citizens to attend at a police station when summoned, and threatened them with incarceration if they did not speak. Without question, this would be perceived as a Stalinistic breach of the right to remain silent. It would be greeted by those having a sense of history and a commitment to liberty with revulsion and disdain. Requiring individuals, on threat of punishment, to respond to state agents who

¹²¹ *R. v. S. (R.J.)* (1995), 36 C.R. (4th) 1, at 51 (S.C.C.).

¹²² I share expressions of doubt by others that all this section is likely to accomplish is to attract perjured or misleading testimony. Those who are not adverse to providing information will do so in the ordinary course. Those who are adverse are unlikely to break down on the stand and talk simply because of the power of the oath or affirmation, the threat of perjury or even expert cross-examination. Who would you be more afraid of offending if you had information, the court or a terrorist cell? As Professor Roach has noted, (and as John Henry Wigmore warned more generally) “compelled interrogation can be a risky shortcut to labour intensive and expensive police work and intelligence gathering”: Roach, “Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 137.

¹²³ The involvement of a trusted judge in a decorous and protective atmosphere who can remove the risk of abuse during the hearing, and who can protect privileged or near-privileged information from being disclosed, can distract one’s attention from the essential fact that this provision is about compelling the disclosure of information as part of an investigation. To remain focused on the self-incrimination concerns, *i.e.*, the *fact* of the compelled extraction of information rather than the *mode* in which it is compelled, one must, in my opinion, airbrush out the sanitizing but, for this purpose, immaterial involvement of a judge. We would do well to remember that the Courts of Star Chamber and High Commission, where the most notorious breaches of self-incrimination rights in Anglo-Canadian history occurred, were presided over by judges.

demand information is offensive because it contravenes the principle against self-incrimination. That principle, in turn, rests on an amalgam of considerations. First, it reflects a conception of liberty, an idea about the relationship between citizen and state, that was forged in our political history, and is now expressed in the right to remain silent and in the “principle of a case to meet.”¹²⁴ Second, the principle against self-incrimination exists to respect the dignity of individuals. Third, it exists because of pragmatic appreciation that compelled information is not always terribly trustworthy. Each of these objectives are compromised in some measure by “investigative hearings.”

(A) The Right to Silence and the Principle of a Case to Meet

Dealing with each of these in turn, the conception of liberty expressed in the “principle of a case to meet” is normally thought of as a trial principle, but a moment’s reflection illustrates that it has broader links. It is an adjunct to the “right to silence” and the “voluntariness” conception at common law, that preserves to suspects the right to choose whether to speak to the authorities prior to the trial commencing.¹²⁵ We have long believed that, in a free society, citizens are entitled to be left alone by the state until good cause has been shown for depriving them of that liberty. This includes being left free of legal compulsion to answer the allegations made by authorities prior to trial. It is the same basic idea that requires the Crown to bear the burden of proof in a criminal case, or to “show cause” in an interim release hearing. The suspect is to be left alone until a case to meet has been shown, entitled even to refuse to dignify an allegation with a response.

This, of course, is a political ideal, a conception of fairness or justice that not everyone shares. It is rejected entirely, for example, in totalitarian or communist states, and although the Canadian government has a laudable record of respecting it, this principle is compromised by section 83.28. A provision that compels individuals to be interrogated, on pain of punishment, about their own conduct is inconsistent with this notion. This is so whether the compelled testimony occurs in a police station or before a kindly judge. The principle is every bit as breached whether the person is held incommunicado at the time or given the right to have counsel present who can advise the suspect from time to time that he will have to keep on answering. The principle is violated notwithstanding the protection for privileges and near-privileges, and even though the At-

¹²⁴ See *Dubois v. R.*, *supra*, note 27, at 215, and see Ratushny, “The Role of the Accused in the Criminal Process” in Tarnopolsky and Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at 358-59.

¹²⁵ *R. v. Hebert* (1990), 57 C.C.C. (3d) 1, at 30 (S.C.C.).

torney General said the interrogation was acceptable by consenting to the procedure, and even though five years from now the power might evaporate under a sunset clause. While treatment would be worse without these protections, it would violate the right to remain silent or the principle of a case to meet no more.

(B) Respect for the Integrity of the Individual

What, then, of respect for the integrity of the individual? This, too, is a conception born of history. It had to do with compassion for guilty persons, as well as those innocent persons who might be roped into investigations as suspects. When guilty persons were brought before the Courts of Star Chamber and High Commission, they were put in what history has judged to be the “cruel dilemma” of either having to breach their oath to God, or incriminate themselves and invite punishment. No person, it was felt, should be forced to be his or her own accuser in this fashion.¹²⁶ As for persons who are innocent, the ignominy of having to face and answer wrongful, infamous accusations was seen to contravene their dignity.

Section 83.28 only partially respects these ideals. It avoids the full “cruel dilemma” by providing “use immunity,” something that I will suggest below will likely save it from constitutional failure on self-incrimination grounds. On the other hand, even though persons who are brought before a judge during an investigative hearing are not incriminating themselves directly because their answers cannot be used against them, the guilty among them are compelled, as part of an investigation, to be their own accusers, and innocent suspects are subjected to compulsion and infamous allegations.

(C) The Pragmatic Consideration

The pragmatic consideration against compelled self-incrimination, that it tends not to produce dependable information, supports the “voluntariness” rule at common law¹²⁷ and the “right to silence.” Although the concern of the common law was mainly about persons falsely implicating themselves by giving involuntary confessions in the face of pressure,¹²⁸ compelled testimony by suspects is also offensive because it creates the risk that persons compelled to speak will feel they have no choice but to protect themselves, and will therefore falsely exculpate themselves, ultimately to their

¹²⁶ See Salhany, *The Origin of Rights* (1986), at 93.

¹²⁷ See *R. v. Hebert*, *supra*, note 125.

¹²⁸ See *R. v. Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.).

prejudice either by committing further offences such as perjury or by producing information that can be used to cross-examine them. This is another, albeit less sympathetic, “dilemma” created by compulsion. In *R. v. White*, for example, the Supreme Court of Canada was concerned with whether legislation compelling a person to identify herself as the driver of a motor vehicle after an accident contravened self-incrimination principles. One of the factors the Court considered in answering in the affirmative was that there would be a tendency on the part of persons to speak falsely in denying their involvement for fear of the consequences.¹²⁹

It is therefore apparent that section 83.28 violates self-incrimination principles.¹³⁰ If it is going to be upheld, it must be with cognizance that the provision represents a serious compromise on long-standing values.

(iv) The Limited Contribution of the Charter

The government is counting on subsection 83.28(10) to prevent a finding of unconstitutionality. Subsection 83.28(10) provides “use immunity” and “derivative use immunity.” Use immunity operates to compel the witness to answer, but then guarantees that the answers provided will not be used as evidence of guilt against that witness if he or she is ever prosecuted. Our law has used “use immunity” as a sufficient substitute for granting a privilege to refuse to answer self-incriminating questions since 1893. “Derivative use immunity,” in turn, prevents evidence found as a result of the compelled testimony from being used to incriminate the witness in a subsequent proceedings. For example, if a witness were to disclose the location of a biochemical warfare lab while testifying during an investigative hearing, the contents of the lab could not be used as evidence against him.

As can be seen, neither use immunity nor derivative use immunity prevents the suspect from being examined. They simply result in the exclusion of self-incriminatory evidence in a subsequent proceedings. This prevents self-incrimination in the full sense from occurring.¹³¹ Thus, while persons may have

¹²⁹ *R. v. White*, *supra*, note 115, at 226 (S.C.C.).

¹³⁰ Another way to demonstrate this is to apply the general four-part test used in *R. v. White*, *id.*, to determine whether statutory compulsion to answer questions violates self-incrimination rights. The Court used the factors of the existence of coercion, the existence of an adversarial relationship, the risk of unreliable statements, and the risk of abuse of power, to identify whether statutory compulsion would do so. Each of those factors supports the view that s. 83.28 compromises self-incrimination principles.

¹³¹ In truth, subs. 83.28(10)(a) and (b) are *in some measure* redundant because s. 13 and s. 7 of the Charter would have supplied use immunity and derivative use immunity even had subs. 83.28(10) been absent. These sections would have been completely rather than “in some measure”

their liberty abridged by losing their right to silence and by being compelled to speak about their own criminality at an investigative hearing without a case to meet having been shown, and while those persons may have to suffer the indignity of speaking about their own criminal conduct, and while they may have to endure the cruel dilemma of whether to admit their involvement or lie, they will not be furnishing “evidence” against themselves. It is precisely because similar restraint is shown that the Charter permits the compelled testimony of suspects in aid of regulatory regimes, under statutory compulsion, and in the separate trials of confederates. So long as these persons are protected from having their answers and derivative evidence used against them to prove directly their criminal conduct, this will generally satisfy the Charter.

The protection against use of the evidence to incriminate the witness will therefore go a long way in preserving section 83.28 from Charter-based self-incrimination attack, but it may not get all the way there. In every one of the cases where compelled, self-incriminatory testimony has been upheld, it has been upheld because the proceedings or the statutory compulsion in question was serving a public function unconnected to the criminal investigation of the witness. By contrast, when used against a suspect, section 83.28 is not unconnected to a criminal investigation of the witness. It is being used precisely as a form of criminal investigation.

It has already been determined that even use immunity and derivative use immunity will not prevent a Charter violation, where the sole purpose of compelling the testimony of a witness is to obtain incriminating information about that witness. It is contrary to the principles of fundamental justice to compel a person to testify in a proceedings solely so that the state can interrogate him under oath to obtain incriminating information about him. The state power to compel testimony is not supposed to be used as a substitute for investigation of persons who are compelled.¹³²

Even where there is some other, legitimate purpose for compelling the witness to testify, if the predominant purpose of compelling that testimony is to obtain self-incriminating information from that witness, the Charter might still be violated by requiring that testimony.¹³³

redundant, save for the curious fact that subs. 83.28(10)(b) provides greater protection against the use of derivative evidence than the Charter requires. Section 7 of the Charter permits derivative evidence to be admitted if the Crown can show on the balance of probabilities that the derivative evidence referred to in the testimony would inevitably have been discovered even without the testimony: *R. v. S. (R.J.)*, *supra*, note 121, and *British Columbia (Securities Commission) v. Branch* (1995), 38 C.R. (4th) 133 (S.C.C.).

¹³² *British Columbia (Securities Commission) v. Branch*, *id.*

¹³³ The law is unsettled as to precisely what the test is in such a case. In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1995), 98 C.C.C. (3d) 20, at 55-56

These constitutional principles do not present a problem for subsection 83.28(4)(b) interrogations because, where that subsection applies, the questioning is being done for the legitimate public purpose of forestalling a reasonably apprehended terrorist attack. Nor do these rules present a problem where section 83.28(4)(a) is being used to compel testimony from someone who is not a suspect in an investigation into a crime that has occurred. Where, however, section 83.28(4)(a) is being used to conduct an investigative hearing of a suspect into an offence that has already occurred, these rules will be breached, since the purpose of that investigative hearing will be to obtain incriminating information about the witness. This should not cause section 83.28(4)(a) to fail, since it is a provision that may be used either constitutionally or unconstitutionally. It will, however, deprive the provision of much of its utility because the Charter should prevent the section from being employed to interrogate terrorism suspects about their involvement in offences that have already occurred.

The inability to use the investigative hearing procedure to compel suspects to testify against themselves would be a major setback to the legislation. One might not think so because the obvious question that arises from the very existence of use and derivative use immunity is, what will the government lose? They could not have used the testimony to prosecute the terrorist in any event. Why bother calling him at all? The answer is simple. It has to be remembered that this enactment is part of an international initiative. Allied countries are all claiming jurisdiction to try terrorism offences committed outside of their borders. In reality, given likely targets, there is less prospect of a Canadian terrorism investigation leading to a prosecution in Canada than there is in it being used to support an American investigation and prosecution of a suspect who has fled to Canada. A person subjected to an investigative hearing in Canada would not be able to claim the benefits of use immunity or derivative use immunity if deported for trial to the United States, because the United States is not bound by the Canadian *Anti-Terrorism Act*, just as American authorities are not bound by the Charter. Should section 7 be used to prevent the compelled testimony altogether, it will therefore be a huge disappointment to the government. It will be unable to assist its allies by compelling suspects who will be tried in

(S.C.C.), Cory J. suggested that in all such cases, the witness will be exempted from testifying. Justice Sopinka took a less aggressive view in *British Columbia (Securities Commission) v. Branch, id.*, at 143. In his view, the witness would be excused unless the Crown can justify any potential prejudice to the accused caused by the compelled testimony. Justice Sopinka suggested that if the only prejudice is the possible subsequent use of the testimony or derivative evidence, there will be no problem because ss. 13 and 7 prevent this form of prejudice from arising. With subs. 83.28, however, additional prejudice, in the form of the stigmatization and trauma of being interrogated as a suspect in a terrorist investigation, or the risk that admissions obtained could be used in foreign proceedings, may not be justifiable.

foreign jurisdictions to incriminate themselves in Canada in order to aid in their ultimate prosecution in that foreign jurisdiction.

(d) *Judicial Impartiality and Independence Challenges*

(i) The Involvement of a Judge Should Make This Process More, Not Less Vulnerable to Charter Challenge

The government is no doubt of the view that the presence of a judge at the time of the compelled testimony will support the reasonableness of this provision;¹³⁴ had they adopted the hypothetical system posed above and required citizens to go directly to the police station to be interrogated, on pain of punishment for refusing, one might think the section would be a harder constitutional sell. In fact, the opposite could be true. The Canadian Bar Association expressed concern about the involvement of judges in investigative hearings in its submissions before the legislative committees: “The investigative hearing provisions . . . bring the judiciary uncomfortably close to the police investigation activities.”¹³⁵ That comment is too restrained. This is the most troubling feature of this provision from the perspective of our fundamental traditions. Judges are co-opted into the criminal investigative process. They are brought into the process for no other purpose than to husband the inquisition. They are not adjudicating anything. There are no factual controversies to resolve, or no legal question to be tried, other than those that arise incidentally to the interrogation. This is not even like a search warrant application where a judge is called on to pass judgment about whether the grounds exist for providing legal authorization to invade privacy. While judges are not cast into the role of inquisitors (neither posing the questions nor passing judgment at this proceedings) they are nonetheless expected to become part of the state’s investigation. This, in my opinion, is a startling and a serious contravention of those basic constitutional norms that define the role of judges in our accusatorial, adversarial system. This jeopardizes the entire section, irrespective of the limited protection given to the fact of self-incrimination under the Charter.

¹³⁴ So, too, are other commentators. See, for example, Roach, “Dangers of a Charter-Proof and Crime-Based Response to Terrorism” in Daniels *et al.* (eds.), *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001), at 136.

¹³⁵ The Canadian Bar Association, “Submissions on Bill C-36: *Anti-Terrorism Act*, (October 2001), at 4.

(ii) The Meaning of Impartiality and Independence

It is universally understood that judges are to be both independent and impartial. They could not discharge their function of conducting fair trials, or preserve the confidence of the public, if they were not. In my view, section 83.28 implicates both independence and impartiality.

“Although there is obviously a close relationship between independence and impartiality, they are . . . distinct values or requirements.”¹³⁶ “Impartiality” refers to the state of mind or attitude of the tribunal in relation to the issue or the parties. It connotes the absence of bias. “Independence” connotes not merely a state of mind but a kind of “status or relationship to others, particularly to the executive branch of government.”¹³⁷ The concept implies that judges should be free from executive or legislative encroachment.¹³⁸ “Independence,” in turn, has “two dimensions,” the individual independence of the judge and the institutional or collective independence of the court or tribunal of which the judge is a member.¹³⁹ As Le Dain J. explained in *Valente*, even if an individual judge enjoys the essential conditions of independence, if the court or tribunal over which he presides is not independent of other branches of government, the judge is not independent.¹⁴⁰

Judges must not only be impartial and independent. It is “important that a tribunal should be perceived as independent, as well as impartial, and that [like the test for impartiality] the test for independence should include that perception.”¹⁴¹

(iii) The Myth of the Judge as a Non-Participant in the Investigation

What impact does section 83.28 have on the impartiality or independence of the judiciary? It is always possible to rationalize matters and to say that the judge is there as a neutral player who can offer protection to the witnesses, thereby preserving impartiality and independence, but this, in my view, is unconvincing. The government is clearly counting on the oath of the witness and the threat of contempt of court to enforce this system, and it is using the power of the judicial office, not to obtain a legal ruling or to resolve a question of fact, but as a form of coercion to compel information in the advancement of

¹³⁶ *Valente v. R.* [1985] 2 S.C.R. 673, at 685.

¹³⁷ *Id.*

¹³⁸ *Manitoba Provincial Court Judges Assn. v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3, at 87.

¹³⁹ *Id.*, at 82.

¹⁴⁰ *Supra*, note 136, at 687.

¹⁴¹ *Id.*, at 689.

the executive, investigative function. The simple fact that section 83.28(4)(b) contemplates that other reasonable efforts must first be unsuccessfully undertaken to attempt to get this information before section 83.28 is to be resorted to demonstrates as much. The judge is not simply a referee. Judicial power is conscripted by the government for coercive purposes.

(iv) Impartiality and Its Appearance

The regime contemplated by section 83.28 will have no effect on the impartiality of the judge conducting the investigative hearing unless she also presides over the ultimate trial, so actual impartiality is not a concern. It is the appearance of impartiality on the part of the court that may be compromised. If, like independence, impartiality has both an individual and a court-based dimension, this will render the section unconstitutional.

In my opinion, the use of courts as investigative tools must raise an appearance of partiality. Can confidence be placed in the impartiality of a court that is trying accused persons, when judges of that same court have assisted the state in its investigations? Indeed, the fact that this can happen with respect to no other kind of investigation can only add to its tawdry appearance. I draw this conclusion even though apprehension of impartiality is to be adjudged through the eyes of the reasonable and informed person, familiar with the traditions of the criminal justice system.¹⁴² Since our common law traditions scrupulously avoid giving judges both an investigative and adjudicative function, and separate the two precisely in order to avoid the loss of impartiality, it is doubtful that this reasonable and informed person would not apprehend bias. Indeed, not only have we separated the prosecutorial and judicial function, our tradition has been to limit the role of the judge in the evidence-gathering process even during a trial, for fear that the judge's eyes will become clouded by the dust of combat.¹⁴³ Where a judge gets too involved in discovering evidence to the detriment of the accused, we consider that the accused has not had a fair trial.¹⁴⁴ Even though the judge will not be the direct inquisitor during an "investigative hearing," the same principle is doubtlessly implicated. In our tradition, judges lose the appearance of neutrality if they get too close to investigative functions.

¹⁴² *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353, at 390 (S.C.C.).

¹⁴³ *Yuill v. Yuill*, [1945] 1 All E.R. 183, at 189 (C.A.).

¹⁴⁴ See, for example, *R. v. Stewart* (1991), 62 C.C.C. (3d) 289 (Ont. C.A.).

(v) Independence and Its Appearance

The central concern, however, is with independence. There is no need to craft novel conceptions of institutional partiality to make “independence” arguments. Section 83.28 contravenes judicial independence, in my view, because it creates a rule of law that contemplates using the judge to facilitate or further the executive function of investigating crime. Again, it bears repeating that the judge is not facilitating that function by performing a judicial role and deciding such legal questions as whether, according to law, a warrant should issue. The judge is facilitating the investigation by presiding over an “investigative hearing.” Even though the legislation does not purport to command judges to perform this function, but leaves them with the discretion as to whether to conduct such a hearing,¹⁴⁵ the appearance of independence is compromised. Indeed, the very decision by a judge to elect to participate raises a reasonable apprehension that the judge is not independent of the executive, having chosen to assist in the investigation.

(vi) The Technical Dimension

If all of this is right, what implications does it have for section 83.29? The technical side of the matter is not straightforward. In the judicial independence cases, the parties argued section 11(*d*), the right of accused persons to a fair trial before an independent and impartial tribunal. There is no person charged with an offence at the investigative hearing, so section 11(*d*) does not apply directly. Section 7 may not directly apply either because it is not the investigative hearing that poses a risk to the liberty or security of the person of the accused.¹⁴⁶

Notwithstanding this, it is obvious that if independence or impartiality of the judiciary is compromised by this section, a means will be found to prevent that independence and impartiality from being violated. The most probable way of resolving the technical problem is for a court to find that if it were to conduct an investigative hearing, that would undermine the appearance of impartiality or independence in any and all subsequent trials. The court could then refuse to conduct the hearing to preserve its ultimate independence and to avoid tainting the repute of the administration of justice.

¹⁴⁵ Subsection 83.28(4) provides that the judge *may* make an investigative order [*Criminal Code*, en. 2001, c. 41, s. 4].

¹⁴⁶ Section 7 has been recognized, however, as available to prevent compelled testimony in proceedings where the liberty of the suspect is not in peril.

In *Assn. (Manitoba) v. Manitoba (Minister of Justice)*¹⁴⁷ the Court relied on an unwritten constitutional principle, traced to the *Act of Settlement* of 1701¹⁴⁸ and affirmed in the preamble to the *Constitution Act, 1867*,¹⁴⁹ to make orders relating to the financial security of judges. Similar reasoning could require a non-Charter-based challenge, in which the very jurisdiction of the legislative branch of government to pass this kind of law is questioned.

One way or another, if “investigative hearings” do compromise impartiality or independence, the Constitution would prevent them from being conducted, and section 1 of the Charter could do nothing about it; when could it be demonstrably justifiable in a free and democratic society for a court to surrender its impartiality or independence? To ask the question is to answer it.

V. CONCLUSION

The *Anti-Terrorism Act* is important legislation. I am not opposed generally to its passage. It is not, however, without serious constitutional problems. Notwithstanding honest efforts to make most of it Charter-compliant, there are excesses born of a natural enthusiasm for the critically important enterprise being undertaken. Where excesses happen in this fashion, it is the function of the Charter to roll them back.

I have featured three key provisions in this paper. The first, the use of a government regulation as a substitute for in-court proof of an essential element of the “terrorist group” offences, is a reprehensible and frightening initiative. It cannot be allowed to succeed, no matter how pressing the terrorist problem, for it is nothing more than acceptance that persons should be convicted on the basis of reasonable beliefs, even in the absence of proof.

The second, the so-called “Recognizance with Conditions” provision that allows both arrest and recognizance, may fair slightly better. Many find the idea of restraining liberty because of the apprehension of future offences troubling, but the idea that this will be acceptable in some contexts has a significant pedigree. If there is a problem, it is in the intolerably low standards used to spark detention and

recognizance. At the very least, reasonable grounds should be required, and there are sound constitutional arguments supporting this view.

The third provision examined, “investigative hearings,” is not unconstitutional because of self-incrimination considerations, as is most commonly be-

¹⁴⁷ *Supra*, note 138.

¹⁴⁸ (U.K.), 12 & 13 Will. 3, c. 2.

¹⁴⁹ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II., No. 5.

lieved, although such considerations could undermine the procedure where a suspect is being questioned about an offence that has already occurred. More important, though, is the fact that the form of “investigative hearings” developed in the *Anti-Terrorism Act* will compromise the appearance of judicial neutrality and independence. This should cause the whole scheme to fail.

Whether I am right or wrong in these particular opinions, I have absolute confidence in this: the biggest threat posed by this legislation is that it will support a “creeping incrementalism” as the government borrows its tools, techniques and novel offences to combat less pressing and less exceptional criminal conduct. I fear that this enactment will become part of the fabric of the criminal law in this country, unless courts are scrupulous and governments conscientious. This statute is not just a threat to terrorists, or to those who are wrongly suspected of being terrorists based on creed or nationality, or even to those business people, professionals and charitable donors who deal with listed groups whom the government believes, without proof beyond a reasonable doubt, to be engaged in terrorist activity. If this enactment becomes in any measure the prototype for law reform, it is a threat to all of us.

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