COMMISSION OF INQUIRY INTO THE INVESTIGATION OF THE BOMBING OF AIR INDIA FLIGHT 182

REPLY SUBMISSIONS OF THE ATTORNEY GENERAL OF CANADA

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I. INTRODUCTION

1. Among the recommendations proposed in their submissions filed with the Commission the following parties and interveners have suggested that there should be an offence in the *Criminal Code* of incitement to terrorism or of glorification of terrorist entities and terrorist activity for the purpose of emulation: the Air India Victims families association, Canadian coalition for Democracies and B'nai Brith.

2. The purpose of this submission is to outline the existing *Code* provisions that address incitement to terrorism. Glorification of terrorism may be considered to be a form of indirect incitement to terrorism. In addition, this submission also brings to the Commission's attention two *Security of Information Act* offences.

3. This submission also addresses a statement contained in the submission of the Federation of Law Societies of Canada.

II. SUMMARY OF CANADIAN CRIMINAL LAW

4. The Criminal *Code* currently has a number of offences that address incitement to terrorism, implicitly or specifically.

A. Counselling to Commit a Crime Whether or Not the Crime is Committed

5. Under subsection 22(1) of the *Criminal Code*, a person who counsels another to be a party to an offence where the other person afterwards commits the offence, is also a party to the offence and subject to the same penalty as the person who committed the offence. Subsection 22(3) defines "counsel" to "include procure, solicit, or incite".

6. Under section 464 of the *Criminal Code*, a person who counsels another to commit a crime, even though the crime is not committed, is also subject to a criminal penalty, albeit a lesser penalty than would be imposed if the crime were committed.

7. The fault element or *mens rea* for counselling is not restricted to intention. In *R. v. Hamilton,*[1] the Supreme Court of Canada held that the *mens rea* for counselling the commission of a crime which is not in fact committed included recklessness. The Supreme Court stated that:

> [I]t must be shown that the accused either intended that the offence counselled be committed or knowingly counselled the commission of an offence while aware of the unjustified risk that the offence

[1] *R. v. Hamilton*, [2005] 2 S.C.R. 432.

counselled was likely to be committed as a result of the accused's conduct.[2]

B. Counselling a "Terrorist Activity" or a "Terrorism Offence"

8. The *Criminal* Code expressly covers counselling, including inciting, the commission of a "terrorist activity" or a "terrorism offence".

9. Subsection 83.01(1) of the *Criminal Code* defines "terrorist activity". Part of this definition provides that an act or omission falling within the definition of terrorist activity "includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission …" As mentioned, counselling, by subsection 22(3) of the *Code*, includes inciting. Hence, someone who incites another to commit an act or omission that constitutes "terrorist activity" also engages in "terrorist activity". As well, someone who threatens the commission of a "terrorist activity" also engages in "terrorist activity".

10. Section 2 of the *Criminal Code* defines "terrorism offence" in paragraph (d) of the definition to mean a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraphs (a), (b) or (c) of the definition. The offences in paragraphs (a) to (c) mean: (a) an offence under sections 83.02 to 83.04 or 83.18 to 83.23 of the Code (relating, for example, to the financing of terrorism, participating in an activity of a

[2] *Ibid*, at pp. 16-17.

terrorist group and facilitating terrorist activity); (b) an indictable offence under the *Criminal Code* or any other Act of Parliament committed for the benefit of, at the direction of or in association with, a terrorist group; and (c) an indictable offence under the *Criminal Code* or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity. "Terrorist group" and "terrorist activity" are defined in section 83.01 of the *Code*. So counselling or inciting another person to engage in conduct that falls within paragraphs (a) to (c) of the definition of "terrorism offence" also constitutes a "terrorism offence".

C. Specific Crimes Designed to Prevent Terrorism

(i) Knowingly Participating or Contributing to Any Activity of a Terrorist Group (s. 83.18)

11. Subsection 83.18 (1) of the *Criminal Code* says every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. Subsection 83.18(2) adds that the offence may be committed whether or not a terrorist group actually facilitates or carries out a terrorist activity; the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group. By subsection 83.18(3), "participating in or contributing to an activity of a terrorist group" includes, in part,

providing, receiving or recruiting a person to receive training; providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with, a terrorist group; or recruiting a person in order to facilitate or commit a terrorism offence. Under subsection 83.18(4), factors that a court may use to determine whether an accused participates in or contributes to any activity of a terrorist group include whether the accused uses a name, word, symbol or other representation identifying the terrorist group; frequently associates with any of the persons who constitute the terrorist group; or receives any benefit from the terrorist group.

(ii) Knowingly Facilitating a Terrorist Activity (s. 83.19)

12. Subsection 83.19 (1) provides that every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. By subsection 83.19(2), a terrorist activity is facilitated whether or not the facilitator knows that a particular terrorist activity is facilitated; any particular terrorist activity was foreseen or planned at the time it was facilitated; or any terrorist activity was actually carried out.

(iii) Knowingly Instructing a Person to Carry Out Activity for a Terrorist Group (s. 83.21)

13. Subsection 83.21 (1) explains that every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of, or in association with, a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an

indictable offence and liable to imprisonment for life. Subsection 83.21(2) outlines matters which are immaterial to the commission of the offence, such as whether the activity instructed is carried out, a particular person is instructed or known by the accused, the person instructed has any knowledge of the relationship of the activity to a terrorist group, any thing is actually carried out or facilitated or an ability to do so is actually enhanced, or the accused knows the specific nature of any terrorist activity that may be carried out or facilitated.

14. This offence imposes criminal liability upon those who play leadership roles in respect of activities that are intended to enhance the ability of the terrorist group to commit or facilitate terrorist activity.

(iv) Knowingly Instructing a Person to Carry Out a Terrorist Activity (83.22(1))

15. By subsection 83.22 (1), every person who knowingly instructs, directly or indirectly, any person to carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for life. By subsection 83.22(2), the offence may be committed whether or not the terrorist activity is actually carried out, the accused instructs a particular person to carry out the terrorist activity, the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity or the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity.

(v) Knowingly Harbouring or Concealing a Terrorist (s. 83.23)

16. By section 83.23, every one who knowingly harbours or conceals any person whom he or she knows to be a person who has carried out or is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

D. The Crimes of Hate Propaganda

17. The Criminal *Code* has three crimes of hate propaganda directed against an identifiable group:

(a) advocating genocide against an identifiable group (subsection 318(1));

(b) by communicating statements in any public place, inciting hatred against an identifiable group where such incitement is likely to lead to a breach of the peace (subsection 319(1));

(c) by communicating statements, other than in private conversation, wilfully promoting hatred against an identifiable group (subsection 319(2)).

18. Subsection 319(3) sets out four defences to the crime of wilfully promoting hatred. These are: (a) that the accused establish that the statements were true; (b) that the accused, in good faith, expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) that the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and that the accused, on reasonable grounds, believed them to be true; or (d) that, in good faith, the accused intended to point

out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

19. "Identifiable group" is defined to mean any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

With regard to the fault element or *mens rea* required for the crime of wilful promotion of hatred in subsection 319(2) of the *Code*, Canadian courts have interpreted the word "wilful" to mean intention.[3]

20. In 1990, in *R. v. Keegstra,*[4] the Supreme Court of Canada upheld the constitutionality of the crime of wilfully promoting hatred against an identifiable group in a 4-3 decision.

21. The *Anti-terrorism Act* created a procedure in 2001 whereby a judge may order the deletion of hate propaganda stored on or made available to the public on a computer system. This provision is found in subsection 320.1 of the *Code*.

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[3] See *R. v. Keegstra*, [1990] 3 S.C.R.697, where Dickson C.J, for the majority of the Supreme Court of Canada approved of the interpretation of 'wilfully" given by Martin J.A. in R. *v. Buzzanga and Durocher* (1979), 49 C.C.C. 369 (Ont. C.A.). Martin J.A. had interpreted the word "wilfully" to mean intention, not recklessness. Martin J.A. had concluded that "wilfully" is satisfied only where an accused subjectively desires the promotion of hatred or foresees such a consequence as certain or substantially certain to result from an act done in order to achieve some other purpose. Dickson C.J. also "wholeheartedly" endorsed the view of the Law Reform Commission of Canada that "wilfully" should be restricted to mean "intention".

[4] *R. v. Keegstra*, [1990] 3 S.C.R. 697. The majority of the Supreme Court concluded that, although the crime of wilfully promoting hatred against an identifiable group offends the freedom of expression guarantee in section 2(b) of the *Charter*, it constitutes a reasonable limit on the freedom under section 1 of the *Charter.*

E. Spreading False News – Held to be Unconstitutional

22. The submission to this Inquiry made by B'nai Brith refers, in part, to the crime of spreading or publishing false news. This crime is found in section 181 of the *Criminal Code*. It provides:

> Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

23. However, in 1992, the Supreme Court of Canada held that this provision violated the freedom of expression guarantee in s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and so section 181 is of no force and effect.[5]

F. Certain Offences under the *Security of Information Act*

24. Part 2 of the *Anti-terrorism Act* substantially amended the *Official Secrets Act*, which became the *Security of Information Act* (*SOIA*).

25. One of these amendments was the addition of an offence of foreign-influenced and terrorist-influenced threats or violence, found in section 20 of the *SOIA*. This offence was designed to address coercive activities against émigré communities in Canada.

26. Subsection 20(1) of the *SOIA* says that every person commits an offence who, at the direction of, for the benefit of or in association with, a foreign entity or a

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5 *R. v. Zundel*, [1992] 2 S.C.R. 731.

terrorist group, induces or attempts to induce, by threat, accusation, menace or violence, any person to do anything or cause anything to be done

(a) that is for the purpose of increasing the capacity of a foreign entity or terrorist group to harm Canadian interests; or

(b) that is reasonably likely to harm Canadian interests.

27. The maximum penalty for *committing* this indictable offence is imprisonment for life.

28. The preparatory acts offence in section 22 of the *SOIA* relates to doing anything in preparation of the commission of certain named offences in the *SOIA*. The Act provides the state with the ability to investigate, and where appropriate, prosecute a foreign agent or terrorist before the agent or terrorist has caused, or actually attempted to cause, any harm to Canada.

29. The issue of the creation of an offence in the *Criminal Code* of glorification of terrorist activity for the purpose of emulation was a recommendation in the House of Commons report RIGHTS, LIMITS, SECURITY: A COMPREHENSIVE REVIEW OF THE ANTI-TERRORISM ACT AND RELATED ISSUES. The Government responded to this recommendation by stating:

> After considering the balance between the need for effective anti-terrorism provisions and freedom of expression, the Subcommittee also recommended the creation of a new offence of the glorification of terrorism for the purpose of emulation. The Government will carefully consider whether such an offence ought

to be created, bearing in mind the *Canadian Charter of Rights and Freedoms* (*Charter*) and the policy implications.

30. The Special Senate Committee on the *Anti-terrorism Act* did not include a similar recommendation.

III SUBMISSION OF THE FEDERATION OF LAW SOCIETIES OF CANADA

31. The Federation of Law Societies of Canada in their submission to the Commission has stated:

> "Case law supports the view that a Federal Court judge hearing a section 38 application has the discretion to appoint a special advocate to represent the accused's interest in disclosure of the information in issue" (p, 2).

32. The footnote to this statement refers to the "concurring opinion of Pelletier J.A. in decision of the Federal Court of Appeal in *Khawaja v. Canada (Attorney General)*, 2007 FCA 388, upholding the constitutional validity of *ex parte* proceedings under section 38: see paras. 77-78."

33. Paragraphs 77 and 78 in the case cited in the footnote refer only to the discretionary authority of the Court to appoint an *amicus curiae*. Similarities in the *amicus* and special advocate were recently considered by Justice Mosley when appointing an *amicus curiae* in the case of *Khadr v. Canada (Attorney General)* (2008 FC 46). However, Justice Mosley maintained an essential distinction that an *amicus* is to assist the court while a special advocate is selected by the interested person. Justice Mosley would not accept such a constraint on the exercise of the court's discretion stating:

> "It is open to the Court to select independent counsel worthy of the Court's trust and confidence whether or not they are proposed by the parties."

34. Thus it may be concluded that a mechanism such as the creation of a special advocate, chosen by the individual to protect them while keeping critical information confidential, falls within the purview of Parliament (See *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9 (par. 87) whereas an *amicus curiae* remains an exercise of a court's inherent jurisdiction over its own process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF MARCH, 2008.

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