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Yesterday's Law: Terrorist Group Listing in Canada

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ABSTRACT

Canada's approach to proscription differs from that of other Westminster democracies. After the negative example of listing in the October Crisis, 1970 and with the subsequent advent of a constitutional bill of rights, Canada does not ban organizations; instead it penalizes certain forms of conduct, above mere membership, with terrorist groups. "Terrorist groups" include entities listed proactively by the executive, but also entities that meet a functional definition in Canadian criminal law. In practice, the latter, functionally-defined terrorist groups have figured in most terrorism prosecutions—only a few cases have involved listed groups. With the new focus on Daesh (a listed group), that may begin to change. However, executive listing raises unresolved constitutional doubts in Canada, prompting concerns that reliance on proscription may be more trouble than it is worth. Listing has also been used with respect to individuals, but such listings in Canada have already produced false positives, perhaps because of the due process deficits of listing by the executive. In many respects, therefore, terrorist group listing is yesterday's law, problematic and of marginal utility. There may be reasons of administrative expediency to preserve listing, but the tool is more doubtful when used as a precursor to criminal prosecutions.

KEYWORDS

Canada; counterterrorism; criminal code; proscription

Introduction

Proscription-style tools have not mattered much in Canadian anti-terrorism. Dating to the period prior to 9/11 and bolstered substantially thereafter, Canadian terrorist "listing" laws are potent in principle, but have been rarely deployed in practice. Their insignificance may now be changing with the rise of Daesh and its affiliates. Even absent Canadian or UN listing, however, those inspired by or acting with Daesh would likely be convicted, as have other terrorists in Canada, without reliance on the executive's proscription of any specific terrorist group. In short, proscription in Canada is yesterday's law.

The first part of this article examines Canadian listing laws with attention to their origins, their use in relation to terrorism offences in Canada's Criminal Code,[1] and Canada's infrequent reliance on the executive listing in actual terrorism prosecutions to date. The second part of this article critiques Canada's listing laws. One such area of criticism is based on Canada's experience with listing "false positives," namely the listing of individuals as associated with Al Qaeda that were subsequently withdrawn presumably

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because the listing decision was based on faulty intelligence. We will also examine a range of due process deficits in the Canadian listing process. As is other countries, listing in Canada is done by the executive without notice to those affected and on the basis of secret intelligence that may never be disclosed even if listed entities attempt to challenge the listing. It also has the potential to substitute a political decision by the executive on the basis of secret and unchallenged information for a legal decision made on the basis of evidence. We will suggest that these flaws in the listing process are particularly contentious in a Canadian context that, unlike in the United Kingdom or Australia, includes a constitutional bill of rights and that concerns about constitutional complications may partially explain Canada's limited reliance on listing.

Listing in Canada

The negative example of listing during the October Crisis, 1970

In response to two acts of terrorism in October 1970 that resulted in one death, Canada invoked the *War Measures Act*.[2] This effectively resulted in a form of martial law. The Governor in Council (effectively the Canadian Cabinet) infamously issued a regulation in the early morning hours of October 16, 1970 that declared the Front de Liberation du Québec to be an unlawful association.[3] Being a member of the FLQ was made a crime punishable by five years imprisonment under these regulations.[4]

The retroactive executive listing of the FLQ as an unlawful association was challenged on the basis that it substituted an executive decision of guilt for decisions that should only be made by the courts. The challengers also argued that listing offended the presumption of innocence and required the accused effectively to testify. The courts, however, rejected this argument reasoning that Parliament was entitled to make retroactive laws that violated the presumption of innocence and other fair trial rights enshrined in supra-national law.[5]

Although the executive banning of the FLQ survived legal challenge at the time, its most lasting impact was as negative example. The use of the *War Measures Act*, and the imprisonment of hundreds of non-violent Quebec separatist sympathizers under it, was a moving force in Canada's enactment of the *Canadian Charter of Rights and Freedoms* (henceforth the Charter) in 1982 as the country's constitutionalized bill of rights. As will be seen, the Charter has already placed limits on the listing process and even Canada's comparatively restrained listing process remains vulnerable to Charter challenges.

Canadian law today does not ban groups as it did in October 1970. It also does not ban membership in groups in the manner of the United Kingdom *Terrorism Act 2000*[6] or Australian law.[7] In this respect, Canada today shares with the United States a more libertarian constitutional culture that is more resistant to the theory of militant democracy; that is, a view that democracies should ban groups that do not accept democracy.[8] This position also represents a form of learning from the 1970 October Crisis, Canada's most widely recognized overreaction to terrorism.[9] After 9/11, Canada enacted a massive anti-terrorism law containing proscription mechanisms, but it stopped short of criminalizing membership in proscribed groups or making those groups unlawful. Instead, the

Anti-Terrorism Act, 2001 criminalized certain conduct undertaken in association with a "listed entity" (or potentially, a listed individual).[10]

Outlawing groups (and membership in them) engages constitutional issues in Canada, where s. 2 of the *Canadian Charter of Rights and Freedoms* guarantees freedom of association defined broadly to include "the right to join with others and form associations. . .."[11] A terrorist or criminal organization could pursue both legitimate and criminal activities. A terrorist group such as Hamas may, for example, provide social services in an area it controls and even form the elected government of the area. A member engaged in that conduct may not, in fact, engage in the criminal aspect of the organization's conduct, or share its criminal purpose. Criminalizing mere membership may, therefore, trench too far on freedom of association. Canadian lawmakers both in the immediate aftermath of 9/11 and in the aftermath of two Daesh-inspired acts of terrorism in October, 2014 did not return to the October 1970 model of making membership in a listed terrorist group itself a crime. Canada's terrorism crimes require actual contributions to the terrorist group's illegal conduct, above mere association. They have so far withstood Charter challenges that alleged a breach of fundamental freedoms.[12]

Origins of Canada's listing laws

The Canadian government created Canada's first listing regime following UN Security Council resolution 1267, a 1999 instrument barring financial transactions with Taliban (and then Al Qaeda) affiliates listed by the Security Council. In doing so, the government treated resolution 1267 as a conventional sanctions regime. Hence, it used its regulatory power under Canada's *United Nations Act*[13] to create, in essence, regulatory offences. Under these regulations[14]—still in place—Canadians and those in Canada are barred from dealing in the property of those listed, and from providing financial services to them.

Canada followed this same pattern in the immediate aftermath of 9/11 and Security Council Resolution 1373. In October 2001, it issued the *United Nations Suppression of Terrorism Regulations*,[15] again made pursuant to the *United Nations Act*. The current version of the instrument enables the Canada government to unilaterally list someone where there are reasonable grounds to believe that the person has carried out, participated in, or facilitated a terrorist activity, or is controlled by or acting for someone who has.[16]

The *Suppression of Terrorism Regulations* criminalize a number of different sorts of transactions with individual persons so listed. For instance, it is illegal to provide or collect funds with the intention that the funds be used by a listed person or to deal in any property of a listed person, or provide any financial service in respect of that property.[17]

While Canada continues to implement the UN 1267 list through its 1999 regulations, the 2001 *Suppression of Terrorism Regulations* are now moribund—the list of 36 individuals and groups it creates has not been modified since 2006. The *Suppression of Terrorism Regulations* have been superseded for all practical purposes by statutory listing provisions enacted as part of the *Criminal Code* in late 2001, through the *Anti-terrorism Act, 2001*. As will be seen in the second half of this article, the relatively short history of listing

individuals as associated with Al Qaeda in Canada produced two cases of arguable false positives.

Criminal code terrorist groups

Criminal Code listing hinges on the concept of "terrorist group." A terrorist group in Canadian criminal law is defined under section 83.01(1) as "*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." "Entity" means "a person, group, trust, partnership or fund or an unincorporated association or organization" while a "listed entity" means "an entity on a list established by" the federal Cabinet. As of the end of 2016, 53 groups are on the latter list.[18] This is a broader list than in some other democracies—notably Australia and the United Kingdom. The majority of the listed groups are Islamist terrorist groups, but the list also includes Aum Shinrikyo in Japan, right- and left-wing terrorist groups in Colombia including FARC, the Shining Path in Peru, ETA in Spain, Kach in Israel, the LTTE in Sri Lanka and the associated Canadian organization of the World Tamil Movement, the Kurdistan Workers' Party in Turkey, and a number of Sikh terrorist groups.

As a result of the definitional formula in section 83.01, there are two sorts of terrorist groups in Canada's criminal law: a group identified and listed as such by the executive per paragraph (b); and, a group that is not listed, but which meets the functional definition in paragraph (a), as assessed ultimately by a court (typically when a person is prosecuted for their conduct in relation to that group).

Legal commentators have raised concerns about whether executive listing under paragraph (b) will satisfy *Charter* standards when relied upon in criminal trials to supply an essential element of a criminal offence. The argument is that paragraph (b) substitutes a closed executive listing process for the proof beyond a reasonable doubt on the basis of public evidence that an alleged group has as one of its purposes or activities facilitating or carrying out any terrorist activity.[19] The fact that the *Charter* argument has not yet been decided by a court may reflect the relative lack of reliance on executive listing mechanisms in terrorism prosecutions in Canada.

Terrorist group crimes

Under the *Criminal Code*, a terrorist group's property can be frozen, and the provision of financial or other services to it is criminalized.[20] Property "owned or controlled by or on behalf of a terrorist group" or "that has been or will be used, in whole or in part, to facilitate or carry out a terrorist activity" may be seized and forfeited.[21] But the listing of an organization does not mean that the group itself is illegal or that membership in, or association with the group, is a crime. In this way, Canada's contemporary listing mechanisms have taken care to avoid the negative model used by the executive during the October Crisis of 1970.

Listing, however, in Canada is not entirely symbolic. Under s.83.01 of the Criminal Code, the prosecution can rely on executive listing as conclusive proof that a listed entity is a terrorist group in any criminal prosecution that requires proof that an entity is a terrorist group.

The key terrorism group offence in the *Criminal Code* is found in section 83.18. It prohibits participating in a terrorist group in or contributing to the activity of terrorist group where the purpose of this participation is to enhance the latter's ability to facilitate or carry out a terrorist activity. In the leading case on Canada's terrorism laws from the Supreme Court of Canada, the court crafted a *de minimis* harm threshold for criminal culpability under the terrorist group participation offence.[22] It is clear that participation and contribution require something more than "membership."

A separate statute—the *Security of Information Act* (SOIA)—includes its own criminal offences roughly akin to the *Criminal Code* terrorist group crimes. "Terrorist group" is defined in the SOIA in the same manner as in s.83.01 the *Criminal Code*.[23] This means that both groups officially listed by the executive and any entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity are considered to be terrorist groups. In theory, reliance on executive listing can represent a significant advantage to the state in terrorism prosecutions. In practice, however, this advantage has, as will be examined in the next section, rarely been used in Canadian terrorism prosecutions.

Past application

No person has ever been convicted (or, as best we know, even charged) under the SOIA terrorist group offences. However, as Figure 1 shows, most of Canada's completed criminal prosecutions for terrorism since 9/11—24 of 26—have involved s.83.18 participation offences or variations on this terrorist group participation crime. A further conviction stemmed from Canada's terrorism financing laws, outlawing the provision of property or services for the use or benefit of a terrorist group.[24]

In 17 of the 24 participation cases, the terrorist group was not a listed terrorist group but rather an ad hoc entity that fell under the primary and functional definition of a terrorist group under s.83.01 as an entity that has as one of its purposes or activities the facilitation or carrying out of any terrorist activity. In other words, the vast majority of terrorism prosecutions in Canada have been framed around participation in an ad hoc

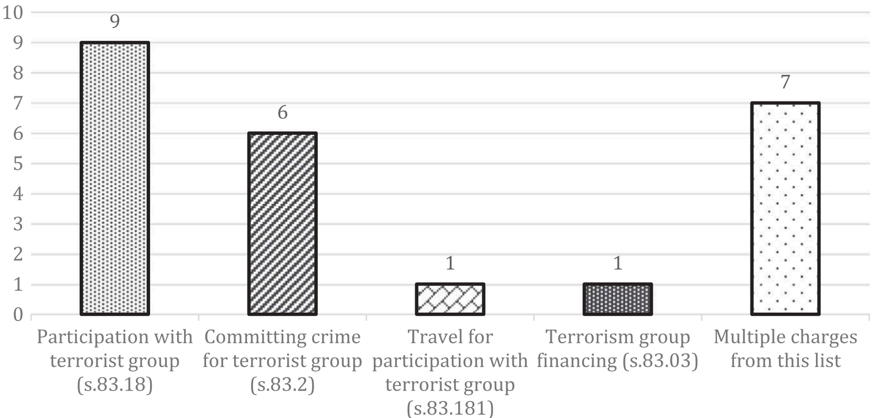

Figure 1. Prosecutions involving terrorist group offences.

"bunch of guys" association rather than an entity formally listed by the Canadian executive. In all of these cases, the judge has accepted that the prosecution has established beyond a reasonable doubt that the ad hoc and not formally listed entity nevertheless satisfied Canada's broad functional definition of a terrorist group. In one participation case, the terrorist group was a foreign entity of the type generally listed by the executive. The group in question—the Global Islamic Media Front—was and indeed still is not listed, by the federal Cabinet. Nevertheless, the judge concluded that the group met the paragraph (a) functional definition of a terrorist group.[25]

Truly lone wolf acts of terrorism such as the Daesh-inspired October 2014 acts of terrorism that resulted in two deaths or the January 2017 right-wing act of terrorism that killed six people worshipping in a Quebec City mosque may not easily be amenable to terrorism group charges which require proof of some form of assistance or support of a group.[26] The awkwardness of using terrorist group charges to lone wolf attacks also supports our overall conclusion that listing is "yesterday's law" in an era where lone wolf attacks are increasingly defined as terrorism.

Only six of Canada's 26 completed criminal cases to date involved entities listed by the government (that is, a paragraph (b) group). Canada's single terrorism financing conviction involved a donation by the accused to the (listed) Tamil Tigers.[27] The modest, 6-month sentence in this case may reflect the fact that the non-remorseful accused sent only $3000 to what he believed was a justified cause, but it also appears to qualify, if not question, the executive's initial proscription decision.[28] In the second matter, a court convicted the accused after he was found guilty of an attempt to participate in the terrorist activities of (listed) Al-Shabaab in Somalia.[29] In December 2015, a youth was convicted of committing a crime for the benefit of (listed) Daesh, and attempting to travel for the purpose of participating in terrorist activities with Daesh. In an August 2016 prosecution, two defendants pled guilty to offences related to participation with Daesh.[30] Finally, in September 2016, a youth pled guilty to committing a crime for the benefit of a terrorist group, identified by the media as Daesh.[31]

Why has listing not mattered much in Canadian terrorism prosecutions?

The question of why there have been so few terrorism prosecutions in Canada involving listed entities is not easily answered. It may be a product of several influences.

First, Canada has had very few terrorism prosecutions overall (for any terrorism offence), in either absolute or *per capita* terms relative to close allies such as the United Kingdom, the United States, and Australia. This performance record likely stems in part from Canada's different security environment. But we have argued elsewhere it also reflects Canada's particularly unwieldy terrorism prosecution system—and especially the difficulties in converting intelligence collected by Canadian and foreign intelligence agencies into evidence for prosecutorial purposes.[32] Since most listed entities are foreign groups, it stands to reason that much information concerning an affiliation by a person in Canada with that group will be from intelligence sources, and so be difficult to use in court.

This supposition is supported by another reason why Canada has had fewer prosecutions: a number of cases that might be characterized as participation with a terrorist group (especially with Al Qaeda) have been pursued (mostly unsuccessfully) using Canada's

immigration security certificate process that permits the use of secret intelligence, in a way that the criminal law does not. Attempts within the criminal trial to defend the secrecy of intelligence that supports a listing could delay and burden a criminal trial. It might also produce collateral challenges to the executive's listing decision, a process that is provided for under s.83.05 of the Criminal Code but which may be constitutionally suspect to the extent it allows the executive to defend the listing on the basis of secret evidence/ intelligence not seen by those who challenge the listing. In short, reliance on executive listing decisions in criminal trials could be subject to *Charter* challenges. Nevertheless we note that this did not occur in the six instances in which list-based terrorism group participation convictions have been entered in Canada.[33]

Third, Canada has been notoriously slow to prosecute terrorism financing cases— matters in which the provision of money to listed entities might reasonably be expected to play a prominent role. Canada's record in this area is aptly captured in the title of a 2013 Senate study of the matter: "Follow the Money: Is Canada making progress in combatting money laundering and terrorist financing? Not Really."[34]

Fourth, the pattern of Canadian prosecutions may simply have reflected the nature of terrorism in the last decade, including the "leaderless jihad" phenomenon described by Marc Sageman[35] producing "bunch of guys"-style plots or more recently "lone-wolf" terrorism. Listing seems to be yesterday's law, one that lags behind developments in terrorism.

Increased use of listing in the future?

Despite the rarity of listed-group prosecutions in the past, circumstances have now changed. The obvious reason is the rise of Daesh-inspired terrorism, foreign terrorist fighting, and the Canadian Parliament's enactment in 2013 of several new terrorism-travel related offences. It is now a crime, for instance, to leave or attempt to leave Canada for the purpose of engaging in conduct that, if committed in Canada, would constitute the crime of participation in a terrorist group under 83.18.[36]

The number of people potentially subject to this new crime has since exploded. In February 2016, the government was aware of more than 180 individuals with Canadian connections who were abroad and suspected of engaging in terrorism-related activities, 100 of whom were believed to be in Iraq and Syria. Another 60 had returned home.[37] Earlier, in October 2014, the RCMP was reportedly tracking 90 individuals who intended to travel, or had returned from overseas,[38] although it is not clear how many of these were affiliated with Daesh.

The Canadian government listing of "Islamic State" dates from 2012. Since late 2014, more than a dozen people have been charged for participation in crimes tied to Daesh. Only a handful of these cases have reached the courts. However, this increase constitutes an appreciable increase in the total number of terrorism charges brought since 9/11, and suggests strongly that for the first time a listed terrorist entity shall figure prominently in multiple Canadian terrorism trials.

Listing may also have a bearing on an intermediate tactic employed in Canada—peace bonds used to constrain liberty of those who authorities fear may commit a terrorism offence.[39] These preventive instruments are somewhat similar to control orders used in the United Kingdom or Australia. It is difficult to track use of these instruments in Canada, but

again, by summer 2016, there had been approximately a dozen such orders sought since late 2014. Most of these appear to relate to a fear that the accused may travel to fight for Daesh. In the result, the Daesh listing again serves as a fact undergirding the resulting peace bonds. That is, the feared terrorism offence motivating the peace bond is one involving some form of support for the terrorist group—and the listing of Daesh would, subject to a successful Charter challenge, constitute conclusive proof, that Daesh is a terrorist group. The use of listing in this context also accords with preventive rationales that err on the side of caution and blur the question of whether a potential Daesh sympathizer would actually engage or even support terrorist violence. Once a listing is made, it may be assumed that even groups who provide non-violent services to populations are in fact supporting terrorist groups. At the same time, Canada's alternative functional definition of a terrorist group only requires that the group have as one of its perhaps many purposes or activities the facilitation or carrying out of any terrorist activity. In other words, both executive listing of terrorist groups and the alternative of a broad legislative definition of a terrorist group combined with judicial determination of whether a group is within the listing of terrorist groups have embraced broad preventive logics in Canada.

In short, the listing of Daesh, as is often the case with listing of terrorist groups, may not be that crucial. Daesh would certainly satisfy the paragraph (a) functional definition of a terrorist group. Indeed attempts to bring Daesh under Canada's limited exception in its terrorism law for conduct done lawfully as part of an armed conflict would likely run aground on the basis that Daesh has not (in any shape or manner) acted "in accordance with customary international law or conventional international law applicable to the conflict."[40] At best, therefore, the Daesh listing eases the prosecutor's workload, and even then it might not prove useful if reliance on executive listing in a criminal trial provokes a Charter challenge.

A critique of listing in Canada

While as a statistical matter terrorist group listing has not mattered much in terrorism prosecutions, it has galvanized controversy.[41] This also suggests that increased reliance on listing in the future might be controversial, begging the question of whether the benefits of listing outweigh its costs in affecting the legitimacy of counterterrorism and producing prolonged constitutional challenges.

Transnational listing of individuals and false positives

Some of the controversies about listing in Canada echo commonplace due process concerns about listing at the international level, and especially the United Nations Security Council Resolution 1267 process. For instance, the early *Suppression of Terrorism Regulations* enacted under the *United Nations Act* were used in November 2001 to list Liban Hussein, a resident of Ottawa, Canada, after he was indicted in Massachusetts for the operation of an unlicensed money transfer business and accused of moving US$3 million to the United Arab Emirates during the first nine months of 2001.[42] The charges stemmed from the unlicensed nature of the money transfer business undertaken by Mr. Hussein's U.S.-based firm, but were part of larger efforts of U.S. officials to shut down the operations of suspected terrorist financiers. Hussein was listed

by Canada under the unilateral listing provision in the *Suppression of Terrorism Regulations*,[43] soon after the U.S. charges were laid. Mr. Hussein's assets were immediately frozen, reportedly ruining him.[44]

The United States then sought Hussein's extradition from Canada to face trial in the United States. Canada had no equivalent crime to the licensing misdemeanour with which Hussein was charged in the United States. Canadian Justice Department officials, however, apparently treated the *Suppression of Terrorism Regulations* listing as meeting the standard dual criminality requirement of extradition law. The Canadian government's theory was reportedly that Mr. Hussein had committed the crime of having financial dealings with a listed person—namely, himself and his companies—thus justifying his removal to the United States to face trial for unlicensed money transfers.[45] Hussein's counsel mounted a constitutional challenge to the *Suppression of Terrorism Regulations*, arguing among other things that the creation of comprehensive criminal offences of the sort found in the regulations went beyond what the executive may properly do via delegated legislation never vetted in Parliament.[46]

The merits of this case were never contested, as the dubious extradition effort collapsed in June 2002 when the Canadian government concluded that "based on a full and thorough investigation of the information collected in relation to the extradition proceedings, the Government of Canada has concluded that there are no reasonable grounds to believe Mr. Hussein is connected to any terrorist activities."[47] The government then removed him from its list under the *Suppression of Terrorism Regulations*. The government also ultimately paid Mr. Hussein an undisclosed amount in compensation for financial and emotional hardship.[48]

As with much counterterrorism, listing exists simultaneously at the supra-national and national levels. By November 2001, the UN 1267 Committee had also listed Mr. Hussein.[49] He was, therefore, still subject to international censure, and indeed Canada's unilateral delisting placed it in noncompliance with its UN obligations. In June 2002, Canada promised to seek his delisting at the United Nations and, in fact, Mr. Hussein was deleted from the 1267 Committee list in July 2002.[50] The whole episode cast doubt on the accuracy of the information that led to the listing in the first place. It demonstrates how listing at either the national or supra-national levels can cause reputational and financial harms on listed persons even if the listing is eventually withdrawn. The same lack of due process that makes listing a process that is particularly susceptible to false positives also means that delisting is also often achieved in a similarly secretive and executive-dominated manner that may not be conducive to the exoneration of the delisted person.

A second, more recent 1267 listing controversy erupted in relation to another Muslim Canadian, Abousfian Abdelrazik. Mr. Abdelrazik came to Canada as a Sudanese refugee in 1992, eventually acquiring Canadian citizenship. He subsequently came to the attention of the Canadian Security Intelligence Service (CSIS) in part because he associated in Montréal with both Ahmed Ressam, the attempted "millennial bomber," and Adil Charkaoui, then a named person under an immigration security certificate.

Abdelrazik left Canada in 2003 to visit his ailing mother in Sudan, but was promptly arrested and held in a Khartoum jail where CSIS agents interviewed him.[51] He was eventually released and cleared by Sudanese authorities of involvement in terrorism. But in July 2006, he was listed by both the United States and the UN Security Council as a terrorist associated with Al Qaeda. As a result, he was barred from international travel.

This, and the fact that Canada refused, without giving reasons, to grant an emergency travel document to replace his expired passport, meant that he was effectively banished from Canada and stranded in the Sudan where he was mistreated.

The matter ended in Federal Court. In a strongly worded judgment, the Federal Court held that Abdelrazik's *Charter* right as a Canadian citizen to return to Canada had been infringed, and ordered the government to facilitate his return. Justice Zinn was not deterred by the fact that Abdelrazik had been placed on the UN list as affiliated with Al Qaeda, or that the United Nations had denied Canada's request that he be delisted. Justice Zinn characterized that listing process as Kafkaesque and stressed that there was no public evidence that Abdelrazik was involved with terrorism. Sensing government reluctance, he retained jurisdiction over the case until Canadian officials could bring the listed and banished applicant to court.[52] Abdelrazik was eventually removed from the UN list in December 2011 and is now suing Canadian authorities.[53] The Hussein and Abdelrazik cases, like the October 1970 listing of the FLQ, serve as negative examples that have underlined some of the potential harms and errors that can be imposed by a secretive and executive based listing process.

Controversies over listed groups

For its part, the *Criminal Code* listed group process has not generated as much litigation as the UN and Canadian listing systems used to designate individuals as associated with Al Qaeda. But it also raises due process preoccupations.

Mechanics, standards, and the risks of false positives

Section 83.05 of the *Criminal Code* empowers Cabinet to list an "entity" (defined to reach persons, groups, trusts, funds, partnerships, and unincorporated associations or organizations[54]) by regulation if "on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council [effectively, the federal Cabinet] is satisfied that there are reasonable grounds to believe that (*a*) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (*b*) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (*a*)."

"Reasonable grounds to believe" is a standard employed often in Canadian law to justify warrants and searches. In another context, the Supreme Court held that this exists where "there is an objective basis … which is based on compelling and credible information."[55] It is a standard lower than the beyond reasonable doubt standard employed in the criminal law or even the proof on a balance of probabilities standard used in the civil context. In other words, listing is based on a preemptive standard more akin to the standard used to grant preliminary investigative measures such as search warrants than to impose final judgments of guilt or liability in either criminal or civil law. This is so even though listing can have much more final and dramatic effects than a preliminary investigative measure—even if the latter produces incriminating evidence, it can still be challenged at a criminal trial.

One result of the low substantive standard for listing under the Criminal Code is to tolerate a higher degree of false positives than would normally be tolerated in criminal or

even civil trials. As we have argued elsewhere, false positives in counterterrorism can create both moral and strategic problems.[56] There are normative harms when a person or group is falsely accused of being involved in terrorism. False positives may also unintentionally feed a Daesh ideology that seeks to portray Western counterterrorism as indiscriminately aimed at Muslims rather than violence.

The illusory delisting process

One antidote to the risk of false positives is to build in more procedure. As examined above, there is no due process before the federal Cabinet lists a terrorist group. There is no requirement or practice of advance notice or hearing of the evidence in a manner that assures some adversarial challenge to the information used to support the government's conclusion that a group is involved in terrorism. There is also, as there is in Australia, no requirements that the leader of the opposition in the federal Legislature or that the provinces be consulted before a group is listed or that a Parliamentary committee review listing decisions.[57] For better or worse, Canada has not invested in the checks and balances of political constitutionalism and pluralism as Australia has and has instead relied on the availability of judicial review of listing decisions.

Section 83.05, however, provides a delisting process: a listed entity may apply to the minister for a decision on "whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity."[58] Unfortunately, however, there are reasons to believe that the promise of delisting is more illusory than real. Although the government has delisted some groups, none of the delisting decisions has to our knowledge come from a successful delisting application either to the Minister or a subsequent review by the courts.

There are a number of procedural shortcomings in the Canadian delisting process. One is that an application for delisting is made to the Minister of Public Safety. The Minister has 60 days to make a decision but s.83.05(3) contemplates that the Minister may not even make a decision. In such a case, the Minister is deemed to have decided that the listed group remain listed. Although the Criminal Code is far from clear on this point, Cabinet is also presumably free to reject the Minister's recommendation that a group be delisted; that is, after all, the nature of a recommendation. In other words, the first level of appeal is to a Minister who does not make the ultimate decision on delisting and is not even obliged to hold a hearing on the delisting request or even to make a decision on the request.

Subsequently, the group challenging a listing decision has a right to initiate judicial review of a delisting decision (or failure to decide) before the Federal Court. The Federal Court judge can:

> examine in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Minister and may, at his or her request, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person.[59]

The section is also clear that the judge "may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence."[60]

As noted, this enables the use of secret information—including intelligence—in the judicial review procedure that is not disclosed to the applicant and that may not satisfy the usual requirements of the law of evidence that are designed to ensure the reliability of information. In particular, reviewing judges might consider intelligence even though the sources and methods used to obtain the intelligence are not known. This accords with the priority that intelligence services often place on protecting their (and their allies') sources and methods. At the same time, it may also produce a situation where information of unknown reliability is used to impose legal consequences on those who are listed.[61]

Instead of full disclosure, the applicant is to be provided by the court with "a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person."[62] The statute includes supplemental provisions on information obtained in confidence from a foreign state or international organization that allow the government to present such information to the judge, but then to withdraw it from consideration in the proceedings should the judge determine that the information should be disclosed to the applicant challenging the listing.[63] These protections demonstrate acute sensitivity by Canada to the implications that disclosure of this information would have on the willingness of foreign agencies to share intelligence and Canada's oft-noted status as a "net importer of security information."[64]

Ultimately, the judge determines whether the minister's decision is "reasonable on the basis of the information available to the judge" and if not, he or she must "order that the applicant no longer be a listed entity."[65] The reasonableness standard to be applied by the court is distinct from a standard of correctness, though it will under Canadian administrative law incorporate a form of proportionality analysis[66] that should be attentive to the drastic consequences of listing as a terrorist group.

If the applicant is successful, the minister is to publish notice of the delisting in the *Canada Gazette*.[67] If unsuccessful, the applicant may not reapply absent a material change of circumstances or until completion of a mandatory two-year review of the entire list. The latter is to be completed by the minister "to determine whether there are still reasonable grounds … for an entity to be a listed entity." Following the review, which should be completed within 120 days, the minister is to "make a recommendation to the Governor in Council as to whether the entity should remain a listed entity."[68] As suggested above, the Governor in Council is likely not bound by the Minister's recommendations. The Canadian process contemplates ongoing Ministerial reviews but does not as in Australia involve Parliamentary committees in the review process. Parliamentary committee review has the potential to involve more diverse views and community participation than is found in the process of executive review in Canada even as supplemented by judicial review. Until recently, no Canadian Parliamentary committee was specifically authorized to have access to classified information.

The statute also includes a process for clarifying "mistaken identities." Thus, an entity that claims not to be listed may apply for a certificate to this effect from the government. The latter is to issue this certificate within 15 days if the entity is not, in fact, listed.[69] This can provide some relief, but also acknowledges the risks of false positives of listing in a context where individuals or groups might share or have similar names. Again this built-in

recognition of false positives illustrates a much greater tolerance for false positives in listing than found in criminal trials.

Appeals of listing will necessarily be uncommon—almost all of the listed entities are international groups with presumably limited access to Canadian courts. There are also no provisions, as in UK legislation,[70] to protect those who associate with a listed entity from possible terrorism prosecutions by virtue of the challenge. This means that those individuals in Canada who claim to be associated with a group for the purpose of seeking its delisting could risk prosecution for their support or participation of the group even if that support or participation was for the purpose of seeking delisting.

There has been one ultimately unsuccessful delisting challenge. It reveals some of the many and perhaps insurmountable difficulties in obtaining a delisting. In that single instance, the government repealed the charitable status of a small Canadian organization said to have given financial assistance to Hamas-associated groups. In 2014, the government also then listed this body—the International Relief Fund for the Afflicted and Needy (Canada)—as a terrorist group under the *Criminal Code*. The entity's subsequent appeal of that listing was stymied because the government had frozen the group's property following its listing and the government refused to allow the unfreezing of the group's assets to allow them to pay legal fees to challenge its listing. A court appeared to recognize that this left the group in a "Catch 22 position" of being unable to fund a challenge to its listing. At the same time, however, the court refused to order relief because of concerns about the lack of evidence about the group's finances and in part because of concessions that some lawyers might bring the challenges on a pro bono basis.[71] We are not aware of a new challenge to the listing which was renewed near the end of 2016.[72] In the result, no delisting challenges have wended their way through the courts on their merits. Hence, a number of constitutional issues surrounding listing remain unresolved[73] and the promise of effective delisting challenges remains unfulfilled.

Some might argue that the lack of successful delisting challenges simply reflects the accuracy of the executive's listing decisions under the Criminal Code. Such arguments strike us as overly optimistic especially given the false positives in similar listing processes used in Canada with respect to individuals.

The absence of advance notice and comment before listing

One obvious omission in the listing system is the absence of a notice and comment opportunity for the entity *prior* to listing as would generally be required by the administrative rules of natural or procedural justice. As one of us has noted, "after-the-fact judicial review … may be too late for a group that has been erroneously placed on the official list of terrorist organizations. They will have been stigmatized as a terrorist group and people will be afraid that they may be charged with terrorism offences if they participate or give money to the organization."[74] Even if successful in its delisting application, this stigma will not be easily expunged.

The absence of notice and comment also runs counter to a line of constitutional jurisprudence under section 7 of the *Charter* entitling people to "fundamental justice"—including, especially, notice and comment—where life, liberty, or security of the person are jeopardized. It is true that organizations do not enjoy this right—but it is also the case

they can invoke it where the government's conduct could affect the right of an individual. In this case, a terrorist group listing obviously imperils liberty for those who interact with it and the stigma of being tarred a member of a terrorist group is likely so great as to trench on security of the person.[75]

The Supreme Court of Canada has held that notice and comment obligations under section 7 persist even in national security cases, albeit in attenuated form. Specifically, in *Suresh*, the Court considered whether, among other things, a refugee claimant earmarked for deportation on the ground of being a suspected terrorist had any constitutional notice or comment protections. The Court concluded that, confronted with the prospect of being deported to torture, the applicant "must be informed of the case to be met" and that an "opportunity be provided to respond to the case presented to the Minister," including through the presentation of evidence countering the view that he constituted a national security threat.[76] Information provided by the government to inform Suresh of the case against him was legitimately "subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents."[77] Further, the Court emphasized that "the Minister must be allowed considerable discretion in evaluating future risk and security concerns. This factor also suggests a degree of deference to the Minister's choice of procedures since Parliament has signaled the difficulty of the decision by leaving to the Minister the choice of how best to make it."[78] Nevertheless, notice and comment—however rudimentary—was available to an actual suspected terrorist.

In a policy national security Green Paper released in September 2016, the Canadian government defended the absence of advance notice in the listing process. It has accurately noted that "the entity and the public are not made aware that the Government is planning to list the entity until the listing takes effect" and argued that this approach is necessary "to prevent the entity removing its Canadian assets from Canada before the listing freezes them."[79] This does not address whether alternative means—such as case-specific interlocutory freezing orders—should be used. It also implicitly raises the vexing question in Canadian constitutional law of whether procedural violations of the principle of fundamental justice under section 7 of the Charter can be justified as reasonable and proportionate limits under section 1—since section 1 is essentially where this argument concerning the expediency of unannounced proscription as an asset freezing device would need to be made.

There is some jurisprudence suggesting that the due process limitations in listing may be justified. However, those cases—concerning use of secret evidence in immigration security certificate matters—suggest that listing processes which engage liberty or security of the person should at least include security-cleared special advocates able to probe all the secret evidence relied upon by the government.[80] Along with *Suresh*, they also suggest that enough of the gist of the allegation should be disclosed to the applicant to ensure that a challenge can effectively be made on the applicant on the merits. The stigma stemming from listing mean the same Charter doubts infect the listing process in section 83.05 used for any of its other purposes, such as asset freezing. If so, then there will be some obligation on government to give notice—and open the door to comment—prior to listing, even if these procedural opportunities are rudimentary. As a practical matter, of course, it is not certain how the government would give notice to sometimes clandestine

international organizations. But in cases involving Canadian domestic groups such as International Relief Fund for the Afflicted and Needy, there is no impediment to notice.

Finally, the government's defence of listing without prior notice and comment in the Green Paper does not suggest that the government will be particularly eager to reform the listing process to make it fairer to those adversely affected by the listing process.[81] Listing may be yesterday's law, destined to remain steps behind the evolution and permutation of terrorist groups and so far peripheral to actual terrorism prosecutions, but it remains well entrenched in both supra-national and Canadian law.

Political issues

A final listing controversy is the political nature of the process. The executive decides whether to list an entity or not. In the past, critics have accused governments of making listing decisions for political reasons.[82] Listing decisions may implicate domestic politics, as Canadian politicians calculate the implications of listing among diaspora communities in Canada. Sometimes also at issue are foreign policy considerations, and especially Canada's stature as a proverbial "honest broker" in international peace negotiations. These considerations seem particularly acute where the entity has a political wing and exercises a governance role in a foreign jurisdiction. For instance, Hezbollah and Hamas were listed in late 2002, but only after substantial political controversy over the failure to list it earlier.[83] The government listed the Tamil Tigers (LTTE) in 2006, after an election in which the victorious Conservative Party raised its listing during the campaign.[84] The group remained listed at the end of 2016 even after a new Liberal government was elected in 2015.

Russell Hogg has expressed concerns that listing of terrorist groups may inhibit governments from talking to such groups in an attempt to address some of the issues that may have led to terrorism. The codification of listing decisions provide what can be quite political decisions with "a veneer of legalism" and one that can damage "both the legal *and* political capacities of the state to address problems of political conflict and violence."[85] In other words, listing simplifies complex geo-political matters through the binary lens of a group either being listed as a terrorist group or not. We share many of these concerns, but add that even in the absence of executive listing, Canada's broad functional definition would include as a terrorist group, groups such as Hamas and the Tamil Tigers if one of many of their purposes included the facilitation or commission of terrorism.

There is also a broader political issue: we recognize the convenience of premeditated executive listing, especially in the area of regulating terrorism financing. But the use of executive listing to undergird terrorism criminal prosecutions implies a lack of confidence in the ability of an independent judiciary to decide whether a group qualifies as terrorist based, simply, on the functional definition also found in s.83.05. We are concerned that increased reliance on listing decisions in criminal prosecutions could undermine some of the legitimacy of the use of the criminal sanction. The lack of due process before listing, the illusory nature of the delisting process, and the danger of false positives in listing all risk undermining the legitimacy of counterterrorism as a targeted intervention aimed at preventing violence.

Conclusion

Canada does not ban organizations *per se*, or outlaw membership in them. Rather, Canadian listing law imposes a series of financial penalties on listed entities, while limiting criminal culpability to those who do more than affiliate. The key crime penalizes those who conduct themselves in relation to a terrorist group in a manner that enhances (more than negligibly) its capacity to engage in terrorist activity.

Listing of terrorist groups by the executive has so far played second-seat in Canada to convictions for conduct done in association with ad hoc terrorist groups who are not listed, but instead meet a functional definition of a "terrorist group." This may change as prosecutions for conduct done in association with Daesh or other listed groups increase. If so, we would expect *Charter* challenges to Canada's executive listing system—and especially the use of a secret proscription process without advance notice and comment to establish an essential element of criminal liability.

A successful Charter challenge to proscription in Canada might, however, not harm security. Even if Canada had never listed Daesh, prosecutors would almost certainly persuade courts that that entity meets the functional definition of a "terrorist group," permitting convictions. Advance listing adds little, in other words, to these cases. Where listing could matter more is in the areas of terrorism financing: listing aids the identification of those entities with whom financial dealings are proscribed. Terrorism financing laws may do little to stop homegrown and low-cost terrorism, but they could be more useful with respect to stopping Daesh's attempts to raise revenue through the sale of goods such as oil and antiquities. Yet, Canada is a laggard in prosecutions for terrorism financing and even in such prosecutions, there is little reason beyond administrative convenience why the existence of Daesh as a terrorist group could not be established without reliance on executive proscription.

Finally, the invalidation of listing as a tool with legal consequences would not mean that informal watch-listing could not be used as a form of intelligence, including with respect to terrorism financing and border controls. Listing is in many respects an intelligence technique and tool. Its migration into the law presents threats to the integrity of law including the risks of false positives and the use of secret evidence in delisting proceedings. The main consolation in Canada, at least, is that terrorist group listing has played a limited role in terrorism prosecutions while other forms of listing of individuals as associated with Al Qaeda have been successfully challenged.

Notes

1. RSC 1985 c. C-34. Criminal law in Canada is a matter of exclusive federal jurisdiction.
2. RSC 1970 c. W-2.
3. *Public Order Regulations*, SOR/70–444 s.3.
4. ibid s.4.
5. *Gagnon v. Vallieres* (1971) 14 C.R.N.S. 321 (Que. C.A.)
6. 2000 c.11.
7. Criminal Code Act 1995 (Cth) Division 102. See generally Andrew Lynch, Nicola McGarrity, and George Williams, "The Proscription of Terrorist Organisation in Australia," *Federal Law Review* 37 (2009): 1.
8. For an overview, see Andras Sajo, ed., *Militant Democracy* (Amsterdam: Eleventh Publishing, 2004).

9. For a fuller discussion of Canada's learning from the October Crisis of 1970 see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015), 25–45.
10. S.C. 2001, c. 41. The Act was an omnibus statute that mostly focused on amending existing laws. Listing was included in the *Criminal Code*, as discussed further below.
11. *Mounted Police Assn. of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 66.
12. *R. v. Khawaja* 2012 SCC 69.
13. RSC 1985 c.U-2.
14. *United Nations Al-Qaida and Taliban Regulations*, SOR/99–444.
15. *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001–360 (*Suppression of Terrorism Regulations*).
16. SOR/2001–360, s. 2.
17. SOR/2001–360, ss. 3–8.
18. See Listed Terrorist Entities, online: http://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/index-en.aspx. Although under Canada law, individuals can also meet the definition of an "entity," no individual has been listed.
19. David Paciocco, "Constitutional Casualties of September 11," *SCLR(2d)* 16 (2002): 199.
20. *Criminal Code*, R.S.C. 1985, c. C-46, ss.83.08–83.12.
21. *Criminal Code*, ss. 83.13 & 83.14. See, by way of example, *International Relief Fund for the Afflicted and Needy (Canada) v. Canada*, 2015 FC 435; Daniel LeBlanc and Colin Freeze, "Charity that Worked with Palestinians Added to Canada's Terror List," *Globe and Mail*, April 29, 2014.
22. *R. v. Khawaja*, 2012 SCC 69 at para. 50.
23. SOIA, s. 2.
24. *Criminal Code*, s.83.04.
25. *R. v. Namouh*, 2010 QCCQ 943.
26. The reference to "a person" in the definition of "an entity" in s.83.01 opens up the possibility of a terrorism charge based on one lone's wolf assistance to him or herself and the commission of a terrorist activity. Nevertheless, when read in a logical or purposive sense and when informed by the other references to groups in the definition of entity, the idea that an entity could include only one person seems odd.
27. *R. v. Thambaithurai*, 2011 BCCA 137.
28. One of us has previously suggested that the light sentence in this and similar financing cases in Australia "demonstrates how proscription of terrorist groups simplifies a complex situation where both governments and organizations such as the Tamil Tigers have abused human rights." Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011), 382.
29. *R. v. Hersi*, 2014 ONSC 4414.
30. *R. v. Larmond*, 2016 ONSC 5479 (the offences in question were s.83.181 and s.465 conspiracy in relation to s.83.18).
31. Public Prosecution Service of Canada, "Youth Pleads Guilty to Terrorism Offence," September 12, 2016, http://www.ppsc-sppc.gc.ca/eng/nws-nvs/2016/12_09_16.html. Katie May, "IS 'Pushing Hard' to Radicalize Our Youth," *Winnipeg Free Press*, September 14, 2016, http://www.winnipegfreepress.com/local/manitoba-teen-faces-possible-life-sentence-for-terrorism-related-offence-393279201.html.
32. Craig Forcese and Kent Roach, *False Security* (see note 9), chapter 9. See also Chapter 9 for a statistical breakdown of the Canadian prosecutorial record in comparative context.
33. In *R. v. Thambaithurai*, 2011 BCCA 137 the accused pled guilty to financing the Tamil Tigers. Likewise, the two defendants pled guilty to terrorist group-related crimes linked to Daesh in *R. v. Larmond*, 2016 ONSC 5479. It does not appear the issue was raised in the two recent youth convictions noted in the text. In *R. v. Hersi*, 2014 ONSC 2897 at para. 13, the accused decided not to challenge the use of the executive listing of Al Shabaab.
34. "Report of the Standing Senate Committee on Banking Trade and Commerce," March 2013, http://www.parl.gc.ca/Content/SEN/Committee/411/BANC/rep/rep10mar13-e.pdf.

35. Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Philadelphia: University of Pennsylvania Press, 2008).
36. *Criminal Code*, s. 83.181.
37. Robert Fife, “Spy Agencies See Sharp Rise in Number of Canadians Involved in Terrorist Activities Abroad,” *The Globe and Mail*, February 23, 2016.
38. Daniel Leblanc and Colin Freeze, “RCMP Investigating Dozens of Suspected Extremists Who Returned to Canada,” *Globe and Mail*, October 8, 2014, http://www.theglobeandmail.com/news/politics/rcmp-investigating-dozens-of-suspected-extremists-who-returned-to-canada/article20991206/.
39. *Criminal Code*, s.811.011.
40. *Criminal Code*, s.83.01(1)(b).
41. Portions of this discussion appear in a different form in Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008).
42. See discussion in *Hearing on “The Financial War on Terrorism and the Administration’s Implementation of the Anti-Money Laundering Provisions of the U.S.A Patriot Act,”* Prepared Statement of the Honorable Michael Chertoff, Assistant Attorney General, Criminal Division, U.S. Department of Justice (January 29, 2002).
43. SOR/2001-360.
44. See Jake Rupert, “Government Pays Off Victim of Terror Smear: Ottawa Man Was Arrested, His Business Ruined,” *The Ottawa Citizen*, October 2, 2003, A.1.
45. Applicant’s Factum, *U.S.A. v. Liban M. Hussein* (on file with author). See also discussion in E. Alexandra Dosman, “For the Record: Designating ‘Listed Entities’ for the Purposes of Terrorist Financing Offences at Canadian Law” *University of Toronto Faculty Law Review* 62 (2004): 1, 17.
46. Applicant’s Factum, *U.S.A. v. Liban M. Hussein* (on file with author).
47. Justice Canada, Press Release, *Canada Halts Extradition, Liban Hussein De-Listed* (June 3, 2002). See SOR/2002-210 and SOR/2002-211.
48. Rupert (see note 44).
49. UN Press Release SC/7206 (November 9, 2001).
50. UN Press Release SC/7447 (July 10, 2001).
51. 2009 FC 580 at para. 91.
52. 2009 FC 580 at para. 168.
53. There has been preliminary litigation over Abdelrazik’s access to government documents as part of the disclosure process. *Abdelrazik v. Canada* 2015 FC 548.
54. The definition of “entity” is found at s.83.01 but for ease of expression we have defined entity as group throughout this paper.
55. *Charkaoui v. Canada*, [2007] SCC 9 at para. 39 (discussing the standard in relation to detentions under *Immigration and Refugee Protection Act* security certificates). Federal Court jurisprudence in the same case has described this standard as “a serious possibility that the facts exist based on reliable, credible evidence.” *Charkaoui (Re)*, [2004] 3 FCR 32 (F.C.).
56. Forcese and Roach, *False Security* (see note 9), supra chs 6 and 7.
57. Lynch, McGarrity, and Williams, “The Proscription of Terrorist Organisation in Australia” (see note 7).
58. *Criminal Code*, s-s. 83.05(2).
59. *Criminal Code*, s-s. 83.05(6).
60. *Criminal Code*, s-s. 83.05(6.1).
61. On the differences between intelligence and evidence with respect to the disclosure of sources and methods and the risk of false positives see Kent Roach, “The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations,” in Nicola McGarrity, Andrew Lynch, and George Williams, eds., *Counter-Terrorism and Beyond* (Abington: Routledge, 2010), 50–52.
62. *Criminal Code*, s-s. 83.05(6).
63. *Criminal Code*, s. 83.06.

64. *Charkaoui v. Canada*, [2007] 1 SCR 350 at para. 68.
65. *Criminal Code*, s-s. 85.05(6).
66. *Dunsmuir v. New Brunswick* 2008 SCC 9.
67. *Criminal Code*, s-s. 85.05(7).
68. *Criminal Code*, s-s. 85.05(8)–(10).
69. *Criminal Code*, s. 83.07.
70. *Terrorism Act, 2000* c.11 s.10 (UK).
71. *International Relief Fund for the Afflicted and Needy (Canada) v. Canada*, 2015 FC 435 at para. 4.
72. "Listing Entities-International Relief Fund for the Afflicted and Needed" (IRFAN-Canada" at https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx#2052.
73. In one (puzzling case) a person who was not listed sought affirmative confirmation from the government that he was not a listed entity. *Figueroa v. Canada*, 2014 FC 836.
74. Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003), 37.
75. Reputational injury almost never violates section 7. Nevertheless, rare circumstances exist where a psychological harm inflicted by government proceedings could attract section 7 protections. *Blencoe v. British Columbia*, [2000] 2 S.C.R. 307 at para. 81 ("In order for security of the person to be triggered in [cases involving alleged psychological harm], the impugned state action must have had a serious and profound effect on the respondent's psychological integrity… . There must be state interference with an individual interest of fundamental importance").
76. *Suresh v. Canada*, [2002] 1 SCR 3 at paras. 122–23.
77. Ibid. at para. 122.
78. Ibid. at para. 120.
79. Government of Canada, *Our Security, Our Rights: National Security Green Paper, 2016 Background Document* (September, 2016), 48, http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016-bckgrndr/index-en.aspx.
80. *Charkaoui v. Canada*, [2007] SCC 9; *Harkat v. Canada*, 2014 SCC 37.
81. On the Green Paper generally see Craig Forcese and Kent Roach, "Righting Security: A Contextual and Critical Analysis and Response to Canada's 2016 National Security Green Paper" [2015] Canadian Yearbook of International Law (67), http://hri.ca/wp-content/uploads/2017/10/ottawau_canadianyearbookofhumanrights_vol1_2015.pdf.
82. Stewart Bell, "Canada's Terror Lobby," *National Post*, June 17, 2002, A17.
83. Mike Trickey, "Liberal Line on Hezbollah 'Dead Wrong,'" *Ottawa Citizen* (November 6, 2002), A4.
84. Stewart Bell, "Tories Would List Tigers as Terrorists," *National Post*, January 18, 2006, A1.
85. Russell Hogg, "Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border Between Crime and Politics," in Miriam Gani and Penelope Mathew, eds., *Fresh Perspectives on the War on Terror* (Canberra: Australian National University Press, 2008), 322.

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