



Legislative Proposal  
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## **Returning Foreign Fighters from the Islamic State:**

### **Addressing This Dilemma Using Immigration and Criminal Law Solutions**

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TABLE OF CONTENTS

**EXECUTIVE SUMMARY.....3**

**SUMMARY OF C-CAT’S PROPOSALS.....5**

**PROPOSAL #1: CITIZENSHIP REVOCATION.....8**

**PROPOSAL #2: AMENDMENTS TO THE *CRIMINAL CODE OF CANADA*.....11**

**PROPOSAL 2A: AMENDMENTS TO THE PART II.1 TERRORISM OFFENCES.....11**

**PROPOSAL 2B: SYSTEMATIC USE OF THE PART II.1 RECOGNIZANCE PROVISIONS.....14**

**PROPOSAL 2C: EXPAND THE APPLICATION OF THE CONSPIRACY PROVISIONS .....15**

**PROPOSAL 2D: REVITALIZING THE TREASON OFFENCES .....17**

**APPENDIX I: CITIZENSHIP REVOCATION COMPARISONS .....21**

**APPENDIX II: PASSPORT REVOCATION IN CANADA.....23**

**APPENDIX III: PART II.1 OF THE CRIMINAL CODE.....25**

**THE CRIMINAL OFFENCES.....25**

**PROCEEDINGS AND AGGRAVATED PUNISHMENT.....31**

**PROPERTY: SEIZING, RESTRAINING, FORFEITING .....31**

**UNIQUE PROCEDURES.....33**

*LISTING OF ENTITIES / TERRORIST GROUPS .....33*

*FORFEITURE AND ORDERED DELETION OF TERRORIST PROPAGANDA.....33*

*INVESTIGATIVE HEARINGS .....35*

*RECOGNIZANCE WITH CONDITIONS.....36*

**APPENDIX IV: TREASON OFFENCES IN AUSTRALIA AND NEW ZEALAND.....38**

## EXECUTIVE SUMMARY

1. In June 2014, the Islamic State of Iraq and Syria (ISIS) launched an offensive on Mosul and Tikrit, and their leader, Abu Bakr al Baghdadi, announced the establishment of an Islamic caliphate spanning from Aleppo, Syria, to Diyali, Iraq. The organization quickly changed their name to the Islamic State and made clear that it planned on conquering further territory.
2. In August 2014, a U.S.-led coalition commenced airstrikes against the Islamic State. By December 2017, the Islamic State had lost 95% of its territory, including Mosul and Raqqa. By December 2018, the Islamic State’s territory was reduced to a handful of villages in eastern Syria, near the Iraq border. In February 2019, Baghouz fell, which was the Islamic State’s last remaining territory. On October 26, 2019, Baghdadi was killed in northern Syria in a U.S. raid.
3. While the Islamic State’s territory has collapsed, their influence and danger are ever-present. As early as 2015, the Islamic State spawned affiliate networks in at least eight other countries. These affiliates began carrying out attacks shortly thereafter. In October 2015, the Egyptian affiliate killed 224 people by bombing a Russian airplane. In November 2015, a series of attacks in Paris resulted in 130 people killed and over 300 injured. In June 2016, a gunman who pledged support to the Islamic State killed at least four dozen people at an Orlando nightclub. These are just a handful of examples. This model of decentralized jihad is not new – it is eerily reminiscent of Al Qaeda’s evolution following the attacks of 9/11, when the United States reacted with its “war on terror”, and Al Qaeda adapted to a more decentralized model out of necessity.
4. Facing another Al Qaeda-style decentralization of operations is dangerous enough – but actually, the collapse of the Islamic State’s caliphate brings further, novel complications. The question that almost every Western state is now grappling with: what to do with the returning foreign fighters?<sup>1</sup> The Islamic State drew massive numbers of people to its territory – at least 40,000. It is estimated that over 5,000 came from Europe to join the Islamic State, and 180 came from Canada.
5. Now that the caliphate is destroyed, many foreign fighters wish to return to their country of origin. In Canada, approximately 60 out of the 180 have already returned.

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<sup>1</sup> The term “foreign fighters” has become the common, popular language employed to describe the people who travelled abroad to join terrorist groups, now returning to their home countries. We have adopted this popular language here for simplicity and consistency with the existing literature.

6. The Government of Canada’s current toolkit is limited and ill-equipped to dealing with returning foreign fighters. The current terrorism provisions in the *Criminal Code* were not designed to address such a situation, and current immigration law solutions such as passport revocation do little to address concerns. In the brief that follows, C-CAT proposes a variety of legislative initiatives designed to specifically address returning foreign fighters, in a way that remains in keeping with our democratic Canadian values. **With growing calls to repatriate Canadian foreign fighters, we must ensure that we have the ability to prosecute where appropriate.**
7. The legislative changes proposed in this brief will address foreign fighters returning from all types of terrorist organizations; they are not limited to the Islamic State, although Islamic State fighters are our most pressing concern. The proposed changes articulated in this brief address individuals and entities who join the Islamic State as well as other terrorist organizations, including Hamas, Hezbollah, and any of the recently listed far-right terrorist entities.
8. The legislative changes proposed span immigration and criminal law provisions. This brief begins by exploring a novel formulation of citizenship revocation, and in its second part, proposes a variety of amendments to the *Criminal Code of Canada*, including amendments to the terrorism provisions, conspiracy provisions, and treason offences.

## SUMMARY OF C-CAT'S PROPOSALS

### **Proposal #1: Citizenship Revocation**

1. Citizenship revocation for convicted terrorists is complex and controversial. It was passed under the Harper government and then repealed due to potential Charter issues. However, Canada still allows for citizenship revocation if there was concealment or wilful misrepresentation during the naturalization process. Interestingly, the United States has a similar provision and uses this to capture citizenship revocation for terrorism. The United States considers that affiliation with a listed terrorist group – within 5 years of naturalization – is prima facie evidence that there had been concealment in the naturalization process. (Note that this policy pre-dates the election of Donald Trump).
2. C-CAT proposes that Canada implement a similar policy and consider affiliation with a terrorist group, within a proscribed number of years, as prima facie evidence of concealment. This type of citizenship revocation for terrorism would be consistent with both international legal obligations and the Canadian Charter of Rights and Freedoms.

### **Proposal #2: Amendments to the *Criminal Code of Canada***

#### Proposal 2A: Amendments to the Part II.1 Terrorism Offences

1. To clarify and strengthen the applicability of Part II.1 to returning foreign fighters, C-CAT advocates the following:
  - a. *The increase of all mandatory maximums to life imprisonment.* Canadians who travel abroad to join terrorist entities can cause massive amounts of terror and destruction; this should be reflected in the ability of criminal courts to impose a term of life imprisonment. Note that this would be a mandatory maximum, and not a mandatory minimum – judges would not be required to impose a life sentence, they would simply be permitted to do so.
  - b. *The establishment of further terrorism offences, clearly prohibiting (a) joining a listed terrorist entity, and (b) leaving or attempting to leave Canada to join a listed terrorist entity.* It is surprising that joining a terrorist group is not already a criminal offence.
  - c. *The amending of the “participation” offence in section 83.18, so that it reads, “every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group is guilty of an indictable offence”.*

Proposal 2B: Systematic Use of the Part II.1 Recognizance Provisions

1. Returning foreign fighters may be made to sign a Part II.1 recognizance, or a “terrorism peace bond”, if there is reason to suspect that a terrorist activity may be carried out. By signing such a document, the returning foreign fighter agrees to keep the peace and be of good behaviour. In addition, they may be required to surrender travel documents, not travel beyond a specified geographic area, and not possess weapons.
2. C-CAT is not proposing any amendments to the language of this section. C-CAT simply proposes that the Ministry institute a policy that these recognizances be used systematically with returning foreign fighters.

Proposal 2C: Expand the Application of the Conspiracy Provisions

1. Looking to the interaction of sections 465 and 7(3.73)-(3.75), there is a significant gap in the ability of Canadian courts to prosecute conspiracies to commit terrorism that occurred abroad. Canadian courts have jurisdiction to prosecute conspiracies to finance terrorism that occurred abroad – but do not have jurisdiction to prosecute conspiracies to commit terrorism offences or terrorist activity abroad.
2. To fix this gap, C-CAT proposes that ss. 7(3.74) and 7(3.75) be amended, to match s. 7(3.73) [the terrorism financing provision], to enable Canadian courts to take jurisdiction over conspiracies to commit terrorism offences and terrorist activities outside of Canada.

Proposal 2D: Revitalizing the Treason Offences

1. As members of a political community, Canadians owe important duties to one another. One is a duty of allegiance. The criminal law recognises this duty – the laws of treason are some of the oldest in existence. Looking to the current wording of the treason offences, returning foreign fighters could probably be prosecuted under these offences as they presently stand. However, laws must have clarity. Canada’s treason laws are antiquated and therefore unclear regarding whether they apply to non-state actors such as terrorist organizations, and whether they apply to novel, non-traditional methods of warfare. These laws must be revitalized to clearly reflect the changing realities of the world and the changing realities of war.
2. C-CAT proposes the following changes to revitalize and clarify the laws of treason:
  - a. *Amend subsection 46(1)(c) to explicitly include non-state actors.* Mirroring the Australian treason laws, change the wording from “assists an enemy at war with

- Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country” to “assists an enemy at war with Canada, including state or non-state actors, or any armed forces or armed groups against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists”.
- b. *Amend subsection 46(2)(a) to capture novel, non-traditional modes of warfare.* Change the wording from “uses force or violence for the purpose of overthrowing the government of Canada or a province” to “uses force or violence for the purpose of overthrowing or destabilizing the government of Canada or a province”.
  - c. *Remove the limitation period contained in section 48(1).* A charge of treason should not be subject to a three-year limitation period.

## PROPOSAL #1: CITIZENSHIP REVOCATION

1. Canada briefly allowed for citizenship revocation in the case of convicted terrorists. The *Strengthening Canadian Citizenship Act (SCCA)* (2014) gave the Minister of Citizenship and Immigration the power to revoke the Canadian citizenship of dual citizens in two circumstances:
  - a. If such a person, while a Canadian citizen, was convicted of terrorism, high treason, treason, or espionage, depending on the sentence received; OR
  - b. If such a person, while a Canadian citizen, served as a member of an armed force of a country or organized armed group engaged in armed conflict with Canada.
2. Then, Bill C-6, an *Act to amend the Citizenship Act and make consequential amendments to another Act*, received Royal Assent on June 19, 2017. One change that took effect immediately was the repealing of the above provision of the *Citizenship Act*, on the grounds that it treated dual citizens differently from other Canadians.<sup>2</sup>
3. Since then, Canada has not utilized citizenship revocation to deal with terrorism. This makes sense – use of citizenship revocation for terrorism crimes is complex and controversial. If revocation provisions are applicable to everyone, they risk increasing statelessness, which the United Nations has aimed to reduce, in recognition of the right of every person to a nationality. Such a policy would risk putting Canada in breach of its international legal obligations. On the other hand, if citizenship revocation provisions are only applicable to dual nationals or those with the ability to become a national of another country or territory – those laws would be discriminatory on its face and could be found in breach of Section 15 of the *Canadian Charter of Rights and Freedoms*, which guarantees Canadians freedom from discrimination.
4. This “catch-22” of using citizenship revocation to address terrorism – has similarly been identified by the European Parliament:

“One of the major legal objections against citizenship deprivation is the duty of states to prevent statelessness. This legal constraint explains why most deprivation provisions only concern dual citizens. However, making the citizenship of dual citizens less secure than that of single-nationality citizens raises questions about citizenship equality.”<sup>3</sup>

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<sup>2</sup> “Changes to the Citizenship Act as a Result of Bill C-6: Backgrounder”, Government of Canada, [https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/10/changes\\_to\\_the\\_citizenshipactasareultofbillc-6.html](https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/10/changes_to_the_citizenshipactasareultofbillc-6.html).

<sup>3</sup> “Acquisition and loss of citizenship in EU Member States”, European Parliament, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf), page 11.



5. Canadian citizenship can still be revoked on the following general ground: false representation or fraud or knowingly concealing material circumstances during the citizenship process. This type of revocation provision is common across Western democracies. The United States, the United Kingdom, and almost every E.U. country (except for Croatia, Poland, and Sweden) has something similar.<sup>4</sup> If Canadian citizenship is revoked on this ground, the person becomes a permanent resident. If the individual became a permanent resident by false representation or fraud or knowing concealment – they would become a foreign national. The individual is then precluded from reapplying for citizenship for ten years.
6. One element of the United States’ version of this policy – is that naturalized U.S. citizens are subject to citizenship revocation if they are affiliated with certain organizations, including terrorist organizations, within 5 years of naturalization. Due to the United States’ naturalization requirements (attachment to the Constitution, etc.) – fast involvement is considered *prima facie* evidence that there was concealment or wilful misrepresentation of material evidence in the naturalization process.<sup>5</sup> Note that the United States’ use of this policy pre-dates the election of President Donald Trump.
7. C-CAT proposes that Canada mirror this aspect of the United States’ approach to citizenship revocation. Considering affiliation with a terrorist group, within a proscribed number of years, to be *prima facie* evidence of concealment – would allow the Canadian government to make use of the citizenship revocation tool in a less problematic manner. It also makes sense: affiliation with a terrorist organization within a few short years suggests that the individual was not truthful in his or her citizenship application.
8. By instituting this type of policy, Canada stays in line with both its international legal obligations, and the Canadian *Charter*. Since this type of policy would only apply to “new” citizens or permanent residents – by its very nature, Canadian-born citizens do not submit any application in which they could misrepresent themselves – there is little risk of any individual becoming stateless as a result of this type of policy, unless the individual renounced his or her prior citizenship, or had it stripped. As for the Canadian *Charter*, there might be some room for a *Charter* argument insofar as this type of policy treats anyone who has been a citizen for 5 years or less differently than someone who has held citizenship for longer than 5 years – but this would be a fairly weak case as compared to the previous, Harper-era legislation.

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<sup>4</sup> “Acquisition and loss of citizenship in EU Member States”, European Parliament, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf)

<sup>5</sup> “Chapter 2 - Grounds for Revocation of Naturalization”, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/policy-manual/volume-12-part-1-chapter-2>

9. Since this proposed solution can theoretically apply to E.U. countries as well –all E.U. countries save for Croatia, Poland and Sweden already allow for citizenship revocation in cases of discovered fraud– Canada has the opportunity to be a model for those countries and set the standard. Note that current E.U. and U.K. citizenship revocation policies are briefly summarized in Appendix I, and passport revocation is briefly explained and contrasted from citizenship revocation in Appendix II.

PROPOSAL #2: AMENDMENTS TO THE *CRIMINAL CODE OF CANADA*

**Proposal 2A: Amendments to the Part II.1 Terrorism Offences**

1. Part II.1 of the *Criminal Code* begins by defining “terrorist activity” and “terrorist group”. It then outlines a total of ten (10) new criminal offences, and contains several additional provisions relating to property seizures and forfeitures, proceedings and sentencing, investigative hearings, and recognizances. A comprehensive summary of Part II.1 of the *Criminal Code* is attached as Appendix III.
2. For our purposes, there are only a handful of provisions that may be utilized to prosecute returning foreign fighters. The following terrorism offences may be applicable:
  - a. **Participation in the Activity of a Terrorist Group [s. 83.18(1)]:** “Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term of not more than ten years”
  - b. **Leaving Canada to Participate in Activity of Terrorist Group [s. 83.181]:** “Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.18(1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.”
  - c. **Commission of Offence for Terrorist Group [s. 83.2]:** “Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.”
  - d. **Leaving Canada to Commit Offence for Terrorist Group [s. 83.201]:** “Everyone who leaves or attempts to leave Canada, or goes or attempts to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.”

3. None of these offences are satisfactorily effective to criminalize foreign fighters. The latter two offences, sections 83.2 and 83.201, contain serious evidentiary hurdles, as the Crown would have to prove that the accused person committed an indictable offence. This may be difficult to accomplish with the alleged indictable offence occurring abroad. The former two offences, as outlined in sections 83.18 and 83.181, are somewhat better, although the proofs required are unclear. On the one hand, subsection 83.18(3) provides examples of “participating or contributing”, and the list includes

(a) providing, receiving or recruiting a person to receive training; (b) providing or offering to provide skill or expertise; (c) recruiting a person to facilitate or commit a terrorism offence; (d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and (e) making oneself, in response to instructions from a terrorist group, available to facilitate or commit a terrorism offence [see: s. 83.18(3)] [emphasis added]

This suggests that travelling to Islamic State -controlled territory in Syria, for example, would be captured under this offence. If that is the case, then section 83.181, which criminalizes leaving or attempting to leave to commit such an offence, theoretically captures even those who attempt to leave Canada for this purpose. But, on the other hand, the plain wording of subsection (1) requires proof that the participation or contribution to the terrorist group was “for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”. Proving the multiple elements of “terrorist activity” (defined in s. 83.01(1) and outlined in Appendix III), again when this likely all allegedly occurred abroad, might be exceptionally difficult from an evidentiary point of view, and this does not seem to jive with the spirit of subsection (3)(d) as reproduced above.

4. Even if, taking subsection (3) at its word, “participation in activity of terrorist group” includes “entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group” –i.e., foreign fighters– the maximum sentence is only 10 years’ imprisonment. To put this in perspective, the sentence range for a first-time non-violent importer of certain drugs, as mandated by the Ontario Court of Appeal – is twelve to eighteen years. Interestingly, a later section of Part II.1, Section 83.27, allows for the Crown to seek a lengthier sentence than the 10-year-maximum, if the individual is notified and if the act or omission constituting the offence also constitutes a terrorist activity. Again, proving the multiple elements of “terrorist activity” might present an insurmountable challenge here, and it might not be possible in any event to characterize “entering or remaining” as terrorist activity pursuant to the definitional requirements set out in s. 83.01(1) of the *Code*. As a result, it is unlikely that returning foreign fighters, even if successfully convicted under this offence, could be sentenced to more than 10 years’ imprisonment.

5. Canadian foreign fighters join organizations that have as their mission to destabilize Western democracies by inflicting terror and indiscriminately killing civilians. This should be clearly and unequivocally criminalized, such that these individuals can be properly held accountable upon their return. As calls increase for Canada to repatriate their nationals in Syria and elsewhere, the Canadian government must ensure that it has the tools necessary to prosecute where appropriate. This is irreplaceably important to ensure public safety.
6. To clarify and strengthen the applicability of Part II.1 to returning foreign fighters, C-CAT advocates the following:
  - a. **The increase of all mandatory maximums to life imprisonment.** Section 83.27 provides that if the accused is convicted of an offence which also meets the definition of terrorist activity under s. 83.01(1), the maximum is life imprisonment. This provision was likely enacted to ensure that serious offenders are subject to a higher sentence, while less serious offenders who do not meet that definition are subject to lower sentences. However, as this relates to activity abroad, the evidentiary challenges may be extremely difficult to overcome. Moreover, the rise of foreign fighters – and the particular challenges posed by their return – necessitates a shift in what is considered “serious” by Part II.1 of the *Code*. Canadians who travel abroad to join terrorist entities can cause massive amounts of terror and destruction, and this is true regardless of whether or not they personally commit a terrorist activity pursuant to their membership.
  - b. **The establishment of further terrorism offences, clearly prohibiting (a) joining a listed terrorist entity, and (b) leaving or attempting to leave Canada to join a listed terrorist entity.** It is surprising that joining a listed terrorist group is not already a criminal offence. The participation offence is the closest that Part II.1 gets to this, but as noted, this offence still appears tied to the definition of “terrorist activity”, which is problematic. These gaps in Part II.1 are clearly laid out in Table 1 of Appendix III, which can be found on page 26.
  - c. **The amending of the “participation” offence in section 83.18, to strike out the words “for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity”, so that the offence reads, “Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group is guilty of an indictable offence”.** To be characterized as a “terrorist group”, the group must already be either a listed entity, or determined to engage in terrorist activities. Given that already-high bar, it should be enough for the above offence that one knowingly participates in or contributes to the activity of a terrorist group.

## **Proposal 2B: Systematic Use of the Part II.1 Recognizance Provisions**

1. Part II.1 of the *Criminal Code* also provides for the use of recognizances, popularly called “peace bonds”, in cases of suspected future terrorist activities.
2. A recognizance is a commonly used court order. It is essentially an agreement between the justice system and a particular individual that the individual not breach its conditions. Its conditions always include a provision to keep the peace, and may also include other conditions, such as an agreement not to possess weapons, and/or a condition not to leave the country. If the signee breaches the peace bond, he or she may be imprisoned. It is a criminal offence to breach a recognizance.
3. In the terrorism context, section 83.3 allows a peace officer, subject to the Attorney General’s consent, to lay an information before a provincial court judge if the peace officer believes on reasonable grounds that a terrorist activity may be carried out, and suspects on reasonable grounds that the imposition of a recognizance is necessary to prevent the carrying out of the terrorist activity. Then pursuant to a hearing, a judge may require the individual to sign a recognizance with conditions. The conditions may include: surrender of passport, not to leave a certain geographic area, and not to possess any weapons. In fact, in the terrorism context, the judge must provide reasons on record if he or she decides to *not* include any of the above three conditions. The individual can be ordered detained pending this hearing if the judge finds it necessary, and the individual can also be jailed if he or she refuses to sign the recognizance with conditions. These recognizances are popularly called “terrorism peace bonds”.
4. This section of the *Criminal Code* allows for quick action against potential foreign fighters, and those returning, since all that is required is suspicion that a terrorist activity may be carried out. A returning foreign fighter can then be made to sign a peace bond that requires him or her to keep the peace, surrender travel documents, not travel beyond a specified geographic area, and not possess weapons. If the peace bond is breached, that individual can be jailed, and charged with breach of recognizance, a substantive criminal offence.
5. C-CAT is not proposing any amendments to the language of this section. **C-CAT is simply proposing that the Ministry institute a policy that these “terrorism peace bonds” are to be used systematically with returning foreign fighters.**

## **Proposal 2C: Expand the Application of the Conspiracy Provisions**

1. Section 465 of the *Criminal Code* deals with conspiracies. According to this section, an individual may be charged with conspiracy to commit an indictable offence and be liable to the same punishment as if he or she had actually committed the offence. Specifically, s. 465 (1) (c) reads as follows:

“Everyone who conspires with anyone to commit an indictable offence ... is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable”

2. The terrorism offences contained in sections 83.18, 83.181, 83.2, and 83.201 are indictable offences. Because of this, an individual may be charged with conspiracy to commit one of those offences and be liable to the same punishment as if he or she had actually committed one of those offences.
3. Pursuant to subsections 465 (2) and (3), Canadian courts have jurisdiction to prosecute conspiracies that occur abroad when at least one stage occurs in Canada. Specifically, subsection (3) enables Canadian courts to take jurisdiction when a person in Canada conspires on an offence to be committed outside of Canada, and subsection (4) enables Canadian courts to take jurisdiction when a person outside of Canada conspires on an offence to be committed within Canada. Specifically, these subsections read as follows:

“(3) Everyone who, while in Canada, conspires with anyone to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.”

(4) Everyone who, while outside Canada, conspires with anyone to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.”

4. There is an important gap regarding conspiracies committed abroad. These above sections do not permit Canadian courts to take jurisdiction where the conspirer is outside Canada and the offence also takes place outside of Canada. This is significant in the context of terrorism, and specifically in the context of foreign fighters, where many offences occur entirely abroad.
5. Recognizing the transnational nature of terrorism offences in general, section 7 of the *Criminal Code* permits Canadian courts to prosecute certain terrorism offences that occur entirely outside of Canada, so long as there is some connection to Canada (this is required in order to ground jurisdiction in international law). Specifically, subsection 7(3.73) permits Canadian

courts to take jurisdiction over terrorism financing committed outside of Canada; subsection 7(3.74) permits Canadian courts to take jurisdiction over terrorism offences committed outside of Canada; and subsection 7(3.75) permits Canadian courts to take jurisdiction over terrorist activity committed outside of Canada.<sup>6</sup>

6. According to the language of subsections 7(3.73)-(3.75), jurisdiction over terrorism financing outside of Canada includes conspiracy, while jurisdiction over terrorism offences and activities do not include conspiracy. In other words, subsection 7(3.73) fixes this gap left by the conspiracy provisions in section 465; but subsections 7(3.74) and 7(3.75) do not. As a result, conspiracies to commit terrorism financing abroad can be prosecuted by Canadian courts, but conspiracies to commit terrorism offences or terrorist activity abroad – cannot be prosecuted by Canadian courts.
7. **C-CAT proposes that ss. 7(3.74) and 7(3.75) be amended to bridge this gap, and to permit Canadian courts to take jurisdiction over conspiracies for terrorism offences and terrorist activities committed outside Canada.**
8. For clarity, C-CAT is not proposing any amendments to the restricted applicability of ss. 7(3.74) and 7(3.75). Jurisdiction over terrorism offences outside Canada only applies to Canadian citizens, residents, and permanent residents. Jurisdiction over terrorist activity committed outside Canada only applies to acts against Canadian citizens, acts against a Canadian government or public facility located outside of Canada, and acts intended to compel the Government of Canada or of a province to do or refrain from doing any act. As noted, there needs to be some connection to Canada to ground jurisdiction in international law; it would not be permissible to expand the application of conspiracy provisions to terrorism committed abroad absent any of these connections to Canada or one of the provinces.

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<sup>6</sup> Remember that there must be some connection to Canada to ground jurisdiction in international law. In keeping with those requirements, each of these subsections limits jurisdiction to specific circumstances. For example, jurisdiction over terrorism offences outside Canada [s. 7(3.74)] only applies to Canadian citizens, residents, and permanent residents. Jurisdiction over terrorist activity committed outside Canada [s. 7(3.75)] only applies to acts against Canadian citizens, acts against a Canadian government or public facility located outside of Canada, and acts intended to compel the Government of Canada or of a province to do or refrain from doing any act.



## Proposal 2D: Revitalizing the Treason Offences

1. As members of a political community, Canadians owe important duties to one another. Citizenship involves a series of rights and obligations. One such obligation that citizenship entails is a duty of allegiance: the duty to not betray one's country by assisting its enemies. The criminal law does and should recognise this duty – the laws of treason and high treason are some of the oldest in existence. Of course, it is important that these laws continue to be clear in terms of what is prohibited.<sup>7</sup> In a changing world, with asymmetric warfare, proxy warfare, and the prominence of non-state actors on the rise – it is time for Canada to examine its treason laws and ensure they continue to reflect realities of the world and realities of war.
2. The current *Criminal Code* provisions on treason read as follows:

**High treason [s. 46(1)]:** Every one commits high treason who, in Canada, (a) kills or attempts to kill Her Majesty ... ; (b) levies war against Canada or does any act preparatory thereto; or (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country ... [emphasis added]

**Treason [s. 46(2)]:** Every one commits treason who, in Canada, (a) uses force or violence for the purpose of overthrowing the government of Canada or a province; (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada; (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a); (d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act. [emphasis added]

**Outside Canada [s. 46(3)]:** Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada, (a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or (b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

**Punishment [s. 47]:** Everyone who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life [subsection 1]; everyone who commits treason is guilty of an indictable offence and liable to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(a), (c) or (d) [subsection 2a]

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<sup>7</sup> For a similar proposal put forth in the U.K., see: Richard Ekins et al, *Aiding the Enemy: How and Why to Restore the Law of Treason* (London: Policy Exchange, 2018), <https://policyexchange.org.uk/wp-content/uploads/2018/07/Aiding-the-Enemy.pdf>

**Limitation Period [s. 48(1)]:** No proceedings under s. 46(2)(a) shall be commenced more than three years after the time when the treason is alleged to have been committed.

**Omitting to Prevent Treason [s. 50(1)(b)]:** Everyone commits an offence who, knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.

**Punishment [s. 50(2)]:** Everyone who commits an offence under ss. (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

3. Notice that an individual convicted of high treason *must* be sentenced to life in prison, while an individual convicted of treason *may* be sentenced to up to life. A charge of treason must be laid within three years, while there is no such limitation period for a charge of high treason. Both treason and high treason apply to actions inside Canada, and actions outside Canada if the individual is a Canadian citizen or a person who owes allegiance to Her Majesty.
4. Returning foreign fighters should come under the purview of both high treason and treason offences. Consider – high treason includes preparing for a war against Canada (section 46(1)(b)). High treason also includes assisting “an enemy at war with Canada ... whether or not a state of war exists” (section 46(1)(c)). Then, treason includes conspiring with any person to commit high treason. It also includes conspiring with any person to use force or violence for the purpose of overthrowing the government of Canada or a province (section 46(2)(a), (c)). Treason further includes forming an intention to do either of the above and manifesting that intention by an overt act (section 46(2)(d)).
5. These relevant subsections can be essentially broken down into three criminalized acts:
  1. Preparing for war against Canada or conspiring to do so
  2. Assisting an enemy at war with Canada (whether or not a state of war exists) or conspiring to do so
  3. Using force or violence for the purpose of overthrowing the government of Canada or a province or conspiring to do so

It is also treason to form an intention to do any of the above three and manifest that intention by overt act.

6. As stated, these sections probably capture foreign fighters. However, “probably” is not good enough. Laws must have clarity. Canada’s treason laws are manifestly unclear regarding

whether they apply to non-state actors such as terrorist organizations, and whether they apply to novel, non-traditional methods of warfare. In our changing world, it is imperative that treason laws clearly capture Canadians assisting our non-state-actor enemies such as the Islamic State. These organizations are not state actors, but they plan the destruction of our country, prepare for a declared war against the West, and follow through with continued attacks on Canadian civilians. The duty of non-betrayal can and should apply to these types of enemies. This is especially important as proxy warfare is on the rise, and countries such as Iran utilize non-state actors to fight their battles and advance their interests worldwide. If our treason laws are not amended to clearly apply to non-state actors, malicious state actors can continue to take advantage of this loophole in the law. Notably, treason laws capture non-state actors in Australia and to some extent New Zealand – see Appendix IV. C-CAT proposes following the (more recent) law of Australia, and to some extent New Zealand, in making clear that treason applies to non-state actors. C-CAT proposes amending section 46 (1)(c) to read: “an enemy at war with Canada, including state and non-state actors, or any armed forces or armed groups against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists”.

7. It is also unclear whether or not our current treason laws capture non-traditional methods of warfare. Increasingly, war is no longer conducted on the battlefield and in the trenches. The use of cyberwarfare and other efforts to slowly destabilize one’s enemy – is rising in prevalence. To capture non-traditional methods of warfare, C-CAT proposes amending the provision “use force or violence for the purpose of overthrowing the government of Canada or a province” to read “use force or violence for the purpose of overthrowing or destabilizing the government of Canada or a province”.
8. C-CAT also proposes removing the limitation period. There is no reason why treason should be subject to a three-year limitation period. Limitation periods are irregular in criminal law in general, and there is no reason treason should be subject to one if high treason is not.
9. In sum, C-CAT proposes the following three amendments to revitalize the laws of treason:
  - a. **Amend subsection 46(1)(c) to include non-state actors.** Change the wording from “assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country” to “assists an enemy at war with Canada, including state or non-state actors, or any armed forces or armed groups against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists”.
  - b. **Amend subsection 46(2)(a) to capture non-traditional modes of warfare.** Change the wording from “uses force or violence for the purpose of overthrowing the

- government of Canada or a province” to “uses force or violence for the purpose of overthrowing or destabilizing the government of Canada or a province”.
- c. **Remove the limitation period contained in section 48(1).** A charge of treason should not be subject to a three-year limitation period.
10. There are additional ideological or terminological benefits of the proposed legislative changes under this section. It is an unfortunate reality in our society that many Canadians regard terrorism offences with some cynicism, and the use of this language as politically charged and Islamophobic. Prosecuting terrorists under treason provisions, where applicable, is more likely to communicate to Canadians the seriousness of the offences and the importance of denouncing them at every opportunity.
11. It is worth noting, simply for completeness, that if an individual or entity is charged with both terrorism and treason offences, and convicted of both, only the more serious conviction will stick, according to the Kienapple principle in Canadian law which guards against duplicity of convictions.

APPENDIX I: CITIZENSHIP REVOCATION COMPARISONS

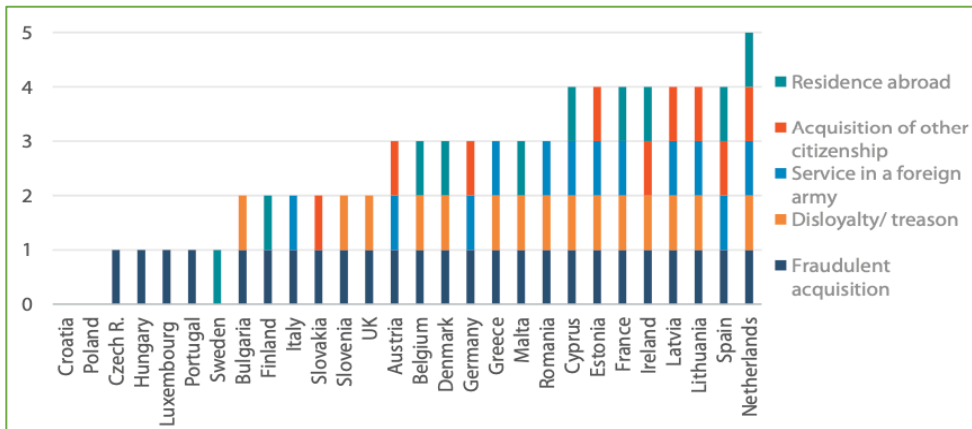
The United Kingdom

1. There are three grounds for citizenship revocation, applicable to all six types of British nationality/citizenship status, at home or abroad:
  - a. The person obtained their citizenship status by fraud, false representation or the concealment of any material fact
  - b. Deprivation is conducive to the public good, and would not make the person stateless
  - c. Deprivation is conducive to the public good because the person has conducted themselves in a manner which is seriously prejudicial to the vital interests of the United Kingdom, and the Home Secretary has reasonable grounds to believe that the person is able to become a national of another country or territory
  
2. Deprivation might be conducive to the public good on the grounds of involvement in terrorism, espionage, serious organized crime, war crimes, unacceptable behaviour.

The European Union

3. All EU countries, except for Croatia, Poland and Sweden, provide for the withdrawal of citizenship in cases of discovered fraud in the acquisition of citizenship.<sup>8</sup>

Figure 1 – Major Modes of Involuntary Loss of Citizenship in EU<sup>9</sup>



<sup>8</sup> “Acquisition and loss of citizenship in EU Member States”, European Parliament, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf).

<sup>9</sup> *Ibid* at page 7.

4. In 15 EU countries, citizenship can be revoked on grounds of treason or disloyalty [Bulgaria, Slovenia, UK, Belgium, Denmark, Greece, Malta, Romania, Cyprus, Estonia, France, Ireland, Latvia, Lithuania, Netherlands]. The actions covered by these grounds include: committing serious crimes against the country [Belgium, Bulgaria, Denmark and the Netherlands]; acting against a country's constitutional order and institutions [Denmark, Estonia, France, Latvia and Lithuania]; showing disloyalty by act or speech [Cyprus, Malta and Ireland]; and, more generally, acting against national interests [Greece, France, Romania, Slovenia and the UK].
5. Involvement in terrorist activities are explicitly mentioned as reasons for withdrawal of citizenship in several EU member countries, including France, Italy, and the Netherlands. In the majority of these countries, these grounds for revocation apply only to naturalised citizens and not those born in the country.

## APPENDIX II: PASSPORT REVOCATION IN CANADA

1. It is important to clarify the difference between citizenship revocation and passport revocation. If a Canadian citizen has his or her citizenship revoked, he or she will consequently lose his or her Canadian passport. But a Canadian may have his or her passport revoked while retaining his or her Canadian citizenship. Although citizenship revocation for terrorism offences has been repealed, passport revocation is still in use for this purpose. Passports can be cancelled and then revoked for national security reasons.
2. Under the *Canadian Passport Order*, the Canadian Minister of Public Safety and Emergency Preparedness, or his/her delegate, has the authority to make passport decisions when it is necessary to prevent the commission of a terrorism offence, as defined in section 2 of the *Criminal Code*, or for the national security of Canada or a foreign country or state.<sup>10</sup>
3. Before passport revocation, a passport is typically cancelled. A Canadian passport may be cancelled by the Minister if there are reasonable grounds to suspect that the decision is necessary to prevent the commission of a terrorism offence as defined in section 2 of the *Criminal Code*, or for the national security of Canada or a foreign country or state. When a passport is cancelled, law enforcement and border control partners are notified of the cancellation and the passport can no longer be used for travel. A passport is typically cancelled first, as cancellation renders a passport invalid for travel while officials conclude a more comprehensive review to establish whether there are grounds to ultimately revoke the passport.<sup>11</sup>
4. The Minister of Public Safety and Emergency Preparedness may revoke a Canadian passport when there are reasonable grounds to believe that the decision is necessary to prevent the commission of a terrorism offence, as defined in Section 2 of the *Criminal Code*, or for the national security of Canada or a foreign country or state. A Canadian passport can be revoked at home or abroad. If the Minister of Public Safety and Emergency Preparedness decides that a passport is to be revoked, he or she may decide that passport services are not to be delivered for a period of up to ten years. During this period of refusal of passport services, a person may

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<sup>10</sup> “Cancellation and revocation of passports and refusal of passport services on grounds of national security”, Government of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/security/refusal-revocation/national-security.html>.

<sup>11</sup> “Refusal, revocation, cancellation and suspension of Canadian passports”, Government of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/security/refusal-revocation.html>.

have a requirement to travel on an urgent basis. In these circumstances, a limited validity passport may be issued on urgent, compelling and compassionate grounds.<sup>12</sup>

5. To clarify, this Appendix is included for completeness and clarity of existing measures. C-CAT is not proposing any changes to Canada’s passport revocation policies.

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<sup>12</sup> “Cancellation and revocation of passports and refusal of passport services on grounds of national security”, Government of Canada, <https://www.canada.ca/en/immigration-refugees-citizenship/services/canadian-passports/security/refusal-revocation/national-security.html>.



## APPENDIX III: PART II.1 OF THE CRIMINAL CODE

### The Criminal Offences

The provisions that create criminal offences are scattered throughout this Part of the *Code*. For clarity, the following are the ten (10) terrorism offences.

**“Terrorist activity”** = an act or omission committed in or outside Canada that, if committed in Canada, is one of the following offences (see section explanation above for list of offences)

OR an act or omission, in or outside Canada, that fulfils the following two requirements:

- Committed **(A)** in whole or in part for a political, religious or ideological purpose, objective or cause, and **(B)** in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act
- Intentionally **(A)** causes death or serious bodily harm to a person by the use of violence, **(B)** endangers a person’s life, **(C)** causes a serious risk to the health or safety of the public or any segment of the public, **(D)** causes substantial property damage, if causing such damage is likely to result in the harm referred to in A-C, or **(E)** causes serious interference with or serious disruption of an essential service, facility or system, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in A-C

**“Terrorist group”** = **(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

#### 1. FINANCING TERRORISM

Offence #1/3: Directly or indirectly, wilfully and without lawful justification or excuse, providing or collecting property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out **(a)** an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of “terrorist activity” in subsection 83.01(1), OR **(b)** any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act – max. 10 years [s. 83.02]

Offence #2/3: Directly or indirectly, collecting property, providing or inviting a person to provide, or making available property or financial or other related services **(a)** intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying

out such an activity, OR **(b)** knowing that, in whole or part, they will be used by or will benefit a terrorist group – max. 10 years [s. 83.03]

Offence #3/3: **(a)** using property, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity, or **(b)** possessing property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of facilitating or carrying out a terrorist activity – max. 10 years [s. 83.04]

## 2. PROPERTY OFFENCES – DEALING IN TERRORIST PROPERTY, ETC.

Offence #1/4: Knowingly **(a)** dealing directly or indirectly in any property that is owned or controlled by or on behalf of a terrorist group; **(b)** entering into or facilitating, directly or indirectly, any transaction in respect of property referred to in para (a); or **(c)** providing any financial or other related services in respect of property referred to in para (a) to, for the benefit of or at the direction of a terrorist group – max. 10 years [s. 83.12 / s. 83.08]

Offence #2/4: Not disclosing (without delay) to RCMP Commissioner or to CSIS Director **(a)** the existence of property in their possession or control that they know is owned or controlled by or on behalf of a terrorist group; and **(b)** information about a transaction or proposed transaction in respect of property referred to in para (a) – max. 10 years [s. 83.12 / s. 83.1]

Offence #3/4: [For listed entity/company under s. 83.11 (1),] not determining on a continuing basis whether they are in possession or control of property owned or controlled by or on behalf of a listed entity (i.e., auditing) – max. 10 years [s. 83.12 / s. 83.11(1)]

Offence #4/4: [For listed entity/company under s. 83.11 (1),] not reporting to its regulating body (within period specified by regulation or, if not specified, monthly) **(a)** that it is not in possession or control of any property referred to in ss. (1), or **(b)** that it is in possession or control of such property, in which case it must also report the number of persons, contracts or accounts involved and the total value of the property (i.e., monthly report) – max. 10 years [s. 83.12 / s. 83.11(2)]

## 3. PARTICIPATING

Main Offence: Knowingly participating in or contributing to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity – max. 10 years [s. 83.18]

- (1) This offence may be committed whether or not **(a)** a terrorist group actually facilitates or carries out a terrorist activity; **(b)** the participation or contribution of the accused actually

enhances the ability of a terrorist group; or (c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out

- (2) Participating in or contributing to an activity of a terrorist group includes:
- (a) providing, receiving or recruiting a person to receive training
  - (b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group
  - (c) recruiting a person in order to facilitate or commit a terrorism offence, or an act or omission outside Canada that, if committed in Canada, would be a terrorism offence
  - (d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group
  - (e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit a terrorism offence, or an act or omission outside Canada that, if committed in Canada, would be a terrorism offence
- (3) In determining whether an accused participates or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused:
- (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group
  - (b) frequently associates with any persons who constitute the terrorist group
  - (c) receives any benefit from the terrorist group; or
  - (d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group

Leaving or Attempting to Leave, to Participate: Leaving or attempting to leave Canada, or going or attempting to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.18(1) – max. 10 years [s. 83.181]

#### 4. FACILITATING

Main Offence: Knowingly facilitating a terrorist activity – max. 14 years. This offence may be committed whether or not (a) the facilitator knows a particular terrorist activity is facilitated; (b) any particular terrorist activity was foreseen or planned at the time it was facilitated; (c) any terrorist activity was actually carried out [s. 83.19]

Leaving or Attempting to Leave, to Facilitate: Leaving or attempting to leave Canada, or going or attempting to go on board a conveyance with the intent to leave Canada, for the purpose of

committing an act or omission outside Canada that, if committed in Canada, would be an offence under subsection 83.19(1) – max. 14 years [s. 83.191]

#### 5. INDICTABLE OFFENCE FOR THE BENEFIT OF A TERRORIST GROUP

Main Offence: Committing an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group – max. life imprisonment [s. 83.2]

Leaving or Attempting to Leave, to Commit Indictable Offence for Benefit of Terrorist Group: Leaving or attempting to leave Canada, or going or attempting to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group – max. 14 years [s. 83.201]

#### 6. INDICTABLE OFFENCE THAT IS ALSO A TERRORIST ACTIVITY

Main Offence: Leaving or attempting to leave Canada, or going or attempting to go on board a conveyance with the intent to leave Canada, for the purpose of committing an act or omission outside Canada that, if committed in Canada, would be an indictable offence under this or any other Act of Parliament if the act or omission constituting the offence also constitutes a terrorist activity – max. 14 years [s. 83.202]

#### 7. INSTRUCTING

Offence Re: Terrorist Group: Knowingly instructing, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity – max. life imprisonment. This offence may be committed whether or not (a) the activity that the accused instructs to be carried out is actually carried out; (b) the accused instructs a particular person to carry out the activity; (c) the accused knows the identity of the person whom the accused instructs to carry out the activity; (d) the person whom the accused instructs to carry out the activity knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group; (e) a terrorist group actually facilitates or carries out a terrorist activity; (f) the activity actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or (g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group [s. 83.21]

Offence Re: Terrorist Activity: Knowingly instructing, directly or indirectly, any person to carry out a terrorist activity – max. life imprisonment. This offence may be committed whether or not (a) the terrorist activity is actually carried out; (b) the accused instructs a particular person to carry out the terrorist activity; (c) the accused knows the identity of the person whom the accused instructs to carry out the terrorist activity; or (d) the person whom the accused instructs to carry out the terrorist activity knows that it is a terrorist activity [s. 83.22]

## 8. ADVOCATING OR PROMOTING TERRORIST OFFENCE

Main Offence: By communicating statements, knowingly advocating or promoting 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 – max. 5 years [s. 83.221]

## 9. HARBOURING OR CONCEALING

Offence When Person Carried Out Terrorist Activity: Knowingly harbouring or concealing any person whom one knows to be a person who has carried out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity – max. 14 years if the person harboured or concealed carried out a terrorist activity that is a terrorism offence for which that person is liable to imprisonment for life; max. 10 years if the person harboured or concealed carried out a terrorist activity that is a terrorism offence for which that person is liable to any other punishment [s. 83.23(1)]

Offence When Person Is Likely to Carry Out: Knowingly harbouring or concealing any person whom one knows to be a person who is likely to carry out a terrorist activity, for the purpose of enabling the person to facilitate or carry out any terrorist activity – max. 10 years [s. 83.23(2)]

## 10. HOAX

Offence Re: Conveying Information: Conveying or causing or procuring to be conveyed information that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur, without believing the information to be true – max. 5 years, max. 10 years if causes bodily harm, max. life imprisonment if causes death [s. 83.231(1)(a)]

Offence Re: Committing an Act: Committing an act that, in all the circumstances, is likely to cause a reasonable apprehension that terrorist activity is occurring or will occur, without believing that such activity is occurring or will occur – max. 5 years, max. 10 years if causes bodily harm, max. life imprisonment if causes death [s. 83.231(1)(b)]

Table I. What Is Criminalized and What Is Not?

Re: Terrorist Activity	Re: Terrorist Group	Other
<p><b>Financing Terrorism:</b></p> <ul style="list-style-type: none"> <li>• Providing or collecting property to carry out <b>(a)</b> one of paras (a)(i) to (ix) of the definition of “terrorist activity”, OR <b>(b)</b> any other act or omission intended to cause death or serious bodily harm to a civilian, if purpose is to intimidate the public or to compel a government or international organization to do or refrain from doing any act</li> <li>• Collecting property, providing or inviting a person to provide, or making available property or financial or other related services <b>(a)</b> to be used for purpose of facilitating or carrying out terrorist activity, or for purpose of benefiting person who is facilitating or carrying out</li> <li>• Using or possessing property knowing it will be used to facilitate or carry out terrorist activity</li> </ul>	<p><b>Financing Terrorism:</b></p> <ul style="list-style-type: none"> <li>• Collecting property, providing or inviting a person to provide, or making available property or financial or other related services <b>(b)</b> knowing that, in whole or part, they will be used by or will benefit a terrorist group</li> </ul> <p><b>Dealing in Terrorist Property:</b> Dealing in any property owned or controlled by or on behalf of a terrorist group</p>	
	<p><b>Participating</b> in or contributing to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out terrorist activity. Includes: entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group. <b>Leaving for Participating:</b> Leaving or attempting to leave, to participate</p>	
<p><b>Facilitating</b> terrorist activity <b>Leaving for Facilitating:</b> Leaving or attempting to leave, for purpose of facilitating</p>		
<p><b>Leaving for Indictable Offence + Terrorist Activity:</b> Leaving or attempting to leave, for purpose of committing indictable offence that is also terrorist activity</p>	<p><b>Indictable Offence + Terrorist Group:</b> Committing an indictable offence for the benefit of, at the direction of or in association with a terrorist group <b>Leaving for Indictable Offence + Terrorist Group:</b> Leaving or attempting to leave, for purpose of committing indictable offence for benefit of terrorist group</p>	
<p><b>Instructing</b> to carry out terrorist activity</p>	<p><b>Instructing</b> to carry out activity for a terrorist group</p>	Advocating or promoting terrorism offence
<p><b>Harbouring</b> one who committed or is likely to commit terrorist activity</p>		
<p><b>Pretending (Hoax)</b></p>		

As made obvious by the above table, there are several gaps in what is criminalized by this Part of the *Code*. Notably, it is not a criminal offence to simply join a terrorist group; to harbour or conceal a member of a terrorist group; to facilitate the activities of a terrorist group; or to participate in terrorist activity.

### **Proceedings and Aggravated Punishment**

Attorney General’s Consent Required: Proceedings in respect of a terrorism offence or an offence under s. 83.12 shall not be commenced without the AG’s consent [s. 83.24]

Extended Territorial Jurisdiction: Where a person is alleged to have committed a terrorism offence or an offence under s. 83.12, proceedings may be commenced in any territorial division in Canada, whether or not that person is in Canada, and whether or not proceedings have previously been commenced elsewhere in Canada [s. 83.25]

Sentences to Be Served Consecutively: A sentence, other than one of life imprisonment, imposed on a person for an offence under any of sections 83.02-83.04 and 83.18-83.23 shall be served consecutively to (a) any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events; and (b) any other sentence, other than one of life imprisonment, to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections [s. 83.26]

Liability to Life Imprisonment: Notwithstanding anything in this Act, a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment, where the act or omission constituting the offence also constitutes a terrorist activity, is liable to imprisonment for life (as long as the offender was notified, prior to a plea, that the application of this section would be sought) [s. 83.27]

### **Property: Seizing, Restraining, Forfeiting**

Part II.1 also contains provisions relating to the seizure, restraint, and forfeiture of property.

#### Seizure and Restraint

Section 83.13 deals with seizure and restraint of property. Subsection (1) specifies: where a judge of the Federal Court, on an *ex-parte* application by the Attorney General, after examining the application in private, is satisfied that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 83.14(5), the judge may issue:

if the property is situated in Canada, a warrant may be issued authorizing search and seizure of the targeted property, and any other property that executing officers reasonably believe is forfeitable

if the property is situated in or outside Canada, a restraint order prohibiting any dealings with the property other than what the order itself permits

The Attorney General may request a manager for the property. The manager's authority includes certain powers: (a) the power to make an interlocutory sale of perishable or rapidly depreciating property; (b) the power to destroy property that has little or no value; and (c) the power to have property, other than real property or a conveyance, forfeited to Her Majesty.

To destroy property, they must apply to judge of Federal Court. Judge will order the property be destroyed if they are satisfied that the property has little or no financial or other value.

To forfeit property, they must apply to judge of Federal Court. Judge will order the property be forfeited if (i) notice is given or published, (ii) the notice specifies a period of 60 days during which a person may make an application to the judge asserting their interest in the property; and (iii) during that period, no one makes such an application.

A management order terminates when the property is returned, destroyed or forfeited.

### Forfeiture

Sections 83.14-.17 deal with forfeiture of property. Section 83.14 authorizes a Federal Court judge to order forfeiture of property that is (a) owned or controlled by or on behalf of a terrorist group, or (b) has been used or will be used to facilitate or carry out a terrorist activity. The judge need only be satisfied on a balance of probabilities that the property is such property. Judge must name respondents and give notice.

Proceeds may be used to compensate victims of terrorist activities and to fund anti-terrorist initiatives in accordance with any regulations made under ss. (5.2). No such regulations appear to have been made to date.

A third party's interest in the property will remain unaffected by the forfeiture, if judge is satisfied that the person has exercised reasonable care to ensure that the property would not be used to facilitate or carry out a terrorist activity, and that the person is not a member of a terrorist group.



If the property is a dwelling house, judge must also consider: the impact of an order of forfeiture on any member of the immediate family; whether the dwelling-house was or is the member's principal residence; and whether family member(s) appears innocent of any complicity or collusion. A person who claims an interest in property that was forfeited and who did not receive notice – may bring a motion not later than 60 days after the day on which the forfeiture order was made.

Any property restrained or seized under s. 83.13 continues to be restrained or seized pending an appeal of the forfeiture order under s. 83.14. Anyone appointed to manage the property continues to have authority to do so during the pendency of the appeal [s. 83.16(1)]

Other forfeiture provisions take precedence over these; property is subject to forfeiture under s. 83.14(5) only to the extent of what is left after other restitution and compensation is made to victims of the offences [s. 83.17]

## **Unique Procedures**

### *Listing of Entities / Terrorist Groups*

Sections 83.05-.07 cover the listing of entities. Under s. 83.05(1.1), the Minister recommends including an entity on the list. This recommendation may only be made if the Minister has 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 para (a). The discretion of the Governor in Council to include an entity on the list requires that the Governor in Council have the same reasonably grounded belief that underlies the Minister's recommendation [s. 83.05]

The Minister must review the list within two years of its completion, and every two years thereafter, and must recommend to the Governor in Council whether an entity should remain listed. The Minister also must review a listed entity's status when the entity applies in writing for delisting. The Minister's decision can then be reviewed by a Judge.

An entity claiming not to be a listed entity may apply to the Minister of Public Safety and Emergency Preparedness for a certificate stating that it is not a listed entity [s. 83.07]

### *Forfeiture and Ordered Deletion of Terrorist Propaganda*

A judge who is satisfied that there are reasonable grounds to believe that any publication, copies of which are kept for sale or distribution in premises within the court's jurisdiction, is terrorist

propaganda may issue a warrant authorizing seizure of the copies [s. 83.222(1)]. “Terrorist propaganda” means any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences or counsels the commission of a terrorism offence.

Within seven days after the day on which the warrant is issued, the judge shall issue a summons to the premises’ occupier requiring the occupier to appear before the court and to show cause why the matter seized should not be forfeited to Her Majesty. If the court is satisfied, on a balance of probabilities, that the publication is terrorist propaganda, it may make an order declaring that the matter be forfeited to Her Majesty. If the court is not satisfied that the publication is terrorist propaganda, it may order that the matter be restored to the person from whom it was seized [s. 83.222(2)-(4)]

A judge who is satisfied that there are reasonable grounds to believe that there is material — that is terrorist propaganda or computer data that makes terrorist propaganda available — stored on and made available to the public through a computer system that is within the court’s jurisdiction – may order the computer system’s custodian to (a) give an electronic copy of the material to the court, (b) ensure that the material is no longer stored on and made available through the computer system, and (c) provide the information that is necessary to identify and locate the person who posted the material [s. 83.223(1)]

Within a reasonable time after receiving the information referred to in para (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear before the court and to show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the computer system’s custodian to post the text of the notice at the location where the material was previously stored and made available [s. 83.223(2)]

If the person who posted the material does not appear before the court, the court may proceed to hear and determine the proceedings in the absence of the person [s. 83.223(4)]

If the court is satisfied, on a balance of probabilities, that the material is available to the public and is terrorist propaganda or computer data that makes terrorist propaganda available, it may order the computer system’s custodian to delete the material. If the court is not satisfied that the material is available to the public and is terrorist propaganda or computer data that makes terrorist propaganda available, the court shall order that the electronic copy be returned to the computer system’s custodian and terminate the order under paragraph (1)(b) [s. 83.223(5), (7)]

Investigative Hearings

*When Can Judge Make Order?*

With the Attorney General’s consent, a peace officer may, for the purposes of an investigation of a terrorism offence, apply to a judge for an order for the gathering of information. The judge may make an order for the gathering of information if they are satisfied that there are reasonable grounds to believe that:

A terrorism offence has been committed; information concerning the offence is likely to be obtained as a result of the order; and reasonable attempts have been made to obtain the information by other means; OR

There are reasonable grounds to believe that a terrorism offence will be committed; there are reasonable grounds to believe that a person has direct and material information that relates to the offence; and reasonable attempts have been made to obtain the information by other means [s. 83.28(2)-(4)]

*Content of Order:*

An order made under ss. (4) shall order the examination, on oath or not, of the person named in the order and require the person to attend at the place fixed by the judge for examination. The order may also require the person to bring items in their possession and produce it to the judge.

*At the Hearing:*

The person has the right to retain and instruct counsel. The person may refuse to answer a question or produce a thing, if answering a question (or producing a thing) would disclose information that is protected by any law relating to privilege or to disclosure of information. The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing. No answer given or thing produced shall be used or received against the person in any criminal proceedings against them, other than a prosecution under s. 132 or 136 [perjury, misleading].

The judge, if satisfied that anything produced during the course of the examination will likely be relevant to the investigation of any terrorism offence, may order that the thing be given into the custody of the peace officer.

*Possibilities for Warrant, Arrest, Detention*

The judge may issue a warrant for the arrest of the person named in the order if the judge is satisfied that the person is evading service of the order; is about to abscond; or did not attend the examination, or did not remain in attendance, as required by the order [s. 83.29]

After the person is arrested pursuant to the warrant, and brought before the judge – the judge may, to ensure compliance with the order, order that the person be detained [for maximum 90 days] or released on recognizance, with or without sureties.

*Recognizance with Conditions*

Section 83.3 permits a provincial court judge to require a person to enter into a recognizance to prevent a terrorist activity from being carried out.

With the consent of the Attorney General, a peace officer who (a) believes on reasonable grounds that terrorist activity may be carried out, and (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is likely to prevent the carrying out of the terrorist activity – may lay an information under oath before a provincial court judge, who may compel the person named to appear before the judge.

[Sections 83.3(4) and (5) provide an alternative approach: arrest without warrant, and attendance before a provincial court judge. The peace officer must have a reasonably-grounded suspicion that detention of the person is likely to prevent a terrorist activity and either exigent circumstance make it impracticable to lay an information, even though the conditions precedent for it are satisfied, or an information has been laid and summons issued.]

First Hearing: Anyone detained in custody has to be taken before a provincial court judge according to the rules of ss. (6) [within 24 hours, or if not, as soon as is practicable]. The provincial court judge must release the person if no information has been laid by that time, or if an information has been laid and the peace officer fails to show cause on why the detention of the person in custody is justified. (i.e., a bail hearing).

Main Hearing: On the hearing of the main application, the provincial court judge has to decide whether the peace officer had reasonable grounds for his or her suspicion – that the imposition of a recognizance is necessary to prevent the terrorist activity from being carried out. If satisfied, the judge must order the person to enter into recognizance to keep the peace and be of good behaviour for a term of not more than twelve months or, if satisfied the person has previously been convicted

of a terrorism offence, for not more than 2 years. The judge may commit the person to prison for max. 12 months if the person fails or refuses to enter into the recognizance.

Conditions on the Recognizance: The judge may include any other conditions. The judge may include a condition prohibiting the possession of weapons, a condition ordering the person to deposit his or her passport, and a condition that the person remain within a specified geographic area. If the judge does not add these three enumerated conditions, he or she shall include in the record a statement of the reasons for not adding it. The conditions may be varied under ss. (13).

## APPENDIX IV: TREASON OFFENCES IN AUSTRALIA AND NEW ZEALAND

### Australia

1. Section 80.1 of the Australian *Criminal Code* creates the treason offence. It prohibits levying war, or doing any act preparatory to levying war, against the Commonwealth of Australia.
2. Prior to June 2018, section 80.1AA prohibited materially assisting an enemy at war with the Commonwealth (whether or not a state of war has been declared) and materially assisting a country or organisation engaged in armed hostilities against the Australian Defence Force. This clearly applied to non-state actors engaged in armed conflict against the Australian military.
3. In June 2018, section 80.1AA was amended. A new offence was created: it became treason to materially assist a party to engage in armed conflict involving the Commonwealth or the Australian Defence Force, provided that the party is declared by Proclamation to be an enemy engaged in such armed conflict. In other words, there is no longer a requirement that a country or organization be engaged in armed conflict *against* Australia. It is now sufficient that a party is engaged in an armed conflict *involving* Australia. This modernization reflects the reality of modern, non-traditional warfare, where the Australian military might be involved in a conflict with multiple groups where it is not engaged in direct combat with all groups involved.

### New Zealand

4. Section 73 of the *Crimes Act* (1961) outlines the offence of treason. It prohibits assisting “an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country”. This is similar to the Canadian version, except that the New Zealand treason offence is more open to the interpretation that it applies to non-state actors. By wording the last phrase “whether or not a state of war exists between New Zealand and any other country”, rather than “the country” – it is more open-ended in its application.