Bill C-10: *Justice for Victims of Terrorism Act*

The Lawfulness and Necessity of Creating a Federal Civil Cause of Action for Terrorism

Submitted to:

The Senate Legal and Constitutional Affairs Committee

Submitted by:

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I. Introduction[1]

The *Justice for Victims of Terrorism Act* (the "Act") seeks to provide Canadians with civil recourse for damages arising from terrorist activity abroad. Its explicit and implicit aims are to deter terrorist attacks and compensate victims of terrorism. Notwithstanding these admirable goals, the Act is troubling for at least three reasons. First, it creates a private right of action – a matter that Canada's constitutional order generally reserves to the provinces. Second, the provisions of Act that alter the *State Immunity Act*[2] could leave Canada in violation of international law and have troubling consequences for its relations with other states. Indeed, recent jurisprudence from the International Court of Justice confirms that states are immune from civil process in other states even where their conduct amounts to gross violations of international law. Third, the realities of civil litigation in Canada are such that victims of terrorism will likely never be compensated: the best they can realistically hope for is some measure of vindication.

II. The Act Violates the Constitutional Division of Powers

a. Creating Causes of Action Is Generally a Provincial Power

According to section 92(13) of the *Constitution Act, 1867*, the provinces and not the federal government have the power to create private causes of action.[3] This is not to say that a federal law creating a cause of action will necessarily be unconstitutional. A federal enactment, grounded in a proper head of federal power under section 91 of the *Constitution Act, 1867*, is constitutional even where it incidentally affects a head of provincial power.[4] However, when creating a civil cause of action is not merely an incidental effect but rather the "dominant purpose" of a federal law, as is the case with the Justice for Victims of Terrorism Act, it will be unconstitutional.[5]

Attempts by Parliament to create civil causes of action have met with mixed success. In *MacDonald v. Vapour*, the Supreme Court invalidated section 7(e) of the *Trade-Marks Act*, finding that it represented a mere extension of tortious liability that was firmly within the purview of the provinces.[6] Sections 7(e) and 53 of the *Trade-Marks Act* combined to create a civil remedy for certain dishonest business practices. The cause of action was held unconstitutional because it was unrelated to Parliament's trademark scheme.[7] Furthermore, the Court was unconvinced that Parliament's criminal law power could justify creating an independent civil remedy.[8]

Civil causes of action that are integrated into a national regulatory scheme, and come within a subject matter that is otherwise within the competence of Parliament, have survived constitutional scrutiny. Thus, civil remedies adopted by Parliament have been held constitutional in the fields of competition law, intellectual property, divorce, railways, and shipping.[9] For example, in *City National Leasing*, a civil remedy under the *Competition Act* was upheld because it was sufficiently related to a regulatory scheme grounded in a federal head of power (trade and commerce).[10] The courts have never recognized Parliament's ability to create freestanding torts not connected to a valid federal regulatory scheme.

b. The Act's Dominant Purpose is To Create a Cause of Action

The purpose clause contained in the *Justice for Victims of Terrorism Act* makes plain the government's aim in introducing the legislation:

> The purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators of terrorism and their supporters.[11] [Emphasis added]

The Act's preamble reinforces this underlying purpose:

> And whereas Parliament considers that it is in the public interest to enable plaintiffs to bring lawsuits against terrorists and their supporters, which will have the effect of impairing the functioning of terrorist groups in order to deter and prevent acts of terrorism against Canada and Canadians[12]

Documents published by the Minister of Public Safety and Emergency Preparedness also make clear that the aim of the Act is to allow terror victims to bring civil actions:

> The Bill will create a cause of action for victims of terrorism allowing them to sue perpetrators and supporters of terrorism. It will also lift the immunity of those states that the Government believes are supporters of terrorism through a listing mechanism.
>
> The proposed legislation will allow any person who can demonstrate a real and substantial connection between their cause of action and Canada to sue in a Canadian court the foreign states that perpetrate and support terrorism. Plaintiffs can seek redress for terrorist acts committed anywhere in the world on, or after, 1 January 1985.[13]

While deterring terrorism is the Act's stated goal, its overriding purpose is to allow Canadians to sue in Canadian courts for damages arising from terrorist activities.

c. The Act's Cause of Action is Not Necessarily Incidental to the State Immunity Act

Creating a cause of action against non-state actors is not necessarily incidental to the *State Immunity Act*. The *State Immunity Act* regulates the immunity of states. Non-state actors have no relationship whatsoever to the immunity of foreign sovereigns.

The Act's cause of action against foreign states is also not necessarily incidental to the *State Immunity Act*. As noted above, the *State Immunity Act* regulates the immunity of states. State immunity in Canada (and indeed under international law) relates to the jurisdiction of a court to hear lawsuits against a state.[14] Jurisdiction is a distinct concept from cause of action. The former involves "the power of a court to hear a particular matter",[15] whereas the latter involves defining a set of facts which, if proven, creates liability.[16]

This distinction is already recognized in domestic law dealing with both Crown and sovereign immunity. For example, the *Crown Liability and Proceedings Act* removes immunity for any tort committed by a Crown servant.[17] Similarly, the *State Immunity Act* removes immunity for death or personal injury that occurs in Canada.[18] What neither statute does, however, is create causes of action against either foreign states or the Crown. Thus, neither statute states that the Crown or a foreign state shall be liable for "negligence", "battery", or "breach of contract"; all of which are causes of action.

Parliament has the authority to define the scope of a foreign state's immunity, but creating causes of action is in no way incidental to the scope of that immunity. As such, the cause of action provision (clause 4) in the Act is likely unconstitutional.

d. The Proposed Cause of Action Cannot be Justified Under a Federal Head of Power

The cause of action proposed in the *Justice for the Victims of Terrorism Act* cannot be justified as a valid exercise of federal power (separate and apart from any incidental relationship to the *State Immunity Act*). To date, no court in Canada has recognized Parliament's power to create causes of action based on the definition of offences in the *Criminal Code* absent the existence of a criminal conviction.[19] Furthermore, justifying the cause of action under Parliament's residual power under section 91 of the *British North America Act* would require showing that creating a cause of action in respect of terrorism is a national concern, and that the provincial governments lack the ability to put such a remedy in place.[20] Meeting this threshold seems unlikely.

III. A Second Constitutional Concern: Real and Substantial Connection

Another unconstitutional feature of the Act is that it creates jurisdiction for Canadian courts if "the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident…"[21] The clear implication is that courts have jurisdiction where plaintiffs are Canadian citizens or permanent residents, even if the action has no real and substantial connection to the province in which the court is found. That is unconstitutional: a real and substantial connection between the action and the province is constitutionally necessary for a court to have jurisdiction over the matter.[22]

IV. The Act Is Contrary to International Law

The Act also raises the possibility that Canada will find itself in violation of its obligations under international law to respect the sovereign immunity of other states.

It is a well recognized principle of customary international law that states are immune from the jurisdiction of other states.[23] The traditional position under international law that a state can never be subject to the jurisdiction of another state has come to be known as the theory of "absolute immunity". Many states accept a theory of "relative immunity" pursuant to which a state would continue to be immune from the jurisdiction of other states for its public acts, while being subject to such jurisdiction for private, or commercial acts.[24] Although the theory of relative immunity remains controversial in some quarters, it has gained widespread acceptance and was codified by the International Law Commission and incorporated into the United Nations Convention on the Jurisdictional Immunities of States and their Property.[25] (It should be noted that the Convention has not yet entered into force.)[26] Canada is among the states that takes a restrictive approach to state immunity.[27]

The Act purports to further limit state immunity by including an exception for support of terrorist activity. However, asserting jurisdiction over a state accused of aiding or financing terrorist activities would very likely violate that state's sovereign immunity. To the authors' knowledge, the United States is the only state that lifts state immunity in the face of such accusations.[28] This weighs heavily against the assertion that a terrorism exception exists under customary international law.

Proponents of such an exception argue that immunity should not apply where a state commits a grave violation of international law, and in particular violates a *jus cogens* (or peremptory) rule.[29] This argument was most famously articulated in proceedings against former

Chilean dictator Augusto Pinochet involving allegations of torture.[30] Critics of such a position point out that there is no conflict, per se, between a *jus cogens* prohibition and rules of state immunity. Rules of state immunity do not excuse wrongful conduct, they simply determine which forums are and are not appropriate for the prosecution of such conduct.[31]

This latter reasoning was most recently adopted by the International Court of Justice in its February 3, 2012 Judgment in the *Germany v. Italy* case. The case involved proceedings in which Italian courts allowed plaintiffs to bring actions against Germany for acts committed in Italy during World War II, including deportation to forced labour. Germany fully acknowledged the wrongfulness of the acts, but asserted that its right to immunity from the jurisdiction of Italian courts should nonetheless be respected. The Court largely agreed with Germany and rejected Italy's argument to the contrary in much the same terms as outlined above: "The rules of State Immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect which the proceedings are brought was lawful or unlawful".[32] Thus, even grave violations of international law, including support for terrorism, do not vitiate the immunities afforded to states under international law. Were proceedings brought against a foreign state under the Act, Canada would likely find itself in violation of these rules in much the same manner as Italy did with respect to proceedings arising out of war crimes committed during the Second World War.

V. The Act Cannot Achieve Its Goals

The Act's stated goal is deterring acts of terrorism against Canadians. As suggested above, another of its goals is to compensate Canadian victims of terrorism by allowing them to sue. With regard to deterrence, it seems unlikely that terrorists who are not deterred by criminal laws or by the risk of death or injury to themselves would be deterred by Canadian tort law – especially since, as addressed below, terrorists will rarely be compelled to pay amounts owing under Canadian judgments. We recommend removing all reference to deterrence from the title and preamble of the Act.

As for helping Canadians to obtain compensation for losses due to terrorism, there are two reasons why victims would rarely obtain compensation from terrorists: it is more difficult to prove liability in relation to acts that happen abroad, and more importantly, it is often difficult to get foreign defendants to pay once liability has been established.

a. Difficulties in Establishing Liability

The Act makes it easier for victims to pursue civil suits against terrorists, including foreign states. One important way it does this is to allow Canadian law to apply in lawsuits related to injuries that occur to Canadians while abroad. If not for the Act, Canadians could bring a suit in a Canadian court but would have to apply the applicable law of the jurisdiction in which the terrorist act occurred.[33] Although removing that obstacle helps victims, the barriers to winning such a case remain formidable. They include: the additional expense of transporting witnesses and evidence to Canada; potential translation costs and other language-based obstacles; and the potential refusal of foreign witnesses to appear. These factors can affect both the cost of litigation and the likelihood of establishing liability. Short of reversing the burden of proof from the plaintiff to the defendant state, which would be inconsistent with principles governing the burden of proof, we can think of no way of minimizing the hurdles litigants will face.

b. Judgments Against Foreigners Will Rarely be Enforced

Even if terror victims prevail in their lawsuits they will face a potentially greater challenge in enforcing a resulting award in other states. All Canadian courts can do is order a defendant to pay: they cannot *enforce* the judgment unless the defendant has assets in Canada. A Canadian court order cannot be enforced abroad unless the courts of the country in which the terrorist (or his assets) are found agree to enforce it, or unless there is an enforcement treaty in place. Although Canada has concluded treaties for the mutual enforcement of civil awards, such treaties remain relatively rare.[34] Enforcement will therefore be subject to the discretion of the courts in the state where enforcement is sought. Such courts may refuse to do so in accordance with their own laws and most countries have been "naturally suspicious of foreign judgments".[35]

Even if a foreign court agrees to enforce a Canadian court order, plaintiffs will receive nothing if defendants have no seizable assets in that country in their own name. The fact that individual terrorists and terrorist organizations may have no significant assets in their own name militates against recovery. So too does the fact that if the defendant is a country it will almost certainly refuse to pay the damages awarded, since Canada will have publicly condemned that country as a state sponsor of terrorism.

This prediction is strengthened by the American experience with similar laws allowing victims of terrorism to sue state sponsors of terrorism for damages. American courts have awarded almost $19 billion to American victims of terrorism by foreign states, but most has never been collected.[36] This has led some victims of terrorism to feel revictimized by the justice system.[37] Enforcement may be somewhat more successful against individuals and organizations, but for the reasons given above, obtaining compensation remains relatively unlikely.

VI. The Risks of Pursuing Vindication

One way in which the Act could realistically help Canadian victims of terrorism is to make it easier for them to obtain vindication in the courts. Pursuing a lawsuit might serve a useful purpose even if the victim is never compensated. The potential benefits include empowering victims, bringing media attention to the act of terrorism, creating a factual public record of events, publicly denouncing acts of terrorism and otherwise giving victims their day in court.

There are, however, risks to victims in pursuing vindication in the courts. They will have to spend considerable sums of their own money, relive traumatic events, and they may be frustrated by court procedures that limit their ability to tell and prove their story. Defendants may not bother to defend, denying victims many of the vindicatory benefits of suing. And of course, the victim might not succeed in proving the alleged acts, which could re-victimize the plaintiff.

Whether or not to take these risks should be up to victims, but it is not clear that Parliament has considered the potential harms that encouraging civil actions against terrorists could have on a vulnerable group of people.

VII. Conclusion

The Act is unconstitutional and could leave Canada in violation of its international legal obligation to respect the sovereign immunity of other states. Despite such risks, it is unlikely to deter terrorists or to result in compensation for victims of terrorism. To the extent that the Act suggests that it can accomplish its goals, it may encourage victims of terrorism to expend emotional and financial resources fighting a losing battle. Removing any reference to deterrence and emphasizing the potential vindicatory role of lawsuits against a terrorist may help eliminate the risk that victims will be made victims again – this time with the help of their own

government. However, given the risks in pursuing lawsuits even only for vindication purposes, a more effective way of promoting justice for victims of terrorism may be for the Canadian government to provide a compensation fund for Canadian victims of terror, as was done by the United States government for the victims of the 9/11 terrorist attacks. Alternately, the government might agree to pay any damage awards obtained through the Act to victims directly. Then Canada could become the creditor of the terrorist defendants. This would ensure victims who could prove their case are compensated.

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[1] The views contained in this submission are those of the authors: they do not represent the views of the authors' current or past employers, or clients. The views are contained in part in previous articles published by the authors, which are attached to this submission. See "Bill C-35: Real Justice for the Victims of Terrorism?" (2010) 36(1) Advocates' Quarterly 329 [Tab A]; "Victims of terrorism: compensation legislation likely ineffective," *Lawyers Weekly* (October 21 2011) [Tab B].

[2] R.S.C. 1985, c. S-18 ["*SIA*"].

[3] *General Motors of Canada Ltd. v. City National Leasing Ltd*., [1989] 1 S.C.R. 641 at 672; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at para. 32.

[4] *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494 at paras. 22-25; *Imperial Tobacco Canada Ltd.*, *ibid.* at para. 28.

[5] *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481-82; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 246.

[6] [1977] 2 S.C.R. 134.

[7] *Ibid.* at 149-50.

[8] *Ibid.* at 145-46.

[9] Peter Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf, vol. 2 (Scarborough: Thomson Carswell, 2007) at 18-23 – 18-25.

[10] *City National Leasing*, *supra* note 3 at 688-89.

[11] Canada, Bill C-10 (Part I), *Justice for Victims of Terrorism Act*, 1st Sess., 41th Parl., 2011, cl. 3.

[12] *Ibid.*, preamble.

[13] Public Safety Canada, "Justice for Victims of Terrorism Act", http://www.publicsafety.gc.ca/media/nr/2009/nr20090602-1-eng.aspx (August 11, 2009).

[14] *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40 at para. 19.

[15] *Tolofson v. Jensen*, [1992] B.C.J. No. 449 (rev'd on other grounds).

[16] *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242

[17] R.S.C., 1985, c. C-50, s. 3.

[18] *SIA*, *supra* note 2, s. 6.

[19] Hogg, *supra note* 9 at 18-26.

[20] *R. v. Crown Zellerbach Canada Ltd*, [1988] 1 S.C.R. 401 at 432, 434.

[21] Bill C-10, *supra* note 11, cl. 4(2).

[22] *Morguard Investments Ltd v. DeSavoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256; *Hunt v. T & N plc*, [1993] 4 S.C.R. 289,109 D.L.R. (4th) 16.

[23] See generally, *The Schooner Exchange v. McFaddon* (1812), 7 Cranch 116; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 326-327; Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge: Cambridge University Press, 2008), p. 697 et seq.; Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2005), p. 159 et seq.; Hazel Fox, *The Law of State Immunity*, 2nd ed. (Oxford: Oxford University Press, 2008).

[24] Shaw, *ibid.* at 704-14.

[25] Yearbook of the International Law Commission (1991), A/C.6/40/L.2; Report of the International Law Commission on the Work of its Fifty First Session, UNGAOR 54th Sess., Supp. No. 10, UN Doc A/54/10 (December 1999).

[26] The Convention was adopted by the General Assembly as an annex to GA Res. 59/38 (December 2, 2004).

[27] *SIA* ss. 5, 6, 12(1)(b).
[28] 28 USC 1605A. The International Court of Justice described this legislation as having, "no counterpart in the legislation of any states." Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012 (General List no. 143) at para. 88.
[29] *See* Brownlie, *supra* note 23 at 510-512.
[30] *See* Fox, *supra* note 23 at 152-154 citing *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex p. Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97 at p. 115 (Lord Brown Wilkinson), p. 169 (Lord Saville), and p. 178 (Lord Millet).
[31] See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, 2006, UN Doc. A/CN.4/L.682 at para. 372; Thomas Giegerich, "Do Claims Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?" in Christian Tomuschat and Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order* (Leiden: Martinus Nijoff Publishers, 2006), 203; Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), [2002] I.C.J. Rep. 3 at para. 61; *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2007] 1 A.C. 270 (H.L.); Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), [2006] I.C.J. Rep. 6 at para. 64 and 125. Cf Brownlie p. 347-348.
[32] See *Germany v. Italy*, *supra* note 28 at para. 93.
[33] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289.
[34] Philip R. Weems, "Guidelines for Enforcing Money Judgments Abroad" (1993), 21 Int. Bus. Lawyer 509.
[35] *Ibid.* at 509.
[36] Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism*, 2008 at CRS-2, online at www.fas.org/sgp/crs/terror/RL31258.pdf (last visited March 9, 2011).
[37] See Jason P. Baletsa, "The Cost of Closure: A Reexamination of the Theory and Practice of the 1996 Amendments to the Foreign Sovereign Immunities Act" (1999-2000), 148 U. Pa. L. Rev. 1248 at p. 1299 citing Editorial, "Lawsuits and Terrorism", *Washington Post* (December 26, 1999), p. B6.