

ARTICLE

WALKING THE TIGHTROPE BETWEEN NATIONAL SECURITY AND FREEDOM OF EXPRESSION: A CONSTITUTIONAL ANALYSIS OF THE NEW ADVOCATING AND PROMOTING TERRORISM OFFENCE

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INTRODUCTION

“There is no liberty without security,” the former Minister of Public Defence and Emergency Preparedness, Steven Blaney, told the House of Commons at the second reading of Bill C-51.¹ “Canadians [...] understand their freedom and security go hand in hand.”² In response to the increased instances of terrorist acts globally, the recently defeated Conservative Government (“the former Government”) made national security and counter-terrorism a political priority, and responded with a wave of anti-terrorism legislation, some of which came under scrutiny and none more so than Bill C-51. The former Government introduced Bill C-51 as another weapon in the war on terror. In particular, Bill C-51 creates a new criminal offence under section 83.221 of the *Criminal Code* (“the Code”),³ which prohibits advocating and promoting terrorism offences. Despite voting in favour of Bill C-51, Liberal Leader and current Prime Minister, Justin Trudeau, promised amendments to “problematic elements” of Bill C-51 in his election platform and in his subsequent Ministerial Mandate Letters to the new Minister of Public Safety and Emergency Preparedness, and Minister of Justice.⁴ In particular, he

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1 *Bill C-51, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 20.

2 *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1535 (Hon. Steven Blaney).

3 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

4 Letter from Justin Trudeau, Prime Minister of Canada to Mr. Ralph Goodale, Minister of Public Safety and Emergency Preparedness [nd] online: Prime Minister of Canada <<http://pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter>> archived at <<https://perma.cc/NV9Q-E9NM>>;

Letter from Justin Trudeau, Prime Minister of Canada to Ms. Wilson-Raybould, Minister of Justice and Attorney General [nd] online: Prime Minister of Canada <<http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>> archived at <<https://perma.cc/K9FJ-BZ74>>.

promised to “narrow overly broad definitions.”⁵ He does not, however, specifically refer to section 83.221 as being a “problematic element” of Bill C-51 or a provision with overly broad definitions.

This paper argues that the newly elected Liberal Government should revisit and reassess section 83.221 because the provision potentially offends section 2(b) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”),⁶ and may not be demonstrably justifiable under section 1. To reach this conclusion, this paper conducts a *Charter* analysis and draws on analogous considerations from five other landmark cases that addressed criminalized limits to free expression: *R v Khawaja*;⁷ *R v Sharpe*;⁸ *R v Zundel*;⁹ *R v Butler*;¹⁰ and *R v Keegstra*.¹¹ Part I introduces section 83.221 and summarizes the five comparison cases. Part II discusses the uncertainty around whether the activity prohibited by section 83.221 may be construed as constitutionally protected expression. Part III outlines why the provision, if found to violate section 2(b), may not be saved under section 1 because its limitations do not minimally impair. Part IV discusses possible remedies.

I. THE BILL, THE SECTION, AND THE FIVE LANDMARK CASES: A PRIMER

A. Bill C-51 and Section 83.221

On January 30, 2015, the former Government tabled Bill C-51, which subsequently received Royal Assent on June 18, 2015. Minister Blaney highlighted the threats of terrorism in Canada during the second reading, and drew special attention to two terrorist attacks in October 2014 as a solemn reminder that international jihadists have also targeted Canada. Bill C-51 therefore reflected the former Government’s commitment to protect Canadians from these threats of terrorism. This paper focuses on an amendment to the *Code* that created a new criminal offence in section 83.221, which as of January 30, 2016 reads:

83.221 (1) Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general—other than an offence under this section—while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

(2) The following definitions apply in this section:
 “communicating” has the same meaning as in subsection 319(7).
 “statements” has the same meaning as in subsection 319(7).

5 “Bill C-51”, Liberal Party of Canada, online: Liberal <<https://www.liberal.ca/realchange/bill-c-51/>> archived at <<https://perma.cc/B7VZ-YG5T>>.

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

7 *R v Khawaja*, 2012 SCC 69; [2012] 3 SCR. 555; [2012] SCJ No 69 (QL) [*Khawaja*].

8 *R v Sharpe*, 2001 SCC 2; [2001] 1 SCR 45; [2001] SCJ No 3 (QL) [*Sharpe*].

9 *R v Zundel*, [1992] 2 SCR 731; [1992] SCJ No 70 (QL) [*Zundel*].

10 *R v Butler*, [1992] 1 SCR 452; [1992] SCJ No 15 (QL) [*Butler*].

11 *R v Keegstra*, [1990] 3 SCR 697; [1990] SCJ No 131 (QL) [*Keegstra*].

The prohibited act includes several elements.¹² First, an accused must communicate statements. Section 319(7) of the *Code* defines “communicating” to include “communicating by telephone, broadcasting or other audible or visible means,” and “statements” to include “words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.”¹³ Secondly, the individual must advocate or promote the communicated statements. As will be discussed in Part II, the meanings of “advocating” and “promoting” present a problematic uncertainty because the *Code* does not define them. Finally, the prohibited subject matter is “terrorism offences in general”. Section 2 of the *Code* defines “terrorism offence” to mean any indictable offences committed for or in association with a terrorist group; any indictable offence that is also “terrorist activity”, which is defined in section 83.01(1); a series of specific offences under Part II.1; and conspiracy, aiding after the fact, or counselling any of the above.¹⁴ The provision does not specify any exceptions.

The new offence indicates that an accused must *knowingly* advocate or promote terrorism offences that he or she *knows*, or is *reckless* that a terrorism offence may be carried out as a result of the promoting or advocating.¹⁵ However, the provision only requires that an accused know or be reckless that a terrorism offence *may* be committed, and does not require an accused to have a terrorist purpose.¹⁶

This new offence attempts to address the increasing number of radicalized individuals from western nations, and the role of terrorist media in the radicalization process. However, some civil liberties groups and legal academics worry that section 83.221 infringes the *Charter*, and will also chill legitimate expression. On July 21, 2015, the Canadian Civil Liberties Association and the Canadian Journalists for Free Expression launched a constitutional challenge against Bill C-51, in which they allege section 83.221 violates section 2(b) and cannot be saved under section 1.¹⁷ At the time of writing, the court has not yet heard this challenge.

B. Criminalizing Expression: Five Landmark Cases

In addressing the potential for the new offence to run up against freedom of speech, the former Minister of Justice, Peter MacKay told the Standing Committee on Public Safety and National Security that the *Code* contains other provisions that criminalize expression which courts have upheld.¹⁸ The *Code* does not include many criminalized limits to free expression. Therefore, drawing analogies from cases that have already addressed the constitutionality of criminally prohibited expressions may be useful in predicting what a court may conclude in the constitutional challenge to section 83.221. Indeed, *Keegstra* looks to *Butler* for comparisons, and *Zundel* to *Keegstra*. This section briefly outlines five landmark cases in which the Supreme Court of Canada (“the Court”) considered the constitutionality of a criminalized limit to freedom of expression.

12 See Kent Roach & Craig Forcese, “Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence” (3 February 2015), *Canada’s Proposed Anti-Terrorism Act: An Assessment* (blog), online: <<https://cdnantiterrorismawordpress.com/page/2/>> archived at <<https://perma.cc/UH9S-C8AG>> at 9-16 [Roach & Forcese].

13 *Criminal Code*, *supra* note 3, s 319(7).

14 *Ibid*, s 2.

15 Roach & Forcese, *supra* note 12 at 6, 17-18.

16 *Ibid* at 17-18.

17 See Canadian Civil Liberties Association, News Release, “CCLA and CJFE mount Charter challenge against Bill C-51” (21 July 2015), online: Canadian Civil Liberties Association <<https://ccla.org/ccla-and-cjfe-mounting-charter-challenge-against-bill-c-51/>> archived at <<https://perma.cc/A49N-V46W>>.

18 Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 41st Parl, 2nd Sess, No 053 (10 March 2015) at 0935 (Hon Peter MacKay) [Public Safety March 2015].

i. *Keegstra*: Hate Propaganda

The accused in *Keegstra* was charged under section 319(2) of the *Code* for communicating anti-Semitic statements to his students. Section 319(2) prohibits an individual from wilfully promoting hatred against any identifiable group by communicating statements. Although the Court found section 319(2) violated the accused's *Charter* protected rights under section 2(b), the impugned provision could be justified under section 1 of the *Charter*. In particular, during the proportionality arm of the section 1 analysis, the Court concluded that hate propaganda was not a form of expression that touched the core of the freedom's underlying values, especially in light of evidence that hate propaganda caused harm to members of the targeted group and to society as a whole.

ii. *Butler*: Obscenity

In *Butler*, the Court unanimously upheld section 163 of the *Code*, which prohibits the publication, distribution, or circulation of obscene materials. Focusing specifically on the definition of "obscene" in section 163(8), the Court found that although the prohibition infringed on the accused's freedom of expression, the prohibition was justified under section 1. Like *Keegstra*, the Court found the subject matter of expression in *Butler* to be outside the section 2(b) core values. It accepted evidence that demonstrated a causal relationship between exposure to obscene material and individuals' desensitization to violence and degradation of women. The Court also gave weight to the fact that the *Code* clearly defines the subject matter prohibited by section 163, and does not unnecessarily extend its reach to legitimate forms of expression.¹⁹

iii. *Sharpe*: Possession of Child Pornography

Section 163.1 of the *Code* prohibits the production, distribution, and possession of child pornography. In *Sharpe*, the Court dealt exclusively with section 163.1(4), which prohibits the possession of child pornography. The majority found that the limits in this provision violated section 2(b). Additionally, although the majority found the general application of section 163.1(4) justified under section 1, the provision also potentially captured two instances of "possession" not intended by Parliament. Instead of striking the entire provision down, the majority read in the missing exceptions to bring the provision in line with the *Charter*.

iv. *Khawaja*: Terrorist Activities

Part of the accused's appeal included a claim that the purpose and effect of Part II.1 violated section 2(b). The Court unanimously rejected this argument. Looking purposively at the Part as a whole, the Court found the conduct captured by the impugned provisions to be acts or threats of violence, or acts intimately connected to violence.²⁰ Thus, the conduct here did not fall within the scope of expression protected under section 2(b), and the Court did not conduct a section 1 analysis.

v. *Zundel*: False News

In *Zundel*, the accused was charged under section 181 of the *Code* for publishing a booklet that denied the Holocaust. In a narrow 4-3 split, the Court struck down the *Code* offence of publishing false statements that could cause injury to public interest because it was overbroad and vague. First, section 181 caught a wide range of speech. Additionally, the qualification that the speech be "false" was unclear and potentially dependant on accepted norms of the day. Finally, the requirement that the speech cause

¹⁹ *Butler*, *supra* note 10 at paras 112-115.

²⁰ *Khawaja*, *supra* note 7 at para 71.

“injury” or “mischief” could not be sufficiently defined. The legislature’s objective at the time of its enactment in 1892 no longer addressed an existing social concern.²¹ For these reasons, the limits section 181 presented to freedom of expression could not be justified under section 1 of the *Charter*.

II. DOES SECTION 83.221 INFRINGE SECTION 2(B)?

The Liberal Government should reassess section 83.221 because it potentially implicates the rights and freedoms protected under section 2(b), and this uncertainty about the provision’s constitutionality is itself problematic. A law infringes section 2(b) if the prohibited activity is a form of “expression” and if Parliament’s purpose in enacting the law is to limit that expression. One of the central issues with section 83.221 is the potential vagueness and overbreadth in some of the offence elements, particularly with the definitions of “advocating” and “promoting”. This potential vagueness and overbreadth creates uncertainty about whether the activities prohibited by section 83.221 are constitutionally valid or if they are protected by the *Charter* at all.

A. Is the Activity Caught by Section 83.221 “Expression”?

Prime Minister Trudeau has already identified provisions with overly broad definitions as one of the problematic areas in Bill C-51 his Government will remedy. Section 83.221 should be one of those provisions because available case law do not clearly resolve whether the activity caught by section 83.221 falls within the scope of section 2(b). If the court does not recognize the impugned activity as “expression”, section 2(b) will not protect it. A court may be persuaded to find these acts do not qualify as “expressions” if it accepts that “advocating” or “promoting” terrorism offences exist on a continuum that contributes to acts of violence, or that “advocating” or “promoting” terrorism offences are akin to counselling an offence. On the other hand, a court may decide that key elements of the offence are too vague, and the activity caught by the provision fall within the ambit of section 2(b) notwithstanding these arguments.

Historically, courts have interpreted section 2(b) generously. If the impugned activity conveys or attempts to convey meaning, courts start from a presumption that the activity falls under the ambit of section 2(b), regardless of its content.²² This low threshold means that section 2(b) protects even unpopular and offensive expression, as evidenced in *Sharpe*, *Keegstra*, and *Butler*. Acts of violence are the exception. A court may find that promoting and advocating terrorism offences are closely connected to acts of violence, and should not receive protection under the *Charter*. In a case review of *Keegstra*, law professor, Kathleen Mahoney, cites a social-psychology study that suggests expressions of prejudicial attitudes connect to acts of violence on a continuum scale, and that each stage of the continuum is connected to and dependent on preceding stages.²³ Using this premise, she argues that the Court in *Keegstra* should not have taken a categorical approach that distinguishes based on content and form because, in the context of hate propaganda, content is very much related to form.²⁴ Similarly, one could argue that advocating and promoting terrorism fall on a continuum of actions that potentially lead to acts of terrorism, and for this reason, should be viewed purposively rather than in dichotomous content and form distinctions. The door may be open for a court to make

21 *Zundel*, *supra* note 9 at para 54.

22 *Keegstra*, *supra* note 11 at para 37, citing *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927; *Butler*, *supra* note 10 at para 69.

23 Gordon Allport, *The Nature of Prejudice* (Cambridge, MA: Addison Wesley, 1954), cited in Kathleen Mahoney, “R. v. Keegstra: A Rationale for Regulating Pornography?”, online: (1992) 37 McGill LJ 242 at 249 <<http://www.lawjournal.mcgill.ca/userfiles/other/4003804-Mahoney.pdf>> archived at <<https://perma.cc/M8ZY-DK2P>>.

24 *Ibid.*

such a conclusion. In the context of a *Charter* analysis of a *Code* provision that prohibits the participation in the activity of a terrorist group, the Court in *Khawaja* noted that “there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts.”²⁵ If a court agrees that advocating and promoting terrorism is an early participatory stage that culminates in the commission of terrorist acts, it may conclude that the activities prohibited by section 83.221 should not receive *Charter* protection.

At the same time a court may find that the prohibition in section 83.221 encroaches too far into activities protected by section 2(b). Justice McLachlin, as she then was, wrote in her dissenting reasons in *Keegstra*, and in the unanimous *Khawaja* decision that section 2(b) excluded threats of violence because threats of violence “take away free choice and undermine freedom of action.”²⁶ Applying this premise, law professors Kent Roach and Craig Forcese²⁷ argue that advocating and promoting terrorism offences are distinguishable from expressions that threaten violence because the former do not remove agency from the receiver.²⁸ Rather, an individual may “advocate or promote terrorism offences” without threatening harm. Arguably, there is nothing inherently violent in expressing one’s opinion in favour of terrorism.

A court may find the activity prohibited by section 83.221 outside the protection of section 2(b) by accepting the proposition that advocating or promoting terrorism is akin to counselling. Although statutory interpretation tools presume that three distinct terms each have a distinct meaning, common sense indicates that the verbs “to advocate”, “to promote”, and “to counsel” bear some relation to each other. According to section 22(3) of the *Code*, to “counsel” means to solicit, procure, or incite.²⁹ *Keegstra* defined “promote” to mean “active support or instigation [...] more than simple encouragement.”³⁰ *Sharpe* noted that the “advocate or counsel” requirement in section 163.1(2) is met if an individual “actively induc[es] or encourag[es]” the described offence.³¹ The Court in *R v Hamilton* said liability flows from counselling an offence because it is just as objectionable to “get someone to commit an objectionable act,” and in doing so, “increases the likelihood of harm occurring.”³² *Khawaja* also confirmed that threats of violence or offences enumerated under section 83.01(1)(b)(ii),³³ which includes counselling an act, fall under the violence exception to section 2(b) protection.³⁴ These activities undermine the law, are unworthy of protection, and are antithetical to the underlying purpose for section 2(b), which is to choose between ideas or courses of conduct.³⁵ The common law definitions of “promoting” and “advocating” suggest a similar culpability as “counselling”. Thus, one could argue that section 2(b) should also exclude acts of advocating or promoting an offence.

25 *Khawaja*, *supra* note 7 at para 63.

26 *Ibid* at para 71; *Keegstra*, *supra* note 11 at para 237.

27 Professors Roach and Forcese teach in the Faculties of Law at the University of Toronto and University of Ottawa respectively. They are recognized as experts on national security law, and have written extensively on C-51.

28 Roach & Forcese, *supra* note 12 at 21-22.

29 *Criminal Code*, *supra* note 3, s 22(3).

30 *Keegstra*, *supra* note 11 at para 115.

31 *Sharpe*, *supra* note 8 at para 56.

32 *R v Hamilton*, 2005 SCC 47; [2005] 2 SCR 432; [2005] SCJ No 48 (QL) at paras 25-26.

33 Subsections 83.01(1)(b)(ii)(A), (B), (C) and (D) defines ‘terrorist activity’ to mean an act or an omission that intentionally causes death or serious bodily harm, endangers a person’s life, causes a serious risk to the health or safety of the public, or causes substantial property damage likely to result in these bodily harms. See *Khawaja*, *supra* note 7 at para 71.

34 *Khawaja*, *supra* note 7 at para 70.

35 *Ibid* at para 70-71; *Keegstra*, *supra* note 11 at para 237.

However, Professors Roach and Forcese caution against “plugging-in” judicially defined terms and presuming these definitions apply from one offence to another without also considering their respective contexts.³⁶ As will be more thoroughly discussed in Part III, unlike in *Sharpe* or *Keegstra*, section 83.221 likely suffers from an overbroad interpretation and application because the prohibited subject matter is also vaguely defined, and the offence lacks statutory defences.³⁷ The potentially overbroad reach of section 83.221 could mean that legitimate expression could be unwittingly caught by this provision. Thus, a court may be disinclined to exclude *Charter* protection because of the potential it will catch legitimate forms of expression, and may prefer to instead consider if the limit is justified under section 1 of the *Charter*. This uncertainty is also problematic because until a court makes a determination on this issue, section 83.221 may effectively chill free speech. The Liberal Government should reassess section 83.221, and amend the provision with clearer definitions to avoid this.

B. Parliament Intended to Limit Expression

If the activity or conduct qualifies as “expression” within the meaning of section 2(b), the second consideration is whether the government intended to restrict freedom of expression.³⁸ Here, the government’s purpose is clearly to prohibit a certain undesirable kind of expression. Section 83.221 specifically targets expression by referencing section 319(7)’s definition of “statements”.

III. IS SECTION 83.221 PRESCRIBED BY LAW AND DEMONSTRABLY JUSTIFIED?

If section 83.221 violates section 2(b), the government must justify its limits under section 1 of the *Charter*. Section 1 requires a court to determine whether the impugned provision is prescribed by law and whether it is demonstrably justified in a free and democratic society. The Liberal Government should reassess section 83.221 because if this provision is indeed *Charter* protected, a court may find section 1 cannot save it. Based on the five comparison cases, a court may not find section 83.221 prescribed by law because it is too vague. Although a court may find that Parliament had a pressing and substantial objective and that section 83.221 is rationally connected to that objective, it may conclude that section 83.221’s limitations are not proportionate to its effects because its limitations do not minimally impair.

A. Section 83.221 may not be Prescribed by Law because it is Vague

Impermissibly vague laws frustrate the fundamental principle of justice that an individual should be able to know that a given act is criminally prohibited at the time he or she commits the act.³⁹ The constitutional doctrine against vagueness also dictates that laws be sufficiently clear to limit law enforcement discretion.⁴⁰ This means a legally prescribed limit cannot be so obscure that it is “incapable of interpretation with any degree of precision” with “no intelligible standard.”⁴¹

Section 83.221 can be contrasted against sections 163, 163.1, and 319 of the *Code*. The subject matter of these prohibitions have distinct and narrow definitions. For example, section 163(8) defines “obscene” to mean “any publication a dominant characteristic of

36 Roach & Forcese, *supra* note 12 at 11.

37 *Ibid.*

38 *Keegstra*, *supra* note 11 at para 31.

39 *R v Levkovic*, 2013 SCC 25; [2013] 2 SCR 204; [2013] SCJ No. 25 (QL) at para 3, citing *R v Mabior*, 2012 SCC 47 [*Levkovic*].

40 *Ibid* at para 2, citing *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123.

41 *Butler*, *supra* note 10 at para 74.

which is the undue exploitation of sex, or of sex and any one or more of the following [...] crime, horror, cruelty and violence.”⁴² Expressions that do not meet this definition are not “obscene”. Similarly, section 163.1(1) specifies the expressive vehicle and what must be depicted for an expression to come within the definition of “child pornography”. The requirement that the “dominant characteristic” of the expression depict a sexual organ “for a sexual purpose” precludes, for example, family pictures of babies in the bath.⁴³

The courts do not always strike down all imprecise laws, as they recognize precise technical definitions may not always be possible.⁴⁴ In such circumstances, the judiciary must interpret undefined terms based on Parliament’s intent. Section 319(2) criminalized wilful promotion of “hatred”. The Court in *Keegstra* interpreted the word “hatred” in context with Parliament’s purpose rather than strike it down, and concluded that based on the way the term was used in the provision, “hatred” denoted a limited range of identifiable emotions.⁴⁵ One of the criticisms of section 83.221 is that unlike section 319(2) where “hatred” had a narrow range of meaning, the potential vagueness in section 83.221 may not be as easily remedied. In the context of terrorism offences, it is unclear here what it means to “advocate” or “promote”, and what needs to be advocated or promoted.⁴⁶

As raised in Part II, the provision is also vague because the difference in meaning between “counselling”, “advocating”, and “promoting” terrorism is unclear. The modern statutory interpretation approach presumes Parliament avoids redundancy.⁴⁷ This then suggests that “advocating” and “promoting” are not synonymous with each other, or with “counselling”. Minister Blaney said section 83.221 targets the “idea of counselling or inciting,” and pointed to *Sharpe* and *Keegstra* as instructive to clarify any potential vagueness in its meaning.⁴⁸ The definitions in *Sharpe* and *Keegstra* also seem to suggest “advocate”, “promote”, and “counsel” have similar meanings. How do “actively inducing and encouraging”; “actively supporting and instigating that is more than mere encouragement”; and “procuring, soliciting, and inciting” differ from each other in meaning? If they do in fact mean the same thing, why did Parliament enact an offence that already exists in the *Code*? Why did Parliament include both “advocate” and “promote” as the actus reus elements of the offence? If these words do not mean the same thing, how are they different? This imprecision in a key element of the offence makes section 83.221 vague.

Secondly, the nature of the subject matter caught by this offence is also vague. The prohibited content is “terrorism offences *in general*.” As aforementioned, section 2 of the *Code* defines “terrorism offences” very broadly. “Terrorism offences” include any indictable offences in the *Code* committed for or in association with a terrorist group; any indictable offence that is also “terrorist activity”; a series of specific offences under Part II.1; and conspiracy, aiding after the fact, or counselling any of the above. Definitions that cite provisions with definitions that refer to yet other provisions with definitions reduce the likelihood of finding an intelligible standard. The Canadian Bar Association (“CBA”) criticized Parliament’s decision to use “terrorism offences” as the content matter, instead of the less broad term, “terrorist activity”, which is more clearly defined in section 83.01(1).⁴⁹ “Terrorism offences” is already vaguely and broadly defined, and the words “in

42 *Criminal Code*, *supra* note 3, s 163(8).

43 *Sharpe*, *supra* note 8 at paras 49-51.

44 *Butler*, *supra* note 10 at para 76.

45 *Keegstra*, *supra* note 11 at paras 116-117.

46 Roach & Forcese, *supra* note 12 at 7.

47 Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law Inc, 2007) at 167.

48 Public Safety March 2015, *supra* note 18 at 0935 (Hon Steven Blaney).

49 Bill C-51, Anti-terrorism Act, 2015” (March 2015), *The Canadian Bar Association*, online: <<http://iclmg.ca/wp-content/uploads/sites/37/2015/03/15-15-eng.pdf>> archived at <<https://perma.cc/M98C-Z6EJ>> at 22 [Bill C-51].

general” add even more uncertainty.⁵⁰ Minister MacKay’s comments suggests Parliament intended this vagueness:

[...] the focus of the proposed new offence is to cover the situation where the active encouragement lacks the specific detail that would link the encouragement to the commission of a specific terrorism offence, although in the circumstances, it is clear that someone is actively encouraging to commit any of the terrorism offences in the *Code*.⁵¹

Although Parliament clearly intended to enact a provision that could adapt to the ever changing counter-terrorism landscape, this approach potentially violates the fundamental principle of justice that individuals must be able to know that a particular act is a criminal offence at the time he or she commits it.⁵² A law cannot prohibit an act if that law is unclear about what the prohibited act is, which section 83.221 attempts to do.

It is possible for section 83.221 to fail at this stage of the section 1 analysis. However, a court may also, as it did in *Zundel*,⁵³ presume the offending provision meets the low vagueness threshold in order to consider the matter on its merits at the next section 1 stage.

B. Is the Limitation of Advocating or Promotion Terrorism Offences Demonstrably Justifiable?

A limit that infringes the *Charter* may be demonstrably justifiable if the government can show Parliament had a pressing and substantial objective, and that the means chosen are proportionate to this objective.⁵⁴ The law is proportionate if the means chosen to achieve it are rationally connected, if the law impairs as minimally as necessary, and if the benefits of the law are proportional to its deleterious effects.⁵⁵ Drawing on analogous considerations from the five comparison cases, a court may conclude that although Parliament had a pressing and substantial objective that is rationally connected to the means adopted, section 83.221 does not minimally impair in its limits, and the provision is therefore not demonstrably justifiable.

i. Parliament had a Pressing and Substantial Objective

A court will likely find that Parliament had a pressing and substantial objective in enacting section 83.221 because Parliament’s purpose in enacting section 83.221 is well documented. Ministers Blaney and MacKay make it very clear at various stages of the legislative process that Bill C-51 targets the very real threat of terrorism in Canada, and that the purpose of the new offence is to give law enforcement more powers to combat the concerning trend in militant radicalization in Canadians. At the second reading, Minister Blaney pointed to the international jihadist movement and the danger it poses to Canada. Minister MacKay said Bill C-51 was “aimed specifically at protecting Canadians from the evolving threat of terrorism.”⁵⁶ The former Government was also clear that the amendments to the *Code* collectively and individually gave law enforcement

50 Roach & Forcese, *supra* note 12 at 14.

51 Public Safety March 2015, *supra* note 18 at 0915 (Hon Peter MacKay).

52 *Levkovic*, *supra* note 39.

53 *Zundel*, *supra* note 9 at para 41.

54 *Carter v Canada (Attorney General)*, 2015 SCC 5; [2015] 1 SCR 331; [2015] SCJ No 5 (QL) at para 94, citing *R v Oakes*, [1986] 1 SCR 103.

55 *Ibid.*

56 *House of Commons Debates*, 41st Parl, 2nd Sess, No 176 (20 February 2015) at 1125 (Hon Peter MacKay).

power to pre-empt, prevent, and thwart terrorist activities.⁵⁷ Minister Blaney compared terrorism to the Holocaust, saying, “[V]iolence begins with words. Hatred begins with words [...] extremist speeches, the language that undermines Canadian values, basically hate propaganda has no place in Canada [...] we must not tolerate incitement to violence.”⁵⁸ These statements align with the Government’s Counter-terrorism Strategy, which identifies prevention as a significant element.⁵⁹

Minister Blaney’s reference to hate propaganda also reminds us that this particular criminalized limit to free expression successfully withstood a constitutional challenge. The Court in *Keegstra* reviewed the provision’s detailed history, which was an essential element when the Court considered Parliament’s objective in enacting the offence. In 1966, with the atrocities of Nazism still fresh in mind, Parliament appointed the Cohen Commission to study the state of hate propaganda in Canada.⁶⁰ The Committee identified potential societal harms associated with hate propaganda and recommended the subsequently enacted offences.⁶¹ This contrasts with *Zundel*, where the Court struck down the false statements offence. Here, the Court’s inability to pinpoint an objective that addressed an existing social harm was fatal to the provision. Section 181 did not have well-documented history of debates, committee recommendations, or international obligations.

The Court in *Butler* and *Keegstra* found Canada’s international obligations important when considering whether Parliament’s objectives were pressing and substantial. The specific international agreements and resolutions in which Canada participates are beyond the scope of this paper, but it is worth noting that Canada contributes to a variety of international counter-terrorism initiatives. For example, Canada helps develop legal instruments and international standards with organizations such as the UN Counter Terrorism Implementation Task Force and NATO.⁶² These activities support the former Government’s contention that section 83.221 contributes to Canada’s domestic and international counter-terrorism strategies.

A court would certainly find the former Government’s objective to prevent and respond to terrorist threats pressing and substantial because of the grave harm associated. Since the events of 9/11, law enforcement in Canada have responded to a handful of known terror related plots, and have successfully interrupted the execution of several plots.⁶³ However, the increased number of “lone wolf” attacks pose a risk that is more difficult for law enforcement to detect. For example, the two terrorist attacks that precipitated the enactment of Bill C-51 in October 2014 included a Quebec man who drove his vehicle into two members of the Canadian military, killing one. Two days later, an Ontario man fatally shot a reservist officer on Parliament Hill and stormed the Parliament building

57 *House of Commons Debates*, 41st Parl, 2nd Sess, No 174 (18 February 2015) at 1715 (Hon Peter MacKay).

58 Public Safety March 2015, *supra* note 18 at 1000 (Hon Steven Blaney).

59 Public Safety Canada, “Countering Violent Extremism”, *Government of Canada*, online: <<http://www.publicsafety.gc.ca/cnt/ntnl-scr/cntr-trrrsm/cntrng-vlnt-xtrmsm/index-eng.aspx>> archived at <<https://perma.cc/Q38X-99X2>>.

60 Kent Roach & David Schneiderman, “Freedom of Expression in Canada” (2013) 61 Sup Ct L Rev (2d) 101 at 462 [Roach & Schneiderman].

61 *Keegstra*, *supra* note 11 at paras 60-62.

62 Global Affairs Canada, “Terrorism”, *Government of Canada*, online: <<http://www.international.gc.ca/crime/terrorism-terrorisme.aspx?view=d&lang=eng>> archived at <<https://perma.cc/3D7V-BLQG>>.

63 In June 2005, a series of police raids in Ontario resulted in the arrest of 18 people later charged with conspiring to carry out terrorist activity: *R v Amara* 2010 ONSC 441. In 2010, an individual, after pledging allegiance to Osama Bin Laden, promised to recruit others to coordinate attacks. He had been making terrorism related plans at the time of his arrest: *R v Alizadeh* 2014 ONSC 1907.

before being fatally shot himself. Both “lone-wolf” attacks were allegedly linked to Islamic State of Iraq and al-Sham (“ISIS”) ideology.⁶⁴ Further, the radicalization of young Canadians is alarming and more prevalent than before, as evidenced by the number of individuals travelling to join terrorist groups abroad.⁶⁵ Based on the available evidence about the prevalence and graveness of terrorist threats to Canada and Canadians, and the former Government’s clear indication that Bill C-51 was meant to respond to these threats, a court will very likely find this arm of the section 1 analysis is met.

ii. Limiting this Expression may be Rationally Connected to Parliament’s Objective

The key question in this portion of the analysis is whether the limits posed by section 83.221 constitute a rational means to meet the objective. Based on *Keegstra*, *Butler*, and *Sharpe*, and the standard of proof the Court accepted in those cases, a court may find a sufficient nexus between the limit in section 83.221 and the objective.

A limit must be rationally connected to Parliament’s pressing and substantial objective. This means the law should be a rational means for Parliament to meet its objectives, and the law’s effect should relate to its purpose.⁶⁶ Courts do not require conclusive, definitive, or causal evidence connecting a limit to a known social harm, because they recognize this standard is often difficult or impossible to meet.⁶⁷ Instead, the Crown’s standard of proof for demonstrating harm is to show an activity creates a “reasoned apprehension of harm,” based on common sense and experience.⁶⁸ In the above cases, although the social science evidence linking obscenity and child pornography to a social harm were inconclusive, available evidence and common sense suggested a rational link between the activity and the social harm existed. For example, the Court in *Keegstra* accepted the Cohen Committee’s findings that hate propaganda existed in Canada at a level sufficient to warrant concern.⁶⁹ In *Butler*, the Court accepted evidence suggesting a correlative relationship between exposures to obscene content and reinforcing gender stereotypes.⁷⁰ The Court also accepted evidence showing a link between viewing child pornography and child sexual abuse in *Sharpe*.⁷¹ The Court’s findings in these cases show its willingness to find a rational connection between the means taken and Parliament’s objectives based on a reasoned apprehension of harm, and a court will likely do the same when considering section 83.221.

Some studies place more weight on interpersonal relationships in the radicalization process than on Internet incitement.⁷² However, while one cannot conclude that advocating or

64 Stewart Bell, “ISIS takes credit for inspiring terrorist attacks that killed two Canadian soldiers”, *National Post* (21 November 2014), online: National Post <<http://news.nationalpost.com/news/canada/isis-takes-credit-for-inspiring-terrorist-attacks-that-killed-two-canadian-soldiers>> archived at <<https://perma.cc/LL9Z-6CKV>>.

65 David Ljunggren, “Spy agency sees sharp increase in Canadians joining Islamic State” (20 April 2015), *Reuters Canada*, online: <<http://ca.reuters.com/article/topNews/idCAKBN0NB2DV20150420>> archived at <<https://perma.cc/QU55-6Z28>>.

66 *Canada (Attorney General) v Bedford*, 2013 SCC 72; [2013] 3 SCR 1101, [2013] SCJ No. 72 (QL) at paras 111, 126 [*Bedford*].

67 *Sharpe*, *supra* note 8 at para 85; *Butler*, *supra* note 10 at para 103; *Keegstra*, *supra* note 11 at para 114.

68 *Sharpe*, *supra* note 8 at para 85; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11; [2013] 1 SCR 467, [2013] SCJ No 11 (QL) at para 132 [*Whatcott*].

69 *Keegstra*, *supra* note 11 at para 60.

70 *Butler*, *supra* note 10 at paras 103, 107-108.

71 *Sharpe*, *supra* note 8 at para 88.

72 Craig Forcese & Kent Roach, “Terrorist Babble and the Limits of the Law: Assessing a Prospective Canadian Terrorism Glorification Offence” (2015) *Canadian Network for Research on Terrorism, Security and Society*, online: <http://library.tsas.ca/media/TSASWP15-02_Forcese-Roach.pdf> archived at <<https://perma.cc/7WYH-RUPK>> at 10.

promoting terrorism *causes* terrorist acts, propagating terrorism may help to normalize terrorist driven violence.⁷³ The Court in *Sharpe* accepted the potential for normalization of harm as a factor in finding a rational connection between the objectives and the means chosen to meet them.⁷⁴ The Internet can facilitate radicalization by providing forums for communication and coordination, and instructive material. Post attack analyses generally show individuals involved in terrorist activity consumed terrorist media. This is all the more prevalent in the current media landscape, where terrorist organizations, such as ISIS and al-Qaeda, employ more sophisticated propaganda tactics than other terrorist groups before it. A 2011 report to the US National Institute of Justice suggests two-thirds of radical discussions online include an explicit call for jihad.⁷⁵ Jim Berger, an expert analyst on extremism at Brookings Institute in Washington, DC, estimated Twitter had over 40,000 accounts promoting ISIS.⁷⁶ Additionally, a Harvard study showed about 10 percent of the violent participation in the Rwandan genocide was directly attributable to violent hate propaganda, because one of the national Rwandan radios called for “pre-emptive violence” which was necessary for “self-defence”.⁷⁷ Radicalization depends on individuals propagating and disseminating a violent and radical ideology, and incitement is used as a tool of mobilization.⁷⁸ This suggests that inciting terrorism is a key component to the eventual materialization of terrorist acts. Given the lower threshold set in *Keegstra*, *Butler*, and *Sharpe*, a court may choose to defer to the Government’s decision to employ this particular limit to meet its objective.

iii. Section 83.221 may not Minimally Impair Freedom of Expression

The third stage of this analysis asks whether the limit minimally impairs. A limit need not be the least restrictive, but it must be rationally tailored to Parliament’s objective “in the context of the infringed right,”⁷⁹ and impair no more than reasonably necessary.⁸⁰ A court will consider two elements at this stage: overbreadth and alternative methods to achieve Parliament’s objectives. An overbroad limit does not minimally impair, and a court may find section 83.221 overbroad because vague elements of the offence possibly captures activities beyond those intended, and because the provision lacks reasonable defences to restrict its application. Additionally, a court may consider whether the limits imposed by section 83.221 fall within the range of reasonable alternatives, although it is unclear whether a court would interfere with a reasonable method even if other alternatives exist.

a. Section 83.221 may be Overbroad

A limit is overbroad when it “goes too far and interferes with some conduct that bears no connection to its objective.”⁸¹ In this case, Parliament intentionally kept the wording of section 83.221 broad to cast a wider net than existing provisions in the *Code*. Unlike in

73 Laura Huey, “This is Not Your Mother’s Terrorism: Social Media, Online Radicalization and the Practice of Political Jamming”, online: (2015) 6:2 J Terror Res at 3, <<http://jtr.st-andrews.ac.uk/articles/10.15664/jtr.1159/>> archived at <<https://perma.cc/34CT-W5QP>>.

74 *Sharpe*, *supra* note 8 at 88.

75 Forcese & Roach, *supra* note 72 at 10-11.

76 Canada, Parliament, Senate, Standing Committee on National Security and Defence, *Evidence*, 41st Parl, 2nd Sess, No 16 (27 April 2015) at 147 [Security and Defence April 2015].

77 David Yanagizawa-Drott, “Propaganda and Conflict: Evidence from the Rwandan Genocide”, online: (2014) 129:4 Q J Econ 1947 at 1953, 1989 <<http://qje.oxfordjournals.org/content/early/2014/08/21/qje.qju020.full.pdf+html>>.

78 Yaël Ronen, “Incitement to Terrorist Acts and International Law” (2010) 23 *Leiden J Int’l L* 645 at 655-656.

79 *Butler*, *supra* note 10 at para 110, citing *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927.

80 *Sharpe*, *supra* note 8 at para 96.

81 *Bedford*, *supra* note 66 at para 101.

Butler, where the obscenity provision narrowly restricted its application to sexually explicit material, or in *Sharpe*, where the definition of child pornography specified particular attributes, key elements of the section 83.221 offence cannot be defined with sufficient precision. The provision, therefore, has the potential to catch activities Parliament never intended to be caught. In *Zundel*, the Court cited overbreadth as the “fatal flaw” of the false information offence.⁸² An undefined and overreaching provision leaves open the possibility of the state restricting constitutional rights in circumstances that may not be justifiable.⁸³ Given the social and political context in which Parliament enacted section 83.221, it was clearly intended to target militant terrorist groups, such as ISIS and al-Qaeda. To this point, Jim Berger, reminded the Senate Committee that anything done as a response to Islamic extremism would have the same application to other groups and individuals.⁸⁴ Professors Roach and Forcese seconded this caution, noting that while law enforcement could apply the provision straightforwardly in cases of ISIS extremism, application to other groups, such as pipeline protesters or Ukrainian rebel supporters, would be less clear.⁸⁵ Jim Berger succinctly commented that “one person’s terrorist is another’s freedom fighter.”⁸⁶ The Canadian Civil Liberties Association advances a scenario in which a journalist in favour of providing resources for Ukrainian insurgents against Russian troops could fall under the new offence.⁸⁷ The CBA posed a similar question, noting civil activists like Nelson Mandela could have also been caught by section 83.221.⁸⁸ One common theme is a reliance on prevailing societal norms to inform what constitutes “legitimate” expression. The vagueness of section 83.221 leaves open the possibility for law enforcement to apply the provision arbitrarily. This level of discretion can be troubling because the very purpose of section 2(b) is to protect all expression, regardless of the popularity of their content.

Additionally, Parliament set the mental fault element of the section 83.221 offence at a lower threshold than other expression limiting offences. As discussed in Part I, section 83.221 captures those individuals who *knowingly* advocates or promotes, rather than a higher mental fault element of *wilful* advocating or promoting. Professors Roach and Forcese note that the Court narrowly upheld section 319(2) in *Keegstra* in part because section 319(2) required “wilful” promotion of hatred.⁸⁹ This mental fault element in section 83.221 increases the potential that individuals may be caught by the offence, even though their actions do not produce the harm Parliament intended to address with this offence.

Further, unlike other criminalized limits to freedom of expression, section 83.221 does not provide any statutory exceptions or defences. *Keegstra* noted that when considering overbreadth, statutory exceptions show the government took steps to avoid intruding on a protected right more than necessary.⁹⁰ For example, section 163 exempts obscene materials kept only for personal consumption. Section 319(2) allows an individual to promote hatred against an identifiable group in the context of a private conversation. In *Sharpe*, the Court read in the exception of possessing child pornography created by the possessor and kept for personal use only to section 163.1(4). For each provision,

82 *Zundel*, *supra* note 9 at para 62.

83 *Ibid* at para 58.

84 Security and Defence April 2015, *supra* note 76 at 149.

85 Roach & Forcese, *supra* note 12 at 13.

86 Security and Defence April 2015, *supra* note 76 at 148.

87 “Understanding Bill C-51: The Anti-Terrorism Act, 2015” (19 May 2015), *Canadian Civil Liberties Association*, online: <<https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/>> archived at <<https://perma.cc/Q7NC-64T6>>.

88 *Bill C-51*, *supra* note 49 at 23.

89 Roach & Forcese, *supra* note 12 at 17.

90 *Keegstra*, *supra* note 11 at para 107.

the Court noted the availability of exceptions or defences as an important restraint on potentially overbroad applications. Section 83.221 does not include a private use exception. On one hand, the lack of a “private conversation” exception for advocating or promoting terrorism makes sense. If one interprets “advocate” and “promote” to mean “incite” or “counsel”, this act should be limited whether one expresses it in private or in the public sphere. There is no “private conversation” exception for counselling an offence, and rightly so. However, because key elements of section 83.221 are vague and therefore likely to capture legitimate expressive activities, the absence of exceptions only compounds the overbroad nature of the provision.

b. Considering Other Reasonable Alternatives

Predicting whether a court will find section 83.221 minimally impairs under this consideration is difficult because of the degree of deference courts accord to Parliament. A court may find that a *Charter* infringing limit minimally impairs if that limit falls within the range of reasonably supportable alternatives.⁹¹ Professors Roach and Forces believe other less impairing methods to prevent or forestall acts of terrorism exist,⁹² and there may be some truth to this proposition. For example, on July 10, 2015, the RCMP arrested a British Columbia man under section 83.2, which prohibits the commission of an indictable offence for the benefit of a terrorist group, and for counselling to commit murder and assault by posting pro-ISIS terrorism propaganda that encouraged and provided instructions to commit murders in the name of jihad.⁹³ This arrest suggests that law enforcement could use existing *Code* provisions to capture the same activities targeted by section 83.221, thereby making section 83.221 superfluous and unnecessary. However, courts are mindful of Parliament’s role in selecting a particular scheme to meet its intended objectives, and a court may be more inclined to accord deference to the method Parliament chooses, even if other less impairing schemes exist.⁹⁴ The Court in *Sharpe* said that a legislative scheme does not have to be “perfect”, as long as it is “appropriately tailored in the context of the infringed right.”⁹⁵ Thus, the court’s conclusion on the potential overbreadth of section 83.221 may influence whether it finds the provision to be a scheme within the range of reasonable alternatives. Given the above discussion about overbreadth, the Liberal Government should reassess section 83.221 and make necessary amendments to increase the likelihood that this provision will meet the minimal impairment test.

iv. Are the Potential Harms Caused by Limiting Expression Proportionate to the Benefits of Preventing Terrorism?

At this stage of the analysis, a court will assess whether the benefits of employing section 83.221 as a counter-terrorism tool outweigh the deleterious effects of limiting freedom of expression. In order to properly weigh these, the court will assess and balance all the section 1 considerations discussed above.⁹⁶ In this case, the final balance between the beneficial and detrimental effects of section 83.221 may be greatly influenced by the court’s view on the potential vagueness and overbreadth of the provision.

91 *Whatcott*, *supra* note 68 at para 101.

92 Roach & Forcese, *supra* note 12 at 23.

93 Royal Canadian Mounted Police, News Release, “Man Arrested by RCMP in BC for Terrorism Offences” (10 July 2015), online: Royal Canadian Mounted Police <<http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodId=2087&contentId=42610>> archived at <<https://perma.cc/H7C7-JUT9>>.

94 *Whatcott*, *supra* note 68 at paras 78, 101.

95 *Butler*, *supra* note 10 at para 110.

96 *Sharpe*, *supra* note 8 at 102.

Undoubtedly, Parliament's objective to prevent terrorism at all stages is pressing and substantial. The failed terrorist plots and recent attacks in Canada, and the increasing number of terrorist attacks internationally, highlight the import of this objective. The former Government clearly articulated these concerns and explicitly pointed to section 83.221 as a response tool. Advocating or promoting terrorism alone may not cause an individual to move to acts of violence, but may be a strong contributing factor. The Rwandan radios' contribution to increased violence suggests this kind of expressive activity at least relates to the incitement of actual violence. Since the standard of proof for rational connection is a "reasoned apprehension of harm", a court could defer to the government and move on to the next stage of the analysis.

The problem arises under minimal impairment, because as a vague and overbroad provision, section 83.221 will likely capture more than Parliament intended. Limits on expressions should be drafted "with the greatest precision possible",⁹⁷ and Parliament could have drafted section 83.221 with some more precision. In *Keegstra* and *Sharpe*, the Court compared the expressive activities caught by the impugned provisions against the core values associated with freedom of expression. Section 2(b) protects expressions that enhance democratic participation, truth seeking functions, and self-fulfilment.⁹⁸ On the narrowest reading of section 83.221, the expression prohibited is of low value, and not the kind of expression society wants to protect. However, the potential vagueness and overbreadth of section 83.221 invites the possibility of including other expressive activities that are more intimately connected to these core values, particularly the enhancement of democratic participation.

In *Khawaja*, the Court also considered whether an impugned provision dealing with terrorism in the *Code* violated the accused's section 7 *Charter* rights. In its proportionality analysis, the Court concluded that while the *Code* provisions at issue "captured a wide range of conduct", when the "tailored reach [of the provision] is weighed against the objective [of preventing devastating harm that may result from terrorist activity]" the means were not overbroad and the impact not disproportionate.⁹⁹ Specifically, the Court concluded the narrow scope of the impugned provision ensured that truly innocent individuals would not be caught.¹⁰⁰ The Court's comments in *Khawaja* suggest its willingness to accord a high degree of deference to Parliament's choice of counter-terrorism schemes, but only once it is satisfied that Parliament sufficiently tailored the impugned scheme to avoid overbreadth. If a court considering section 83.221 concludes the provision does not minimally impair for reasons discussed above, it may distinguish *Khawaja*.

IV. POTENTIAL REMEDIES

If a court finds that section 83.221 cannot be justified by section 1 of the *Charter*, it will consider an appropriate remedy. It may choose to strike the provision entirely, as the Court did in *Zundel*, or to read in or down elements to make the provision constitutionally valid, as the Court did in *Sharpe*.

In *Sharpe*, the Court was hesitant to strike down the entire law because it was valid in most of its applications, and because the *Code* would be left with a gap until Parliament legislated a new provision.¹⁰¹ This hesitance may not be applicable to section 83.221. As a newly enacted offence, section 83.221 has not yet been applied, and there can be no comparison between valid and invalid applications. The aforementioned example of the

97 *Keegstra*, *supra* note 11 at para 293.

98 *Butler*, *supra* note 10 at para 95.

99 *Khawaja*, *supra* note 7 at para 62.

100 *Ibid* at paras 53-54.

101 *Sharpe*, *supra* note 8 at para 111.

recent RCMP arrest suggests the possibility of covering the social harm without the use of section 83.221. It is possible that a court will strike section 83.221 and leave it to the government to re-enact a more constitutionally sound provision.

At the same time, section 83.221 is not quite as egregious as section 181. The Court struck down section 181 in *Zundel* because the vagueness and overbreadth prevented the Court from ascertaining Parliament's objective and a rational connection. Professors Roach and Schneiderman also note a trend in section 2(b) cases where courts tend to avoid striking down a law if possible.¹⁰² A court may choose to read in narrower definitions to avoid striking down a provision enacted by an elected Parliament. Unlike in *Sharpe*, however, reading in or down elements may not be possible for section 83.221 because of the high level of vagueness and overbreadth. As mentioned above, Minister MacKay indicated that Parliament intended to leave section 83.221 vague in order to cover the broadest range of conduct necessary. A court may be disinclined to step on the toes of the legislature by reading in interpretations that the court cannot comfortably conclude Parliament intended.

CONCLUSION

The Liberal Government has already indicated its intention to address problematic elements of Bill C-51. Section 83.221 should be one of the areas addressed. At a quick glance, section 83.221 appears to address a grievous social evil, and this danger to society alone should justify a minor infringement on freedom of expression. After all, other *Code* offences prescribe limits on free expression, and the Court has justified them. A deeper analysis breaks down the smoke screen and presents a more problematic provision. Section 83.221 potentially violates section 2(b) of the *Charter* and may not be justified under section 1. A law violates section 2(b) if it limits expression, and if the government intended to limit expression. Courts broadly interpret "expression" to include all activities that convey or attempt to convey meaning, except acts or threats of violence. A court could exclude advocating or promoting terrorism from the scope of section 2(b) because these activities are too intimately connected to violence, or it may choose to presume protection under section 2(b) in order to consider the limits in a more thorough section 1 analysis. Section 83.221 is inundated with vague terms, such that the elements of the offence cannot be interpreted with an intelligible standard. Although section 83.221 could fail at this stage, the threshold at this stage is low, and a court may choose to weigh the advantages and disadvantages of the law in the next stage. Legislative history clearly establishes an unambiguous objective to prevent terrorism. The gravity of harm to the public makes this objective pressing and substantial. The lower threshold of finding a reasoned apprehension of harm between advocating or promoting terrorism and the harm of terrorist-related violence suggests a court may find a rational connection exists between Parliament's objective and the means taken to achieve it. However, a court may not find that the means taken in section 83.221 minimally impair. The provision likely suffers from overbreadth, which potentially captures more legitimate expressive activities than Parliament intended without exceptions to restrict its application. If a court so finds, it may conclude that the benefits of section 83.221 are not proportional to its detrimental effect on freedom of expression, and find section 83.221 unconstitutional. True freedom balances between competing interests – in this context, between national security concerns and a fundamental freedom. This analysis shows the answer is not clear-cut one way or the other, with analogous precedents weighing in favour of both sides. Parliamentary intervention on this provision could eliminate uncertainty in the provision, and potentially avoid a successful constitutional challenge when section 83.221 appears before the Court.

¹⁰² Roach & Schneiderman, *supra* note 60 at 520.