

# Be Careful What You Wish For? Terrorism Prosecutions in Post-9/11 Canada

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*The criminal law is a significantly more restrained and just approach to anti-terrorism than immigration law. Immigration law risks indeterminate detention, deportation to torture and the use of secret evidence not disclosed to the detainee. Criminal law's emphasis on fair trial rights and the presumption of innocence make it the better alternative. Nevertheless, the criminal law has dangers that are often underappreciated and overlooked in legal scholarship.*

*This article reviews these dangers and demonstrates how some traditional protections of the criminal law are not provided in the anti-terrorism realm. The author begins by examining pretrial detention and shows how options used against those suspected of terrorism offences, including the reverse onus for bail, preventive arrests and peace bonds, do not conform with the presumption of innocence. He then looks at the remedies available for misconduct and fair trials, finding that while the criminal system has remedies in place against non-disclosure and entrapment, courts are often reluctant to stay proceedings when faced with these challenges. Similarly, while the criminal law is supposed to punish only wrongful acts, there is significant legislative overbreadth in defining terrorism offences. Finally, the author explores the promise of proportionate punishment. Although there is a danger of disproportionate punishment of those convicted of terrorism offences that may only have a remote connection to actual terrorist violence, sentencing discretion provides an important but fragile failsafe.*

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# Introduction

Since 9/11, there has been international movement away from criminal law toward less restrained alternatives, including immigration detention. As an antidote to current approaches, Professor Conor Gearty has recently revived the traditional call for “charge or release”.<sup>1</sup> He argues that political violence must be treated as criminal in order to protect the liberty of the least powerful and to ensure that basic rules of justice are met, such as “open justice; a presumption of innocence; careful rules of evidence to prevent abuse; an independent system of sentencing, and much else besides”.<sup>2</sup>

I agree with Professor Gearty that the criminal law is preferable to its less restrained alternatives.<sup>3</sup> Nevertheless, the criminal law that Gearty wishes us to return to is not the same criminal law that eventually acknowledged the wrongful convictions of the Guildford Four and the Birmingham Six. In those cases, the convictions rested on whether the accused actually bombed civilians sitting in pubs. Today, the criminal law has moved so far in a preventive direction that charges are almost always

1. Conor Gearty, *Liberty and Security* (Cambridge, UK: Polity Press, 2013).

2. *Ibid* at 45, 115.

3. See Kent Roach, “The Criminal Law and Its Less Restrained Alternatives” in Victor Ramraj et al, eds, *Global Anti-Terrorism Law and Policy*, 2nd ed (Cambridge, UK: Cambridge University Press, 2012) 91.

laid long before any such event. Issues of guilt or innocence have become far more complex and dependent upon legislative definitions. Indeed, there is a danger that legislative overbreadth can define innocence out of existence.

It is particularly difficult for Canadians to understand that the criminal law may not be the perfect solution, as Canada has been exposed to the worst effects of using immigration law for counter-terrorism,<sup>4</sup> while Canadian criminal law on terrorism is more restrained than its American or British counterparts. Of course, the criminal law is preferable to immigration law, which risks indeterminate detention, judicially sanctioned use of secret evidence, and Canada's shameful "loaded weapon"<sup>5</sup> of the threat of deportation to torture under the *Suresh v Canada (Minister of Citizenship and Immigration)* exception.<sup>6</sup> Unrestrained celebration of the criminal law would, however, be a mistake. In this article I will argue that Professor Gearty and other defenders of the criminal law have overestimated and romanticized criminal law's contemporary restraints.

Canadian criminal law is comparatively restrained. The Supreme Court of Canada has stressed the importance of requiring proof of terrorist purposes and has read broadly defined terrorism offences to exclude conduct that is not harmful or creates only a "negligible risk of harm".<sup>7</sup> The Court has reminded judges of the importance of sentencing discretion, including the potential relevance of rehabilitation when

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4. Canadian law allows for the indeterminate detention of non-citizens suspected of being a security threat even when the prospects of deportation seem distant and remote. It has also been bluntly dismissive of equality challenges to counter-terrorism efforts that single out non-citizens by offering the fact that non-citizens do not have a constitutional right to remain in Canada as an all-encompassing answer to any equality challenge. See *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui* 2007]. More recently, the Court upheld the security certificate scheme from *Charter* challenge including the use of secret evidence without judicial balancing of the case for and against disclosure, while also stressing that there should be enough disclosure to allow the detainee to defend himself and that judges should allow special advocates to contact others even after they have seen the secret evidence when necessary to ensure a fair trial. See *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37, 374 DLR (4th) 193 [*Harkat*]. See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5. *Korematsu v United States*, 323 US 214 at 246 (1944), Jackson J, dissenting.

6. 2002 SCC 1 at para 78, [2002] 1 SCR 3.

7. *R v Khawaja*, 2012 SCC 69 at para 50, [2012] 3 SCR 555 [*Khawaja* SCC].

sentencing terrorists.<sup>8</sup> It has also warned Canadian trial judges that they should stay terrorism trials if they are concerned that the accused cannot obtain a fair trial because of non-disclosure of information on national security confidentiality grounds.<sup>9</sup> These are all important and praiseworthy safeguards.

Nevertheless, Canadians should not be complacent about how criminal law is actually used against suspected terrorists. The criminal law promises to respect the presumption of innocence, and the need to prove guilt beyond a reasonable doubt with public evidence was affirmed when two men were acquitted of the 1985 Air India bombings.<sup>10</sup> Part I of this article will demonstrate, however, that those charged with terrorism offences face a reverse onus that requires them to establish that they should not be denied bail. Moreover, the preventive detention that characterizes security certificates under immigration law is not foreign to the criminal law, as the grounds for denying bail are almost as expansive as the grounds for determining whether a non-citizen is a threat to national security under security certificates. While Canada has not yet used preventive arrests and peace bonds for suspected terrorists, these legal instruments remind us that the criminal law, like immigration law, has preventive aspirations.

The criminal law also promises the accused effective remedies for unfair treatment. Part II of this article will demonstrate, however, that the accused in criminal terrorism cases in Canada have had no more success persuading judges to grant strong remedies like stays of proceedings than detainees in security certificate cases.<sup>11</sup> Accused in three Canadian terrorism prosecutions have asked for stays of proceedings on the basis of entrapment, but all have had their claims rejected.<sup>12</sup> Entrapment has

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8. *Ibid* at para 124.

9. See *R v Ahmad*, 2011 SCC 6, [2011] 1 SCR 110.

10. See *R v Malik*, 2005 BCS 350 at paras 64, 662, 1257 WCB (2d) 420 (stressing the importance of the reasonable doubt standard). See also *R v Sher*, 2014 ONSC 4790 at para 78, [2014] OJ No 4372 (QL) (to the same effect).

11. See *Charakaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 77, [2008] 2 SCR 326 [*Charakaoui* 2008] (refusing to stay proceedings as a remedy for destruction of original intelligence); *Harkat*, *supra* note 4 at para 99 (refusing to exclude evidence as remedy for destruction of original intelligence).

12. See *R v Hersi*, 2014 ONSC 4143, 115 WCB (2d) 348; *R v Y(N)*, 2012 ONCA 745, 113 OR (3d) 347; *R v Abdelhaleem*, 89 WCB (2d) 233, [2010] OJ No 5693 (QL) (Sup Ct J).

similarly failed as a defence in terrorism prosecutions in the United States. Although the Canadian experience is less intense than the American experience, it still opens up the possibility of random virtue testing of those who associate and share extreme religious and political views with suspected terrorists. This Part will also examine the promise that the Supreme Court made in *R v Ahmad* that trial judges would stay proceedings before allowing a trial that was unfair because of non-disclosure due to national security confidentiality rulings by the Federal Court.<sup>13</sup> It will be suggested that there is no reliable means to ensure that trial judges have the information they need to enforce fair trial rights through strong remedies.

Part III of this article will examine why it is unlikely that wrongful convictions will emerge from the terrorism cases of the 2000s and will relate this to problems of legislative overbreadth in defining terrorism offences. Although Canadian law makes some exemptions for freedom fighters<sup>14</sup> and does not base terrorism convictions on objective fault,<sup>15</sup> some Canadian terrorist offences<sup>16</sup> are as broad as the American material support offences which allow convictions in the absence of a terrorist purpose.<sup>17</sup>

The final promise that the criminal law makes is of proportionate punishment. This is an important restraint that is not made in immigration law, where long-term indeterminate detention is not considered a form of punishment.<sup>18</sup> Sentencing has the ability to act as a final check on overbroad offences. This was demonstrated by the British Columbia Court of Appeal's decision upholding a controversial six-month sentence for a man who collected three thousand dollars in support of the Tamil Tigers and was the first person convicted of financing terrorism.<sup>19</sup> It will be seen in Part IV of this article, however, that this

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13. *Supra* note 9 at paras 52–53.

14. This is contrary to the situation in British law. See *R v Gul*, [2013] UKSC 64 at para 61.

15. This is contrary to the situation in the US where objective fault is sufficient for some terrorism offences. See 18 USC § 2339 (2014).

16. See *Criminal Code*, RSC 1985, c C-46, s 83.03(b).

17. See *Holder v Humanitarian Law Project*, 561 US 1 (2010) [*Humanitarian Law Project*].

18. For criticism of this approach, see Rayner Thwaites, *The Liberty of Non-Citizens: Indefinite Detention in Commonwealth Countries* (Oxford: Hart Publishing, 2014) at 296–300.

19. See *R v Thambaiturai*, 2011 BCCA 137, 302 BCAC 288 [*Thambaiturai CA*].

promise of proportionate punishment is fragile. The 2001 *Anti-terrorism Act* challenges proportionate punishment by providing for mandatory consecutive sentences for overlapping terrorism crimes.<sup>20</sup> Moreover, little would stop the government from introducing mandatory minimum penalties for terrorism offences or simply extraditing people to countries with higher sentencing tariffs.<sup>21</sup>

Some of the concerns raised in this article about the criminal law are based on abuses that may occur in the future but cannot be said with certainty to have yet occurred. The speculative nature of some of my concerns largely reflects Canada's limited experience with terrorism prosecutions compared with the United States, the United Kingdom or even Australia.<sup>22</sup> But that could change. The argument made in this article is nuanced because it does not dispute that the criminal law is more restrained than immigration law in its approach to terrorism. Indeed, the criminal law is preferable to immigration law because of its emphasis on fair trial rights and the presumption of innocence. The virtues of the criminal law revolve around fair trials, but the criminal law is less restrained when it comes to offence definition as well as the pre- and post-trial stages of the criminal process. This article attempts to redirect scholarship on terrorism toward these often-neglected parts of the criminal process. It also warns against complacency in preferring the criminal law solution to terrorism. In particular, it is dangerous to ignore Parliament's ability to broadly define all crimes and, in doing so, erase the importance of innocence that Professor Gearty and other defenders of the criminal law rightly celebrate.

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20. SC 2001, c 41, s 4, amending *Criminal Code*, *supra* note 16, s 83.26.

21. See *Sriskandarajah v United States of America*, 2012 SCC 70, [2012] 3 SCR 609 [*Sriskandarajah*].

22. For a survey of these prosecutions, see Canada, Commission of Inquiry into the Investigation of the Bombing on Air India Flight 182, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, by Kent Roach, vol 4 (Ottawa: Public Works and Government Services Canada, 2010) [Roach, *Unique Challenges of Terrorism Prosecutions*].

# I. Criminal Law and the Promise of Being Punished for What You Have Done

Criminal law is often defended on a retributive basis: It punishes people for what they have done and for the choices they have made.<sup>23</sup> Such accounts, however, neglect the criminal law's ability to detain people for preventive reasons in the pretrial stage of the criminal process. Pretrial custody is particularly relevant to those charged with terrorism offences because they are presumed to be ineligible for bail. They can also face the additional sanctions of preventive arrest and peace bonds. These are non-trivial features of the criminal law that are too often ignored.

## A. Bail

Bail or pretrial release can be denied on any one of three grounds. The primary ground is that pretrial detention is necessary to ensure the attendance of the accused at trial. The secondary ground relates to public danger, and the third ground relates to the need to maintain confidence in the administration of justice. Those accused of terrorism may be vulnerable to detention on all three grounds. Moreover, in the immediate aftermath of 9/11, Parliament enacted a reverse onus that requires anyone charged with a terrorism offence to justify why they should be granted bail.<sup>24</sup> As Gary Trotter, Canada's leading authority on bail, observed at the time of the enactment of these provisions: "If a reverse-onus provision is constitutional with respect to drug trafficking, a provision focused on terrorism is surely to be upheld. Whether a reverse-onus provision is necessary in this context (or any context, for that matter) is another question."<sup>25</sup> As McLachlin J (as she then was) observed in her dissent in *R v Pearson*, the reverse onus and presumption against bail will not be

23. *R v M(CA)*, [1996] 1 SCR 500, 194 NR 321.

24. For the definition of "terrorism offence", see *Criminal Code*, *supra* note 16 (this term is defined broadly in section 2 of the *Criminal Code* to include offences under sections 83.02 to 83.04 and 83.18 to 83.23 of the *Criminal Code*, and any indictable offence "committed for the benefit of, at the direction of or in association with a terrorist group", s 2). For the reverse onus provision, see *ibid*, s 515(6)(a)(iii).

25. Gary Trotter, "The Anti-Terrorism Bill and Preventive Restraints in Liberty" in Ronald J Daniels, Patrick Macklem & Kent Roach, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 239 at 245.

necessary for large-scale organized drug traffickers, but could be both determinative and disproportionate if applied to small-scale offenders.<sup>26</sup> Similarly, while a reverse onus would hardly be necessary for an accused with links to a well-resourced international terrorist group, it could be decisive where an accused is alleged to have acted with only a few individuals and has flight and danger risks that can be controlled by appropriate release conditions.

In *R v Morales*, the Supreme Court unanimously upheld the practice of denying bail and pretrial release for public safety reasons.<sup>27</sup> The Court focused on the wording of section 515(10)(b) of the *Criminal Code* and concluded that it was consistent with the *Canadian Charter of Rights and Freedoms* because:

Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a “substantial likelihood” of committing an offence or interfering with the administration of justice, and only where this “substantial likelihood” endangers “the protection or safety of the public”. Moreover, detention is justified only when it is “necessary” for public safety. It is not justified where detention would merely be convenient or advantageous.<sup>28</sup>

The Court in *Morales* accepted that it was appropriate to deny bail for reasons of preventive detention. Chief Justice Lamer reached this conclusion simply by asserting that a bail system that released a person who committed a crime while on bail would “not function properly”.<sup>29</sup> The legitimacy of preventive detention was assumed because “one objective of the entire system of criminal justice is to stop criminal behaviour”.<sup>30</sup>

The Court also candidly recognized that the preventive detention provision would result in a number of false positives where accused persons are kept in pretrial detention even though they would not commit an offence if released. Chief Justice Lamer accepted “that the art of predicting recidivism and future dangerousness is, at the very least, a somewhat inexact process”, but responded to this problem by asserting that “the bail system does not aim to make exact predictions about future dangerousness because

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26. [1992] 3 SCR 665 at 709, 12 CRR (2d) 1.

27. [1992] 3 SCR 711, 144 NR 176 [cited to SCR].

28. *Ibid* at 737.

29. *Ibid* at 738.

30. *Ibid*.



such predictions are impossible to make”.<sup>31</sup> In other words, the impossibility of exact predictions excused the Court from attempting to measure or improve the accuracy of the predictions that are made.

In the post-9/11, but non-terrorism, case of *R v Hall*, the Supreme Court upheld denying bail to maintain confidence in the administration of justice, but struck down an open-ended provision that authorized denying bail “on any just cause”.<sup>32</sup> Chief Justice McLachlin concluded that the ground for denying bail on the basis of public confidence was not vague or overbroad because it instructed judges to focus on the gravity and circumstances of the offence, the potential lengthy term of imprisonment faced by the accused and the apparent strength of the prosecution’s case. Justice Iacobucci and three others dissented, arguing that independent courts should resist “irrational public fears” and “outrage” about “a highly publicized serious crime”.<sup>33</sup>

Although Parliament enacted the public confidence provision in 1997, it almost seems to have been written with terrorism in mind, and it has played an important role in post-9/11 terrorism cases. For example, it was used to detain Saad Gaya of the Toronto 18 plotters, even though the judge was convinced that he had discharged his onus on the two other grounds of bail because his passport had expired and he could be subject to electronic monitoring. Justice Hill concluded that pretrial release of Gaya, who had been “demonstrably immersed in a viable plan capable of wreaking catastrophic consequences within Canadian society . . . would significantly diminish the public’s confidence in the administration of justice”.<sup>34</sup>

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31. *Ibid.*

32. 2002 SCC 64, [2002] 3 SCR 309. One of the examples used by McLachlin CJC in this case did involve situations where the accused was connected with a terrorist organization. The Chief Justice stated that “an accused’s implication in a terrorist ring or organized drug trafficking might be relevant to whether he is likely to appear at trial, whether he is likely to commit further offences or interfere with the administration of justice, and whether his detention is necessary to maintain confidence in the justice system”. *Ibid* at para 30.

33. *Ibid* at para 106.

34. *R v Gaya*, 88 WCB (2d) 549 at para 187, 2008 CanLII 24539 (Ont Sup Ct J). Justice Hill concluded that Gaya had not discharged the onus in part because of the seriousness of the offence but also because time in pretrial detention could be deducted from any ultimate sentence at a 2:1 rate. *Ibid* at paras 197–98. Today the time would be restricted to 1.5 days credit for every day served in pretrial custody.

*Charter* challenges, such as those in *Morales* and *Hall*, often focus on the legal wording of provisions that authorize preventive detention and overlook how these provisions are actually used and against whom they are used. Concerns about systemic discrimination are relevant at the bail stage in post-9/11 terrorism cases as the overwhelming majority of the accused have been Muslim men, and by definition, all those accused of terrorism will have controversial political or religious motives.<sup>35</sup> In both *Morales* and *Hall*, the Court failed to examine the 1991 findings of the Manitoba Aboriginal Justice Inquiry that Aboriginal people in Manitoba were more likely to be denied bail and held for longer periods of time. The commission concluded that “Aboriginal detainees had a 21% chance of being granted bail while non-Aboriginal detainees had a 56% chance”.<sup>36</sup> The Court in *Hall* did not examine the findings of a subsequent inquiry that found African-Canadian accused were disproportionately denied bail in Ontario.<sup>37</sup> In addition, bail decisions and reasoning will often not be available for public scrutiny until after the trial owing to extensive pretrial publication bans. Bail decisions may also be influenced by increasing risk aversion of judges making bail decisions. This risk aversion is demonstrated by the fact that over half of those imprisoned in provincial correctional centres are people who are formally presumed innocent and awaiting trial.<sup>38</sup>

It is noteworthy that not all those accused of terrorism in Canada have been denied bail.<sup>39</sup> Although many of these bail decisions are

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35. For arguments that terrorism provisions could affect Aboriginal people see David Milward, “The Latest Chapter in Fighting Terrorism” (2012) 59:2&3 *Crim LQ* 278.

36. Manitoba, Minister of Justice, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: Queen’s Printer, 1991) at 221.

37. Ontario, Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System: A Community Summary* (Toronto: Queen’s Printer for Ontario, 1995) at 43.

38. Canadian Civil Liberties Association and Education Trust, “Set Up to Fail: Bail and The Revolving Door of Pretrial Detention” (July 2014) at 5, online: <[ccla.org/wordpress/wp-content/uploads/2014/07/Set-up-to-fail-FINAL.pdf](http://ccla.org/wordpress/wp-content/uploads/2014/07/Set-up-to-fail-FINAL.pdf)>.

39. See “Terrorism-Related Cases with Canadian Connections”, *CBC News* (18 September 2014), online: <[www.cbc.ca](http://www.cbc.ca)>. Misbahuddin Ahmed and Dr. Khuram Sher, both charged with various terrorism offences in 2010, were released on bail shortly thereafter but a third co-accused Hiva Alizadeh was denied bail. Dr. Sher was subsequently acquitted by a judge. *R v Sher*, *supra* note 10. Mr. Ahmed, however, was convicted of two terrorism offences by a jury. See *R v Ahmed*, 2014 ONSC 5367, [2014] OJ No 4395 (QL). See also Stewart Bell, “Mohamed Hersi Found Guilty of Attempting to Join Somali Terrorist Group

not publicly available, they do suggest that some judges are capable of resisting public pressure for pretrial detention. However, there are some published examples of decisions denying bail where the accused went on to receive an acquittal or a stay of proceedings. This false positive issue is particularly pressing in the terrorism context given the complexity of terrorism trials and the lengthy period between arrest and trial.

(i) The *Stanikzy* Case

Matin Stanikzy was arrested and taken into custody on November 17, 2010. Along with unrelated domestic violence charges, Stanikzy was charged with a number of terrorism offences: counselling the commission of an offence under section 464, uttering threats under section 264.1 and attempting to possess explosives under section 81(1)(d).<sup>40</sup> He was denied bail, and bail reviews were also twice rejected. He was held in detention for almost a year before being acquitted on November 4, 2011.<sup>41</sup> It is worth noting that Stanikzy's pretrial delay was relatively short for terrorism trials because the evidence against him did not originate from intelligence agencies.

At a bail review, Stanikzy's detention was denied on all three grounds. There were concerns that he would not attend trial because he had

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Al-Shabab", *National Post* (30 May 2014), online: <[www.nationalpost.com](http://www.nationalpost.com)>. Mohamed Hersi was released on bail before being convicted by a jury for attempting to leave Canada to participate in a terrorist group. See also Megan O'Toole, "Toronto 18's Asad Ansari Sentenced to 6 years 5 Months . . . Goes Free", *National Post* (4 October 2010), online: <[www.nationalpost.com](http://www.nationalpost.com)>. Asad Ansari (one of the Toronto 18) was released on bail on strict conditions after three years and three months pretrial custody. He was found guilty and sentenced to six years and five months which amounted to time served after he was given 2:1 credit for his pretrial custody. For extradition cases involving terrorism charges where the accused was granted bail, see *R v Diab*, 2009 CanLII 26600, [2009] OJ No 2173 (Sup Ct J); *France v Ouzghar*, 2009 ONCA 137, 95 OR (3d) 187; *Sriskandarajah*, *supra* note 21.

40. See *R v Stanikzy*, 2011 ONSC 386 at para 3, 92 WCB (2d) 277. The inchoate attempt and counselling offences charged in this case and the conspiracy charges laid in the so-called Via train plot illustrate how the traditional criminal law can be used even without resort to new terrorism offences created after 9/11. An important implication of laying such traditional offences is that unlike terrorism charges they do not require the prior consent of a provincial or federal attorney general. See *Criminal Code*, *supra* note 16, s 83.24.

41. Sean Chase, "Jury Acquits Pembroke Man of All Charges", *The Daily Observer* (5 November 2011), online: <[www.thedailyobserver.ca](http://www.thedailyobserver.ca)>.

recently arrived in Canada from Afghanistan. There were also concerns about public safety concerning both the threats he allegedly made to kill thirty to one hundred people at a Canadian Forces Base and the threats he allegedly made against his wife.<sup>42</sup> There were also concerns about the public confidence in the administration of justice, with the reviewing judge stressing that the

Crown's evidence is strong. It manifests from the defendant's own words. The gravity of the offence is very serious. It falls into the category of the most serious since it includes the threat of indiscriminate wanton killing of innocent Canadians with the intent to undermine the very fabric of our society, rule of law, and our constitutional democracy. . . . Because of the seriousness of the offence, upon conviction, the defendant would potentially face a very long prison term.<sup>43</sup>

Justice Ray rejected the accused's request that he be allowed to live away from his estranged wife, under house arrest with sureties. This suggests that the primary reason for denying bail was the terrorism charges as opposed to those of assaulting and uttering threats against his estranged wife.

## (ii) The *Khadr* Case

The Abdullah Khadr case is another example of someone held in lengthy pretrial custody without ever being convicted. He was indicted for material support of terrorism in the US and was subject to four and a half years of detention before proceedings to extradite him were

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42. See *R v Stanikzy*, *supra* note 40. The judge explained:

The defendant's words as relayed by the complainant are of the greatest concern, not only to innocent Canadians, but also because of the threats to the complainant's safety. The defendant's words, particularly as they describe his wish to be a martyr in the taking of non-muslim lives are chilling and suggest that he would not be amenable to compliance with rules, undertakings, or even the admonition of extended family members including the sureties. The facts before Justice of the Peace Girault in *R v Sher* are by comparison materially different. The defendant there was a Canadian citizen with close family ties and established in the community. His philosophy was clearly not that of a martyr. The evidence was that he did not intend to take lives—only to create fear.

*Ibid* at para 21.

43. *Ibid* at para 24.

stayed. The judge on the first bail review held that the reverse onus that applied to those charged with terrorism offences in Canada would also apply to bail sought in relation to extradition proceedings.<sup>44</sup> The judges at both bail reviews found Khadr had not discharged the onus of demonstrating that he was not a flight risk given his family's notorious history of involvement in terrorism and the fact that he was apprehended in Pakistan. Justice Molloy also agreed with the prosecutor's submission that "this is a tertiary ground case, if ever there was one".<sup>45</sup> She elaborated:

[A] reasonable person apprised of all of the circumstances in this case would be disturbed to learn that Mr. Khadr had been released into the community under the supervision of his grandmother pending his extradition hearing. This case has attracted considerable public attention because of the nature of the allegations against Mr. Khadr and the strength of the evidence connecting him to Al Qaeda terrorists. This is a rare and extraordinary case. If Mr. Khadr were released in these circumstances and then disappeared from the jurisdiction before his extradition hearing, the consequences could be horrific and the Canadian justice system would decidedly be brought into disrepute.<sup>46</sup>

Justice Molloy cited evidence that during a television interview in February 2004, Abdullah Khadr had said "he dreams himself of becoming a martyr for Islam, expressed his admiration for the terrorists who crashed into the World Trade Buildings on September 11, 2001 and referred to Osama Bin Laden as a 'saint'".<sup>47</sup>

In 2008, Khadr sought bail review again and relied in part on the Supreme Court's 2007 decision in *Charkaoui*.<sup>48</sup> The decision expressed approval for regular bail reviews for security certificate detainees and

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44. *United States of America v Khadr* (2006), 262 DLR (4th) 652 at para 31, 205 CCC (3d) 109 (Ont Sup Ct J), Molloy J [*Khadr*]. Justice Molloy concluded that "terrorism is the underlying essence of the offences" charged in the US because

supplying arms and ammunition to Al Qaeda is clearly contributing to the ability of Al Qaeda to carry out its terrorist activities and, as such, would violate s. 83.18(1) of the *Criminal Code*. Engaging in the sale of weapons and ammunition of this nature is an indictable offence in Canada. Doing so for the benefit of Al Qaeda is therefore also an offence under s. 83.2 of the *Criminal Code*.

*Ibid* at paras 30–31.

45. *Ibid* at para 67.

46. *Ibid* at para 68.

47. *Ibid* at para 48.

48. *Supra* note 4 at paras 110–12.

accepted that the detainee's threat to national security should decrease with time, while the government's need to produce evidence of such danger should increase with time. However, Trotter J held that the Court's decision in *Charkaoui* was specific to immigration security certificates and found that Khadr's risk of flight was still present, stating: "[T]he question of whether delay has severed ties is highly fact-specific".<sup>49</sup> Justice Trotter also concluded that bail should be denied in order to maintain public confidence in the administration of justice.<sup>50</sup> In 2010, Khadr was released when extradition proceedings against him were stayed because American officials abused process when they offered a bounty for his capture and detention in Pakistan.<sup>51</sup>

My point is not to argue that either Stanikzy or Khadr should have been granted bail or that the decisions were unreasonable or wrong. It is only to suggest that the bail issue may be as problematic under criminal law as it is under immigration law. A person charged with a terrorism offence has to establish cause for being granted bail and such a reverse onus is likely consistent with the *Charter*. The grounds for denying bail are broad and the concept of denying bail to maintain public confidence is vague and somewhat subjective. Information that does not satisfy the ordinary rules of evidence can be used in bail hearings. In the terrorism context, the accused's expressive and associational activities may, as they did in the Abdullah Khadr case, provide a basis for denying bail. Accused

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49. *United States of America v Khadr* (2008), 234 CCC (3d) 129 at para 66, 61 CR (6th) 93 (Ont Sup Ct J).

50. *Ibid.* Justice Trotter concluded:

At the end of the day, I must consider all of the factors in s. 515(10)(c) in determining whether Mr. Khadr's detention is necessary to maintain confidence in the administration of justice. I conclude that it is. By way of summary, in reaching this conclusion, I rely on the following factors: (1) the gravely serious nature of the offences; (2) the fact that the offences were for the benefit of the Al-Qaeda organization; (3) the connection of Mr. Khadr and his family members to Al-Qaeda and, in the past, to Osama bin Laden himself; (4) Mr. Khadr's interview with the media in which he expressed his desire to die a martyr for Islam; (5) his stated admiration for those involved in the 9/11 attacks on the U.S.; and (6) the inadequate release plan. Mr. Khadr's release in these circumstances would seriously undermine public confidence in the Canadian justice system.

*Ibid* at para 77.

51. See *United States of America v Khadr*, 2011 ONCA 358 at paras 2, 8, 106 OR (3d) 449.

who come from or have been in foreign countries may likely be denied bail. There may be a presumption of danger and the judge may also conclude that public confidence in highly publicized terrorism cases will be adversely affected by granting bail.

Bail practices should not be ignored when realistically assessing use of the criminal law as a response to terrorism. Those denied bail in the Toronto 18 terrorism prosecutions were subject to prolonged detention in administrative segregation, and for the most part, had little success challenging their conditions of confinement.<sup>52</sup> The difference between bail in immigration and criminal terrorism cases is more a matter of degree than a difference of kind. Although the criminal law is rhetorically associated with the presumption of innocence, those accused of terrorism bear the onus of justifying their release before trial. While presumed to be innocent, they may spend years in prison awaiting trial.

### *B. Preventive Arrests and Peace Bonds*

Unlike in the United Kingdom, where preventive arrests have been used extensively, Canada's preventive arrest provisions have had no reported use. However, there has been use of preventative peace bonds in Canada. Some of the Toronto 18 agreed to preventive peace bonds as a condition of having charges dropped.<sup>53</sup> Ali Mohamed Dirie, of the Toronto 18, was subject to a peace bond after his sentence expired in October 2011. The peace bond prohibited his possession of a passport, but Dirie was able to leave Canada and died fighting in Syria.<sup>54</sup>

It is difficult to know why Canadian authorities have not used the preventive arrest powers and have used peace bonds sparingly. Authorities

52. See *R v Ahmad*, 2007 CanLII 28750, [2007] OJ No 2891 (QL) (Sup Ct J); *R v Ahmad*, 2008 CanLII 54312, [2008] OJ No 5920 (QL) (Sup Ct J) (holding that neither stay of proceedings nor release on bail were appropriate remedies, and ordering allegations that the accused was subject to "torture" while in pretrial custody be delayed until completion of trial). See also *R v Ansari*, 2006 CanLII 42261, [2006] OJ No 5782 (QL) (Sup Ct J) (upholding denial of bail to accused in the Toronto terrorism prosecution on all three grounds).

53. See Michael Friscolanti, "The Terrorist Who Wasn't", *Maclean's* 121:17 (5 May 2008) 24 (Abdul Qayyum Jamal, Ahmad Mustafa Ghany and Ibrahim Aboud agreed to peace bonds in exchange for charges being dropped).

54. See "'Toronto 18' Member Ali Mohamed Dirie Was Under Strict Court Order", *CBC News* (26 September 2013), online: <[www.cbc.ca](http://www.cbc.ca)>.

may have concluded that broad new terrorism offences, as well as existing inchoate offences, are sufficient. Furthermore, a terrorism suspect can be detained much longer if he is charged with an offence and is unable to show cause for bail than if he is subject to a preventive arrest or peace bond. Bail denial will last much longer than the seventy-two hours maximum for preventive arrest or even the one-year period for a peace bond. These provisions will briefly be examined in order to advance the theme that it is a mistake to underestimate the restraints of the criminal law at the pretrial stage and think that it only responds to past acts.

Since 2001, the *Criminal Code* has allowed judges to impose peace bonds or recognizances to keep the peace and comply with reasonable conditions when there are reasonable grounds to fear that a person would commit a terrorism offence without such orders.<sup>55</sup> The Ontario Court of Appeal has upheld similar non-terrorism provisions from *Charter* challenge, stressing that peace bonds were included in the original 1892 *Criminal Code* and had their origins in a 1361 British statute.<sup>56</sup>

The language of the peace bond provisions is vague and archaic in its reference to the oxymoronic concept of “reasonable fears”. Nevertheless, the Ontario Court of Appeal salvaged the provision by stressing that a judge must be satisfied on the basis of evidence that there were reasonable grounds for the fear.<sup>57</sup> The Court of Appeal concluded that peace bonds were a proportionate restriction on liberty. As is common in proportionality analyses, the existence of a potentially more draconian response helped justify the existing response. Here, the court stressed that a peace bond was less drastic than imprisoning the accused.<sup>58</sup>

Peace bond restrictions on terrorist suspects could, however, be as intrusive as some of those imposed in the immigration security certificate cases. Restrictive conditions caused one security certificate detainee to seek full imprisonment rather than impose the hardships caused by his conditions on his family.<sup>59</sup> Similar to some security certificate cases, recent amendments to the *Criminal Code*’s peace bond provisions

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55. *Criminal Code*, *supra* note 16, s 810.01.

56. *R v Budreo* (2000), 46 OR (3d) 481, 183 DLR (4th) 519 (CA) [cited to OR], citing *Justices of the Peace Act, 1361* (UK), 34 Edw III, c 1.

57. See *R v Budreo*, *supra* note 56 at para 52.

58. *Ibid* at para 39.

59. See Colin Freeze, “Under Constant Watch, Terror Suspect Seeks Return to Prison”, *The Globe and Mail* (18 March 2009), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.



provide that reasonable conditions could include prohibitions on the use of the internet, use of electronic monitoring, curfews and geographic restrictions.<sup>60</sup> The difference between preventive detention in the criminal law and immigration law is a matter of degree.

Preventive arrests were also introduced in the 2001 *Anti-terrorism Act* and have been reintroduced as of 2013, after they were allowed to sunset.<sup>61</sup> They generally require approval from both the Attorney General and a judge, as well as reasonable grounds to believe that a terrorist activity will be carried out. However, when it comes to the individuals subject to the preventative arrest, police are only required to show a reasonable suspicion that their recognizance is necessary to prevent the terrorist activity from being carried out. Although the actual preventive arrest period is capped at seventy-two hours (as opposed to fourteen days in the UK), a person subject to a preventive arrest can be required to enter into a recognizance for a one-year period.<sup>62</sup>

If the past is any indication, the preventive arrest provisions are unlikely to be used in the future. Although the difference between the reasonable grounds and reasonable suspicion standards looms large in constitutional jurisprudence, it is likely smaller in practice. In most cases it would be far more advantageous to the state to lay a criminal charge under one of the broad terrorism offences and argue that the accused has not shown cause for bail, as opposed to employing the novel preventive arrest powers. The “ordinary criminal law”, in the form of bail denial, can result in lengthy preventive detention of the accused without having to resort to the novel and controversial devices of peace bonds and preventive arrests. It is, therefore, a mistake to think that the criminal law will only detain people in response to proven wrongdoing. As we have seen, an accused may be held in pretrial detention for years, only to be acquitted or have proceedings stayed.

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60. *Criminal Code*, *supra* note 16, s 810.01(4.1), as enacted by SC 2011, c 7, s 8(2). In contrast, the *Terrorism Prevention and Investigation Measures Act 2011* enacted in the UK the same year restricted the ambit of what were formerly control orders to limit house arrest to overnight residence requirements and to ensure access to telephones and the internet. *Terrorism Prevention and Investigation Measures Act 2011* (UK), c 23. This legislation, unlike the Canadian peace bond provisions, is designed to be temporary.

61. *Combatting Terrorism Act*, SC 2013, c 9, s 10.

62. See *Criminal Code*, *supra* note 16, s 83.3(8)(a).

## II. Criminal Law and the Promise of Effective and Strong Remedies for Investigative Misconduct and Fair Trials

Canada has embraced a due process model of criminal justice that is prepared to provide strong remedies such as exclusion of improperly obtained evidence and stays of proceedings for state misconduct.<sup>63</sup> However, we should be careful not to equate the promise and the rhetoric of the criminal law with its actual performance in the terrorism context. One concern that manifests itself in criminal terrorism law is remedial deterrence. Remedial deterrence occurs when the consequences of strong remedies effectively diminish the scope of the right.<sup>64</sup> Remedial deterrence has occurred in the security certificate cases where the Supreme Court has repeatedly refused to stay proceedings or exclude evidence as a remedy for Canadian Security Intelligence Service's (CSIS) wrongful conduct.<sup>65</sup> The fact that terrorist suspects can, in theory, benefit from strong remedies such as stays of proceedings does not mean that they will actually receive such remedies. This Part will look at two possible contexts where remedial deterrence can occur in terrorism trials. The first is the entrapment defence and the second is full disclosure of evidence.

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63. For an outline of the rise of due process and the important role played by remedies such as the exclusion of evidence and stays of proceedings, see Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 51–88.

64. See Daryl J Levinson, "Rights Essentialism and Remedial Equilibration" (1999) 99:4 *Colum L Rev* 857 at 884–85 [Levinson, "Rights Essentialism"]. For a Canadian recognition of this phenomenon see La Forest J's accurate prediction that making the strong remedy of a stay of proceedings the minimum remedy for a violation of a right to trial in a reasonable time under section 11(b) of the *Charter* would shrink the content of the right. *R v Mills*, [1986] 1 SCR 863 at 970–79, 29 DLR (4th) 161.

65. See *Charakaoui* 2008, *supra* note 11 at paras 74–77 (stay of proceedings not appropriate remedy for CSIS's destruction of original notes); *Harkat*, *supra* note 4 at paras 94–99 (neither stay of proceedings nor exclusion of summaries is an appropriate remedy for CSIS's destruction of original notes).

### A. The Entrapment Defence

The entrapment defence in Canada prevents the state from offering a suspect an opportunity to commit a crime unless there is a reasonable suspicion that the person is involved in the crime or the state is conducting a bona fide inquiry in a location associated with crime. This latter approach may be unobjectionable when applied to low intensity drug or prostitution stings, but random virtue testing of certain mosques or political meetings raises real concerns about discriminatory profiling that targets those with unpopular religious or political views.<sup>66</sup> The restraints that the entrapment defence places on targeting people for undercover operations can also be avoided if the courts hold that the undercover operations have not yet provided a person with an opportunity to commit a terrorist crime.<sup>67</sup>

If a person is properly targeted, judges in Canada will then only stay proceedings if the state induces the commission of an offence in a disreputable and unreasonable manner. A stay of proceedings can be justified regardless of the accused's subjective disposition to commit the crime.<sup>68</sup> In difficult cases, courts will balance the damage that the state's conduct causes to the administration of justice against the state's interest in prosecuting crimes<sup>69</sup>—interests that will be high in terrorism cases.

The Federal Courts in the United States use a subjective test for entrapment that requires the state to prove beyond a reasonable doubt that the accused was predisposed to commit a terrorism crime before they were induced by government agents.<sup>70</sup> American juries have rejected entrapment defences by concluding that an accused who went along with a terrorist sting must have been predisposed to commit such crimes. The 2nd Circuit recently held that an accused's desire to "inflict harm on the U.S." and "to be willing to die like a martyr" was sufficient predisposition.<sup>71</sup> The dissent argued that these grievances are common

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66. See Kent Roach, "Entrapment and Equality in Terrorism Prosecutions: A Comparative Examination of North American and European Approaches" (2011) 80:4 Miss LJ 1455 at 1474.

67. See *R v Imoro*, 2010 ONCA 122, 264 OAC 362; *R v Bayat*, 2011 ONCA 778, 108 OR (3d) 420; *R v Hersi*, *supra* note 12.

68. See *R v Mack*, [1988] 2 SCR 903, [1989] 1 WWR 577.

69. See *R v Babos*, 2014 SCC 16, [2014] 1 SCR 309.

70. See *Jacobson v United States*, 503 US 540 (1992).

71. *US v Cromitie*, 727 F (3d) 194 at 207 (2nd Cir 2013).

among Muslims and, in most cases, would “never combust” unless accompanied with an informer’s year-long campaign to induce them.<sup>72</sup>

The aggressive use of informers in terrorism cases amplifies this issue. A recent report by Human Rights Watch has detailed twenty-seven cases where extensive government stings resulted in terrorism convictions.<sup>73</sup> The report concludes that the practice of targeting people on the basis of their speech or associations violates human rights. While such tactics appear to be less frequent in Canada, entrapment claims have also been made in Canada, and as will be seen, as in the US, they have all been rejected.

A Canadian example in the Toronto 18 investigation is the conduct of Mubin Shaikh, an informer who offered himself to the accused as a person experienced with weapons and as a trainer at training camps. One of the accused, who was under 18 years of age at the time of the first camp, claimed he was entrapped into participating by the older Shaikh, and he sought a stay of proceedings. The Ontario Court of Appeal upheld the decision to reject the defence, stating:

First, it was Ahmad and Amara who provided the opportunity for the appellant to do these things, not the state acting through Shaikh. The RCMP was acting on a reasonable suspicion that the appellant was already engaged in terrorist activities, *or* it was making a *bona fide* inquiry into potential terrorist activities in which he happened to be involved. Secondly, even if the state, acting through Shaikh, did provide the opportunity, it did not go beyond providing an opportunity and induce the commission of the offence.<sup>74</sup>

The reference to *bona fide* inquiry raises the possibility that the state could offer someone the opportunity to commit a terrorism offence, such as attending a terrorist training camp, simply based on their association with a person suspected of terrorism, and not necessarily because of reasonable

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72. *Ibid* at 229.

73. Human Rights Watch, *Illusions of Justice: Human Rights Abuses in US Terrorism Prosecutions*, online: <[hrw.org/sites/default/files/reports/usterrorism0714\\_ForUpload\\_1\\_0.pdf](http://hrw.org/sites/default/files/reports/usterrorism0714_ForUpload_1_0.pdf)>. The report also noted that aggressive stings resulting in terrorism convictions were assisted by other practices discussed in this article such as denial of bail and solitary pretrial confinement, overly broad terrorism offences and harsh sentences based on the idea that involvement with terrorism is a significant aggravating factor. The report demonstrates the importance of taking a holistic criminal process approach when evaluating the fairness of criminal terrorism prosecutions. *Ibid*.

74. *R v Y(N)*, *supra* note 12 at para 127 [emphasis added].

suspicion that the individual was involved in terrorism. The Court of Appeal contemplated a “bona fide inquiry into terrorist activities” that, by definition, would not involve reasonable suspicion about a particular individual. On this standard, shared political or religious interests with a terrorist suspect could be enough to warrant random virtue testing through creating opportunities to commit a terrorism offence. Elaborate and sustained stings as a result of bona fide inquiry targeting based on associations would not result in a stay of proceedings unless they actually induce the person to commit the terrorism offences charged.

The Ontario Court of Appeal held that Shaikh did not go beyond providing an opportunity to commit a terrorist offence since the training camp would have taken place without his participation, he made no threats and he did not abuse constitutional values while attending the camp. Even if Shaikh had committed criminal offences at the camp, the Court of Appeal concluded that such conduct would not justify a stay of proceedings because a stay “is an exceptional remedy to be employed only in rare cases and as a last resort”.<sup>75</sup> The Court of Appeal stressed the need to balance competing interests and give considerable weight to the seriousness of the offences being investigated before issuing such a drastic remedy. The Court also concluded that it was

unrealistic—given the seriousness and urgency of the situations in which they find themselves—to expect that [those acting on behalf of the state] will be able to act as if they were unvarnished models of purity, and both refrain from engaging in the activities they are underground to investigate and dissuade other participants from getting drawn into those activities, whether they are young persons or not.<sup>76</sup>

This suggests that the standard justifying a stay of proceedings for terrorism offences is very high indeed.

The Supreme Court’s subsequent decision in *R v Babos* affirms that trial judges should give great weight to the seriousness of the offence before issuing a stay.<sup>77</sup> Both the Ontario Court of Appeal and the Supreme Court decisions create a danger that the criminal law’s promise of effective and meaningful remedies for investigative misconduct may not always be realized in the context of terrorism.

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75. *Ibid* at para 142.

76. *Ibid* at para 153.

77. *Supra* note 69.

Another member of the Toronto 18, Shareef Abdelhaleem, argued that he was entitled to a stay of proceedings because a CSIS and Royal Canadian Mounted Police (RCMP) informer had entrapped him. The informer was Abdelhaleem's former friend who met numerous times with the accused. The informer's testimony was that the accused asked him to obtain ammonium nitrate for truck bombs, and the informer participated in the controlled delivery of a substance held out as such. Justice Dawson rejected the entrapment defence, holding that there was reasonable suspicion that the accused was involved in terrorist activities.<sup>78</sup> The trial judge also concluded that "nothing occurred which would induce an average person in the position of the accused, with strengths and weaknesses, to commit a crime as serious as this one".<sup>79</sup> The judge noted that both CSIS and the RCMP instructed the informer not to induce criminal activity. In several instances, the informer agreed with the accused's suggestions to commit smaller and less deadly types of terrorism. In other words, the informer "went with the flow" and "did not direct it".<sup>80</sup>

In a separate case, Mohamed Hersi was convicted of attempting to participate in the activities of a terrorist group and counselling others

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78. See *R v Abdelhaleem*, *supra* note 12 at para 71. Justice Dawson concluded:

[I]t is very clear that the police had a reasonable suspicion that the accused was engaging in criminal activity prior to Mr. Elsohemy visiting the accused at the hospital. The police knew that the accused was associating with Mr. Amara. As the formal admissions demonstrate, by then there was extensive evidence to show that Mr. Amara was involved in terrorist activity. The police knew from the probe in the kiosk at the gas station that the accused was speaking with Mr. Amara about jihad, and that he was interested in traveling overseas to participate. They were aware of the MSN chat message in which the accused spoke of returning home to do his ultimate duty for God. In the conversation intercepted in the kiosk on March 24 the accused referred to his "jihadi mentality" that had developed. It was also clear that the accused was counselling Mr. Amara in connection with his terrorist activities and advising him about how to throw CSIS off his scent. There was also the comment captured on the probe on April 7 where the accused said he thought Mr. Amara had been arrested in relation to an explosion at a Tim Horton's. The standard of "reasonable suspicion" is meaningful but not onerous. I conclude this evidence meets that standard.

*Ibid.*

79. *Ibid* at para 74.

80. *Ibid* at para 77.

to do so.<sup>81</sup> His claim of entrapment was based on interactions with an undercover officer who befriended Hersi at his workplace after the police found a USB key in Hersi's laundry that contained copies of the *Anarchist Cookbook*, a Canadian Forces National Defence operational manual and various Islamic religious writings. The trial judge found that the undercover officer had "repeatedly steered the conversation towards the topics of Somalia, al-Shabaab and terrorism".<sup>82</sup> Justice Baltman rejected the entrapment defence, ruling that while the police did not have reasonable suspicion to suspect Hersi was involved in terrorist activity, the activities of the undercover officer during that time did not amount to providing Hersi with an opportunity to commit a terrorist offence. The undercover officer had only discussed matters relating to terrorism with Hersi. As such, the entrapment defence did not apply.<sup>83</sup> In the trial judge's words, "Hersi jumped in with both feet. That he now finds them stuck in his mouth is his own doing."<sup>84</sup> This decision suggests that without a reasonable suspicion of involvement in terrorist activity or a bona fide inquiry into terrorism, the police can still engage suspected terrorists in extensive discussions so long as they do not provide the suspect a formal opportunity to commit an offence. Extensive stings may be essentially unregulated if they do not provide the accused with a formal opportunity to commit an offence.

The *Hersi* decision also suggests that undercover operatives will have significant leeway to provide accused with an opportunity to commit a terrorism crime once there is a reasonable suspicion that a suspect is involved with terrorist activities. In this case, the undercover officer not only indicated to Hersi that he also planned to travel to Africa to join al-Shabaab but also indicated that he had doubts about this plan. It was after this particular discussion that Hersi urged the undercover officer to participate in the activities of a terrorist group, thereby providing the evidence for his conviction of counselling. There was no suggestion in the *Hersi* case that the undercover officer activity went over the line by inducing the commission of a terrorist offence even though the counselling offence may never have occurred had the undercover officer

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81. See *R v Hersi*, *supra* note 12.

82. *Ibid* at para 18.

83. *Ibid* at para 19.

84. *Ibid*.

not acted as he did. Moreover, in borderline cases, the courts will be able to weigh the conduct of the undercover officer against the state's interests in prosecuting terrorism as a serious crime. In rejecting Hersi's argument that the police had allowed the five-month undercover investigation to go on too long, the trial judge hinted at the impact that the seriousness of the terrorism charges would have in any overall balance of interests when she concluded:

I do not think that the community would be offended by the length or nature of this investigation. Quite the opposite; given the devastating effects of terrorist acts and the corresponding need to prevent them, I believe the community would be alarmed if the police had done anything less.<sup>85</sup>

While, again, my point is not to suggest that these decisions rejecting entrapment defences were wrong, they have left the door open for intensive and sometimes aggressive stings. They allow for people to be targeted by association for elaborate terrorist stings on the basis of a bona fide investigation, and they allow for extensive undercover operations in the absence of reasonable suspicion so long as the undercover officer does not provide the suspect with an opportunity to commit an offence.

Finally, the Supreme Court's more recent decision in *Babos* makes it clear that courts will be reluctant to issue the drastic remedy of a stay of proceedings without considering the important social interests in deciding terrorism cases on their merits.<sup>86</sup> Strong remedies benefitting terrorist suspects may be no more available in criminal law than immigration law. The result is that prolonged and sophisticated stings may be used that can place considerable pressure on individuals to commit terrorist offences, thereby undermining the rhetoric of terrorist crime as simply an evil choice freely made by the accused.

### *B. Non-Disclosure*

It is often argued that one of the major differences between the criminal law and immigration law is that secret evidence not disclosed to the affected person cannot be used in criminal cases whereas such evidence can be used in immigration cases. Even now that a security cleared special

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85. *Ibid* at para 34.

86. *Supra* note 69.



advocate is available to provide some adversarial challenge to the evidence and the detainee must be reasonably informed of the gist of the allegations, secret evidence remains a huge problem in immigration proceedings.<sup>87</sup> In contrast, secret evidence is not used in criminal proceedings.

Nevertheless, it is a mistake to conclude that non-disclosure of secret information is not a problem in criminal trials. Most terrorism prosecutions that involve CSIS or other intelligence agencies will result in national security confidentiality proceedings under section 38 of the *Canada Evidence Act*.<sup>88</sup> These proceedings are conducted before specially designated judges of the Federal Court who are instructed to balance the competing interests in disclosure and non-disclosure. They can order that information be disclosed to the accused, or disclosed or used at trial in a redacted or modified form.

The Supreme Court in *Ahmad* upheld this approach from *Charter* challenge because trial judges had broad powers to ensure the fairness of the trial including, if necessary, ordering a stay of proceedings if a fair trial was not possible as a result of a non-disclosure or partial disclosure order.<sup>89</sup> The Court stressed that the power of trial judges to issue such stays of proceedings under section 38.14 of the *Canada Evidence Act* was distinct and more generous than the powers to stay proceedings under the abuse of process doctrine or under section 24(1) of the *Charter*.<sup>90</sup> Thus, the caution demonstrated by the Ontario Court of Appeal in upholding a refusal to stay proceedings because of alleged entrapment in the Toronto terrorism prosecution should, in theory, not be applied when administering the statutory stay of proceedings under section 38.14. Even more starkly than in the *Charter* or entrapment context, the criminal law holds out a promise to the accused of scrupulous fairness even at the expense of permanently stopping the prosecution of a very severe crime.

It remains to be seen how trial judges will apply the Court's admonition in *Ahmad* that they should lean toward fairness even at the cost of staying proceedings. Despite the Court's distinction between the greater availability of stays under section 38.14 than under the common law or the *Charter*, there is still a possibility that remedial deterrence

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87. See *Harkat*, *supra* note 4 at paras 54–60.

88. RSC 1985, c C-5, s 38.

89. *Supra* note 9 at paras 33–35.

90. *Ibid.*

will make trial judges reluctant to stay terrorism prosecutions because of concerns about lack of disclosure. There are no examples of such use of stays in the jurisprudence either before or after *Abmad*. One early terrorism prosecution in the 1980s is disturbing because the trial judge admitted that the lack of disclosure of CSIS surveillance bothered him,<sup>91</sup> but held that a stay of proceedings would be too drastic a remedy for non-disclosure of CSIS material that the designated Federal Court judge had concluded must remain secret without even examining the materials to see, for example, if the CSIS surveillance provided the accused with an alibi.<sup>92</sup> Today, secret material would be examined by both the Federal Court judge and a security cleared amicus. Nevertheless, questions remain whether the amicus will be able to appreciate the value of non-disclosed information for the defence. This is especially relevant because section 38 proceedings are intended to take place at the pretrial stage where the defence itself may not know its defence strategy.

The trial judge plays an important role in protecting the accused's right to a fair trial with respect to non-disclosure. As stressed in *Abmad*, the trial judge has broad powers under section 38.14 to make orders dismissing counts, finding against a party or staying proceedings. These are important safeguards, but they require that the trial judge have full access to the information that the Federal Court judge has ordered not disclosed. The Federal Court judge has discretion to provide the trial judge with access, but does not have to. Even if it is provided, one might ask whether it would be fairer to simply allow the trial judge to decide whether the secret information must be disclosed, as is the norm in the US and UK.

Furthermore, there is no obvious procedure to allow a designated Federal Court judge to revise a section 38 non-disclosure order, even if issues at trial reveal that non-disclosed information would be essential to the accused's defence. The Supreme Court has placed a heavy responsibility on the trial judge to ensure that the trial remains fair, but section 38 deprives the trial judge of the ability to reconsider the initial non-disclosure order. Instead, the trial judge is left with the blunt and

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91. See *R v Kevork* (1986), 27 CCC (3d) 523 at 546, 16 WCB 319 (HCJ).

92. See *R v Kevork*, [1984] 2 FC 753, 17 CCC (3d) 426. For a fuller discussion of this disturbing case, see Roach, *Unique Challenges of Terrorism Prosecutions*, *supra* note 22 at 201–22.

drastic remedy of a stay of proceedings or dismissal of certain counts. One danger here is of “remedial deterrence”.<sup>93</sup> Trial judges may be reluctant to conclude that the accused should have access to the material if the result will be a permanent stay of a terrorist trial. Of course, it is possible that the Attorney General of Canada could circumvent a trial judge’s stay of proceedings with an order under section 38 authorizing the release of the previously non-disclosed information. It remains to be seen, however, whether trial judges will have the appetite for such a game of “constitutional chicken”.<sup>94</sup>

Although the public evidence used at criminal trials is a major improvement over the secret evidence used in immigration proceedings, the problems of secrecy and the potential of non-disclosure of material that could be valuable to the defence do not magically disappear when criminal prosecutions are used.

### III. Criminal Law and the Promise of Only Punishing Wrongful Acts

One of the particular concerns with the use of security certificates in immigration law is that non-citizens may be detained on allegations that they participated in resistance struggles in foreign lands. The criminal law seems to offer a more attractive alternative by requiring that the accused have intentionally committed some wrongful act. Such optimistic views of the criminal law, however, discount the ability of the legislature to define terrorism crimes in a broad and extraterritorial manner. They fail to acknowledge the limited exemptions provided for freedom fighters in Canadian criminal law and the non-existent protections for freedom fighters provided in British and American criminal law. They also overestimate the restraining effects of subjective fault requirements of knowledge.

As in other areas of terrorism law, Canadian criminal law is generally more restrained than American and British law. The UK Supreme Court has recently cited Canada’s definition of terrorism as a better way

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93. See Levinson, “Rights Essentialism”, *supra* note 64 at 884–85.

94. For a more sustained version of this argument, see Kent Roach, “‘Constitutional Chicken’: National Security Confidentiality After *Ahmad*” (2011) 54 SCLR (2d) 357.

to make some allowance for freedom fighters.<sup>95</sup> In the US, many have criticized *Holder v Humanitarian Law Project* for convicting people of materially supporting terrorism in the absence of any terrorist purpose.<sup>96</sup> The Supreme Court of Canada in *Khawaja* seems implicitly to reject such a broad approach, at least with respect to the offence of participating in a terrorist organization under section 83.18.<sup>97</sup> Nevertheless, results such as *Humanitarian Law Project* may still be possible in Canada. Although the criminal law generally delivers on its promise of fair trials, the breadth of offence definition should not be ignored.

#### A. Legislative Overbreadth in Defining Terrorism and Terrorist Offences

In the immediate aftermath of 9/11, the UN Security Council required all states to ensure that terrorism and its financing were treated as serious crimes.<sup>98</sup> This was done without any guidance about how states should define terrorism. It was as if long-standing problems of freedom fighters and state terrorism had evaporated with the World Trade Centre. Influenced by the UK's *Terrorism Act 2000*,<sup>99</sup> Canada enacted new laws which were designed to prevent terrorism and prohibit terrorism financing. This resulted in terrorist activities being defined broadly enough to include acts of terrorism against any government in the world, no matter how repressive. The British courts have convicted Libyan refugees and would-be rebels against the Gaddafi regime on the basis that Parliament had clearly criminalized terrorist acts against even "tyrants and dictators".<sup>100</sup> Recently, a decision of the UK Supreme Court admitted that the UK definition of terrorism could apply to "the activities of victims of oppression abroad".<sup>101</sup> As will be seen, Canadian law provides a limited

95. See *R v Gul*, *supra* note 14 at para 61.

96. *Supra* note 17 at 2.

97. *Khawaja* SCC, *supra* note 7 at paras 41–54.

98. See *Resolution 1373*, UNSCOR, 4385th mtg, UN Doc S/Res/1373 (2001). United Nations Security Council *Resolution 2178* makes the same mistake again by not offering member states any guidance about how to define foreign terrorist fighters in criminal law and using even vaguer concepts of extremism and radicalization. UNSCOR, 7272nd mtg, UN Doc S/Res/2178 (2014). For discussion, see Kent Roach, *Comparative Counter-Terrorism Law* (New York: Cambridge University Press, forthcoming) chs 1, 24.

99. (UK), c 11.

100. *R v F*, [2007] EWCA Crim 243 at paras 26, 32.

101. *R v Gul*, *supra* note 14 at para 29.

freedom fighter exception, but offence overbreadth remains a concern.

In *Khawaja*, the Supreme Court recognized Parliament's ability to criminalize conduct that would not satisfy the normal requirements of inchoate liability. It held that courts should respect the purposes of the legislature in criminalizing remote risks, or even a risk of a risk that terrorism would occur.<sup>102</sup> The Court also rejected arguments that a number of broadly defined terrorism crimes were constitutionally overbroad or grossly disproportionate.<sup>103</sup> This decision was rendered before *Canada (Attorney General) v Bedford*, but *Bedford* would, if anything, make it more difficult to challenge terrorism laws under section 7 of the *Charter* by stressing that gross disproportionality depends on balancing the importance of the legislative objective against its adverse effects without any inquiry into the law's effectiveness in achieving important objectives, such as preventing terrorism.<sup>104</sup>

The Court in *Khawaja* read down the *actus reus* of the offence for participating in a terrorist group so that it would not apply to activities that present a "negligible risk of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity".<sup>105</sup> The Court reasoned that:

Parliament did not intend for the provision to capture conduct that creates no risk or a negligible risk of harm. Indeed, the offence carries with it a sentence of up to 10 years of

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102. *Khawaja* SCC, *supra* note 7, McLachlin CJC ("there is no problem of remoteness from a substantive offence because Parliament has defined the substantive offence, not as a terrorist act, but as acting in ways that enhance the ability of a terrorist group to carry out a terrorist activity" at para 61).

103. *Ibid* at para 63. The Court in *Khawaja* recognized the ability of Parliament to create statutory inchoate offences and held that:

The breadth of the impugned provisions reflects Parliament's determination that "there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts". In the context of the present analysis, it is appropriate to exhibit due deference to this determination. The criminalization under s 83.18 of a broad range of interactions that have the potential to—and are intended to—materially enhance the abilities of terrorist groups is not grossly disproportionate nor overbroad in relation to the objective of prosecuting and, in particular, of preventing terrorism.

*Ibid* [citation omitted].

104. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 152, [2013] 3 SCR 1101.

105. *Khawaja* SCC, *supra* note 7 at para 50.

imprisonment and significant stigma. This provision is meant to criminalize conduct that presents a real risk for Canadian society.<sup>106</sup>

The Court also rejected the idea that the participation offence was so broad that it could apply to doctors or lawyers providing legitimate services to known terrorists. In doing so, the Court stressed the importance of the additional *mens rea* requirement in section 83.18 that the accused “have the *subjective* purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity, the accused must *specifically intend* his actions to have this general effect”.<sup>107</sup> This suggests an accused could not be convicted under section 83.18, as an accused could be under American material support offences, for supporting the humanitarian activities of a known terrorist group.

However, there are still a number of potential problems under Canadian criminal law. With respect to *mens rea*, the Supreme Court has only required subjective knowledge of the prohibited act, as distinct from a subjective purpose, as a constitutional requirement for murder, attempted murder or war crimes.<sup>108</sup> Thus, even if the Court held that terrorism offences were special stigma crimes also requiring subjective *mens rea*, Parliament could constitutionally lower the requirement of terrorist purpose in section 83.18 to only require knowledge that the group being assisted is a terrorist group.<sup>109</sup>

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106. *Ibid.* The Court elaborated:

A purposive and contextual reading of the provision confines “participat[ion] in” and “contribut[ion] to” a terrorist activity to conduct that creates a risk of harm that rises beyond a *de minimis* threshold. While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group *to facilitate or carry out a terrorist activity*.

*Ibid* at para 51 [emphasis in original]. This approach would also apply to new terrorist offences such as leaving Canada to participate in the activities of a terrorist group. See *Criminal Code*, *supra* note 16, s 83.18.1.

107. *Khawaja* SCC, *supra* note 7 at paras 46–47 [emphasis in original].

108. See *R v Martineau*, [1990] 2 SCR 633, 79 CR (3d) 129; *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513.

109. Such an amendment would bring section 83.18 in line with the American approach in *Humanitarian Law Project*, which only requires knowledge that support is being given

This is a hypothetical concern with respect to section 83.18, but it is not hypothetical with respect to section 83.03(b), which makes a person guilty of a terrorist offence for supplying funds or services to a terrorist group “knowing that, in whole or part, they will be used to benefit a terrorist group”.<sup>110</sup> This offence accords with a constitutional standard of subjective knowledge of the prohibited act, but it would also allow people to be convicted, such as those in *Humanitarian Law Project*, who knowingly assisted a terrorist group with the intent to assist only its lawful and humanitarian activities.

The terrorist group that is knowingly assisted under section 83.03(b) may be a group that “has as *one* of its purposes or activities” terrorist activities.<sup>111</sup> Alternatively, it might be a group listed by the Cabinet under section 83.05 as a terrorist group. The incorporation of listed groups in terrorism laws is a departure from the universality of criminal laws which are typically aimed at all persons living within the jurisdiction of the court. It substitutes a decision made by the Cabinet on the basis of secret intelligence for public evidence and proof beyond a reasonable doubt. Terrorist lists define the listed group or individual as a type of “enemy” or “outlaw” rather than as a person or citizen subject to the same rules as others. As my colleague Markus Dubber has argued, this classification focuses on the status of a particular person as citizen or enemy and defies the traditional and abstract nature of the criminal law.<sup>112</sup>

### *B. Freedom Fighter Issues*

After the horrors of 9/11, the UN Security Council and many countries placed the perennial problem of punishing freedom fighters as terrorists on the back burner. Today, the issue of freedom fighters can no longer be ignored owing to current events like the Arab Spring and the conflicts in Syria and Iraq. Immigration law’s problem of penalizing people for engaging in resistance strategies or assisting the humanitarian efforts of terrorist organizations abroad does not disappear with use of

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to a terrorist group but not a specific or additional intent or purpose in relation to acts of terrorism. *Supra* note 17.

110. *Criminal Code*, *supra* note 16, s 83.03(b).

111. *Ibid*, s 83.01(1).

112. Markus Dubber, “Citizenship and Penal Law” (2010) 13:2 *New Crim L Rev* 190.

the criminal law. Indeed, the stigmatizing and denunciatory aspects of the criminal law have an even greater potential to overlook the freedom fighter dilemma.

The extraterritorial definition of terrorism means that people can be convicted for supporting the activities of listed or defined terrorist groups in any part of the world. In *Humanitarian Law Project*, the US Supreme Court accepted the controversial theory that financial support for any activity of a listed terrorist group frees up funds for its terrorist activities.<sup>113</sup> Extraterritorial jurisdiction is an exception in the criminal law, and it may ignore the complexities and ambiguities of actions in foreign lands that are defined by the law as terrorism.

Canada's first terrorism financing conviction demonstrates that some of the freedom fighter concerns voiced in the context of immigration law still exist under the criminal law. Prapaharan Thambathurai pleaded guilty to a terrorism financing charge after he collected around three thousand dollars in funds in 2008 for the Liberation Tigers of Tamil Eelam (LTTE).<sup>114</sup> He denied he was working for the LTTE, but admitted that he knew at least some of the money would support the organization. He also acknowledged he knew the LTTE was a banned organization and it was illegal to collect money on its behalf in Canada.<sup>115</sup> As will be seen in the next Part, the courts implicitly recognized some of the problems of broad and extraterritorial definitions of terrorism and only sentenced Mr. Thambathurai to six months of imprisonment. Nevertheless, the reduced sentence does not remove the stigma of a criminal conviction.

The freedom fighter issue was not litigated in *Thambathurai* because the accused pleaded guilty, and the Cabinet arguably removed the issue from the hands of the courts when it listed the LTTE as a terrorist group in 2006. David Paciocco has strongly argued that the inclusion of listed groups in the definition of terrorist groups offends the presumption of innocence because it substitutes the Cabinet's decision for a judicial decision.<sup>116</sup> There is much force in his argument, but the issue could be avoided if Canadian courts read the offence in a positivistic manner

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113. *Supra* note 17.

114. See *Thambathurai CA*, *supra* note 19.

115. *Ibid* at para 8.

116. David Paciocco, "Constitutional Casualties of September 11: Limiting the Legacy of the *Anti-Terrorism Act*" (2002) 16 SCLR (2d) 185.



to include assistance to any “listed entity” and reject the idea that such entities must actually be proven in court to be terrorist groups. The judge in the *Hersi* prosecution also rejected an argument against reliance on the listing of al-Shabaab by concluding that the accused would, under section 83.18, have to know that the listed entity was indeed a terrorist group.<sup>117</sup> In any event, immigration law does not rely on a list of groups, and it is not clear why the criminal law, which aspires to generality and fairness, should rely upon listing.

The *Criminal Code*'s group listing process also denies an accused any ability to argue that the group satisfies the limited freedom fighter exception in section 83.01. This exemption applies to acts or omissions “during an armed conflict and that, at the time and place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict”.<sup>118</sup> Mr. Thambathuria would have been unable to argue that the LTTE satisfied this definition at the time he was raising funds because the LTTE was a “listed entity” under section 83.01 of the *Code*. The safeguards of the criminal trial—disclosure, public evidence, proof beyond a reasonable doubt—were all short-circuited by the Cabinet's decision to list the LTTE as a terrorist group.

Given the narrow definition of freedom fighters, it is unclear whether Mr. Thambathuria would have been successful had he been able to argue that the exemption applied. For non-state actors, only acts during armed conflict that are in accordance with customary or conventional international law are exempted. This is a narrower exemption than the exemption for state military actions during armed conflict, which applies simply if they are governed by international law, regardless of whether they are in breach of it. This opens up the possibility that non-state actors can be prosecuted for both terrorism in Canadian criminal law and war crimes or crimes against humanity under international law.<sup>119</sup> Nevertheless, the fact that any type of freedom fighter exemption is included in Canadian law is no small accomplishment. The UK Supreme Court in *R v Gul* noted the absence of any similar exemption in British law

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117. *R v Hersi*, *supra* note 12 at paras 22–24.

118. *Criminal Code*, *supra* note 16, s 83.01.

119. See Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2008) at 275.

and recommended that Parliament look at the Canadian law as one of the relatively few counter-terrorism laws that include any such exemption.<sup>120</sup>

In *Khawaja*, the Supreme Court held that there was no air of reality to the argument that the accused's planned violence in Afghanistan fell under the exemption. It concluded:

The violent jihadist ideology espoused by the appellant in his numerous communications is fundamentally incompatible with international law. The Geneva Conventions prohibit acts aimed at spreading terror amongst civilian populations, which are considered war crimes. The appellant, by contrast, did what he did in support of a group whose credo was to take arms against whoever supports non-Islamic regimes and that recognized that suicide attacks on civilians may sometimes be justified by the ends of jihad.<sup>121</sup>

My point in this Part is not to suggest that the Supreme Court erred in rejecting the freedom fighter exemption in *Khawaja* or even that it would necessarily apply to the financing of the LTTE in *Thambaiturai*. It is simply to illustrate some of the dangers in defining away issues of potential innocence through offence definitions and executive listing of terrorist groups. The criminal law offers the important promise of a fair trial, but courts have for the most part deferred to the legislature's tendency to define crimes very broadly.<sup>122</sup>

## IV. Criminal Law and the Promise of Proportionate Punishment

The final safeguard against overbreadth in offence definition is the ability of independent judges to fashion fit sentences. Although the exercise of sentencing discretion is far from an ideal remedy, it is recognized as a legitimate one. For example, in *R v Creighton*, McLachlin J recognized that unlawful manslaughter applied to a broad array of unlawful killings, but took note of the complete discretion of judges

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120. *Supra* note 14 at para 61.

121. *Khawaja SCC*, *supra* note 7 at para 102.

122. For a general critique of the performance of American courts in this regard, see William Stuntz, *The Collapse of American Criminal Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 2011).

to award sentences from discharges to life imprisonment.<sup>123</sup> Sentencing discretion is an important but fragile fail-safe when courts refuse to read down or invalidate overbroad offences.

Parliament deserves credit for avoiding the temptation of inserting mandatory minimum sentences and thereby narrowing sentencing discretion when it both enacted the *Anti-terrorism Act* at the end of 2001 and created new offences in 2013. If such sentences were placed around the four-year mark, there is every indication in the Supreme Court's jurisprudence that they would be upheld under the *Charter*.

Although the 2001 *Anti-terrorism Act* avoided mandatory minimum sentences, it provided a variety of legislative enhancements and guidance on sentencing. Offences that constitute a terrorist activity<sup>124</sup> and offences committed in association with or for the benefit of a terrorist group<sup>125</sup> are subject to a maximum of life imprisonment, regardless of lower statutory maximums. Parliament has also provided for mandatory consecutive sentences,<sup>126</sup> something that can be significant given the overlapping nature of terrorism offences and the failure of the courts to restrict multiple convictions under double jeopardy principles.<sup>127</sup> In addition, there is a rebuttable presumption that those convicted of terrorism offences should not be eligible for parole before half of their sentence is served in order to deter and denounce such offences.<sup>128</sup>

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123. [1993] 3 SCR 3, 105 DLR (4th) 632. Parliament, however, subsequently narrowed this sentencing discretion with a mandatory minimum of four years' imprisonment for manslaughter committed with a firearm, a sentence that was subsequently upheld as not constituting cruel and unusual punishment. See *R v Morrisey*, 2000 SCC 39 at para 58, [2000] 2 SCR 90.

124. See *Criminal Code*, *supra* note 16, s 83.27.

125. See *ibid*, s 83.2.

126. See *ibid*, s 83.26.

127. See e.g. *Khawaja* SCC, *supra* note 7. *Khawaja* was convicted of four separate terrorist offences: s 83.03 (providing or making available property or services for terrorist purposes), s 83.18 (participating in or contributing to the activity of a terrorist group), s 83.19 (facilitating a terrorist activity) and s 83.21 (instructing people to carry out an activity for a terrorist group) in relation to a terrorist plot without any suggestion that the multiple offences arising out of the conduct were not permissible.

128. See *Criminal Code*, *supra* note 16, s 743.6(1.2). But see Robert Diab, "Sentencing of Terrorism Offences After 9/11" in Craig Forcece & François Crépeau, eds, *Terrorism Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute Administration of Justice, 2012) 347 at 354–56 [Diab, "Sentencing"]. Robert Diab has pointed out, however,

In evaluating the criminal law as a response to terrorism, it is important to pay attention to the actual sentencing decisions of judges. A common theme in this article is that there is a danger of reifying the criminal law by focusing on its fair trial rights and neglecting its more problematic aspects, especially at the pre- and post-trial stages. There is also a danger that judges will punish people more for the terrorist label of an offence than for what the person actually did or intended. Fortunately, the requirement that judges give reasons for sentences, the ability to appeal sentences and the absence of mandatory minimum sentences are all important safeguards against these dangers.

#### A. *The Thambaiturai Case*

The *Thambaiturai* case is striking because the judge decided that a sentence of six months' imprisonment was appropriate for financing the LTTE. The defence requested a suspended sentence on the basis that the accused had no record, had come to Canada as a refugee, had lost a brother to a government ambush in Sri Lanka, had been motivated by humanitarian concerns and had pleaded guilty. While the judge rejected the suspended sentence, he did hold that the Crown's requested sentence of two years' imprisonment was not required to deter and denounce terrorism financing given the nature and circumstances of the offence. The case is a good example of independent sentencing that factored in the larger context and the breadth of the offence.<sup>129</sup>

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that periods of parole ineligibility can be surprisingly short in terrorism cases, though this is related more to the interaction of rules concerning the calculation of parole eligibility and the reduction of sentences because of pretrial detention. Eligibility for parole of course does not mean that parole is likely to be granted, and concerns about terrorism and the absence of rehabilitation programs designed for convicted terrorists makes it unlikely that those convicted of terrorism in Canada will be granted parole. Singapore's rehabilitation program has resulted in the release of forty of the sixty people associated with the terrorist group Jemaah Islamiyah who were detained under Singapore's *Internal Security Act*. (Cap 143, 1895 Rev Ed Sing). See also Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at 142–43. The Singapore experience underlines that unfair procedure may not be inconsistent with early release while the Canadian focus on fair procedure under the criminal law or security certificates has often resulted in long-term detention.

129. *R v Thambaiturai*, 2010 BCSC 1949, 93 WCB (2d) 738.

On appeal, the British Columbia Court of Appeal rejected the Crown's request for a higher sentence, noting that "by definition" terrorist offences

are often motivated by political, religious, or ideological purposes or objectives. Such beliefs are often immutable. Thus, Mr. Thambathurai's lack of remorse was perhaps not surprising, given his Tamil heritage, the impact of the war on his family, and his continuing concern for the dire circumstances of the Tamil population in Sri Lanka.<sup>130</sup>

These comments demonstrate some understanding and even compassion from the Court despite the terrorist nature of the offence. The Court of Appeal was also not oblivious to the real politick of the matter by noting that "by the time Mr. Thambathurai came before the courts, concern about further terrorist financing of the LTTE had been abated by events in Sri Lanka".<sup>131</sup>

### *B. The Khawaja Case*

In other terrorist cases, however, courts have been less lenient and have allowed Crown appeals of sentences that were imposed by trial judges who were, presumably, more familiar with the details of the offence and the nature of the offender. The Ontario Court of Appeal increased Khawaja's sentence to life imprisonment, a sentence subsequently upheld by the Supreme Court. It justified the increase because of Khawaja's absence of remorse and the seriousness of terrorism. The Court of Appeal also discounted the trial judge's finding that there was a reasonable doubt that the Canadian accused had knowledge of a fertilizer bomb plot.<sup>132</sup>

However, the Supreme Court in *Khawaja* also rejected some of the harsher edges of the Ontario Court of Appeal's judgment. It rejected the idea that the statutory requirement that sentences for terrorism offences be served consecutively meant that the traditional sentencing principle of totality had no place. The Chief Justice stressed that

the temptation to fashion rigid sentencing principles applicable to terrorism offences as a distinct class of offences should be avoided, subject to the provisions in the *Criminal Code*

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130. *Thambathurai CA*, *supra* note 19 at para 22.

131. *Ibid.*

132. *R v Khawaja* (2009), 248 CCC (3d) 233 at para 37, 85 WCB (2d) 407 (Ont Sup Ct J).

that specifically pertain to those offences. The general principles of sentencing, including the totality principle, apply to terrorism offences.<sup>133</sup>

Moreover, the Court specifically rejected the Court of Appeal's statement that rehabilitation had a diminished role in terrorism cases in part because "the terrorism provisions catch a very wide variety of conduct, suggesting that the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis".<sup>134</sup>

Despite its admirable recognition of the importance of individualized sentencing, *Khawaja* has inspired further increases in sentences in Canada. For example, one accused who was a nineteen-year-old first offender who pleaded guilty in the Toronto terrorism plot had his sentence raised on appeal from fourteen to twenty years despite the trial judge's finding that he was not a continuing danger to the public.<sup>135</sup> Such sentences give primacy to the need to deter and denounce terrorism. They also assume that the terrorist label is more important than the youth and prior record of the accused.

There is considerable international and domestic pressure on courts to hand down severe sentences to denounce and deter terrorism. The transnational nature of terrorism also facilitates comparison, if not competition, over jurisdiction and sentences in terrorism cases. In accordance with the pattern seen in other parts of this article, Canadian sentences for terrorism are less severe than those in other democracies—most notably the UK, US and Australia.<sup>136</sup> Parliament could alter sentencing practices very quickly by enacting mandatory minimum penalties for terrorist offences.

The *Khawaja* case now means that life imprisonment is a realistic possibility for terrorist plots. The effects of the heightened sentencing tariff remain unclear. It may induce some accused to plead guilty in the hope of receiving a lesser sentence and in recognition of the reality that most accused will be detained in pretrial custody. This would spare the state many difficulties at lengthy terrorist trials, including the disclosure

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133. *Khawaja* SCC, *supra* note 7 at para 115.

134. *Ibid* at para 124. On this aspect of the discussion, see Robert Diab, "R v *Khawaja* and the Fraught Question of Rehabilitation in Terrorism Sentencing" (2014) 39:2 Queen's LJ 587.

135. See *R v Khalid*, 2010 ONCA 861, 183 OR (3d) 600.

136. See Diab, "Sentencing", *supra* note 128.

of potentially sensitive information. At the same time, the prospect of higher sentences may make Crown prosecutors, and perhaps even trial judges, reluctant to agree to sentences that may appear lenient. It is interesting to question whether the six-month sentence in *Thambaituhi* would be possible after *Khawaja*. After the decision in *Khawaja*, there would be strong arguments that a heavy sentence was necessary to deter and denounce terrorism and that rehabilitation was not justified given the accused's lack of remorse.

A person who is subject to pretrial detention and who faces life imprisonment under *Khawaja* may have little to lose by going to trial. In fact, by going to trial, an accused has the advantage that a trial may be stayed due to non-disclosure, in light of trial judges' broad statutory powers under section 38.14 of the *Canada Evidence Act* to stay proceedings if there is a doubt that such non-disclosure makes a fair trial impossible.<sup>137</sup> This underlines the importance of examining the entire criminal process from arrest to sentencing when assessing the criminal law approach to terrorism.

Sentencing is an important but often neglected feature in evaluating the criminal law's response to terrorism. Trial judges should continue to assess what sort of sentences are appropriate by examining not only the terrorist nature of the offence, but what the accused actually did and knew. As suggested by the Supreme Court's affirmation in *Khawaja* of the need for an individualized case-by-case approach to sentencing, trial judges should consider offender characteristics such as youth, sophistication, future danger and amenability to rehabilitation, and not simply focus on the terrorist label or nature of the offence.<sup>138</sup>

The criminal law holds out the promise of carefully calibrated and proportionate punishment tied to the particular offence and offenders.

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137. *Supra* note 88, s 38.14.

138. The Ontario Court of Appeal's judgment in *R v Nur* does not follow such an individualized approach with respect to reasonable hypothetical offenders used when determining whether mandatory minimum sentences violate section 12 of the *Charter* because it focuses on the breadth of the crime and not the possible characteristics of offenders. 2013 ONCA 677 at paras 136–37, 117 OR (3d) 401. For my arguments that the Supreme Court's initial approach to reasonable hypotheticals under section 12 of the *Charter* appropriately gave considerable weight to offender characteristics, such as the age of the offender, see Kent Roach, "Searching for *Smith*: The Constitutionality of Mandatory Sentences" (2001) 39:2&3 Osgoode Hall LJ 367.

*Thambaiithurai* demonstrates that some judges will honour such promises even at the costs of being appealed and criticized for being lenient on convicted terrorists. Nevertheless, there is a danger that judges will defer to broad legislative labels when it comes to punishing terrorism. Mandatory sentences coupled with overbroad offences could be a recipe for injustice. My point is again not to suggest that the criminal law is worse than immigration law, which has in security certificate cases resulted in seemingly unending, indeterminate detention without any attempt at proportionality. It is only to illustrate how the exercise of sentencing discretion is an uncertain remedy for broadly defined terrorism offences.

## Conclusion

In the end, “charge or release” is still a call for justice, and the criminal law has many virtues over its less restrained alternatives. There is a danger, however, that Canadians in particular will be overly romantic and optimistic about the restraints of the criminal law. This is so both because Canadian criminal law on terrorism is generally more restrained than American or British law and because Canada has relatively little experience with terrorism prosecutions.

In all jurisdictions there is a danger in paying too little attention to the pre- and post-trial stages of terrorism prosecutions and focusing on the provision of fair trials. Conor Gearty does this when he stresses that

[t]he criminal model is robust in its determination to provide security for all, but in a way that respects the liberty not only of the powerful but of all that come to its attention, whether they be citizens or visitors, part of a well-settled community or members of a vulnerable minority or (even, and particularly) suspects of serious wrongdoing.<sup>139</sup>

My colleague, Audrey Macklin, has also called for the criminal law to be used against non-citizens suspected of involvement in terrorism.<sup>140</sup> To be sure, fair trials on the basis of public evidence are extremely important and superior to the use of secret evidence in immigration proceedings. But we should not ignore that the criminal law’s commitment to the

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139. Gearty, *supra* note 1 at 45.

140. Audrey Macklin, “Stuck at the Border: Ten Years After 9/11” in Forcese & Crépeau, *supra* note 128, 261 at 291–300.



presumption of innocence and the rules of evidence is much weaker at the pre- and post-trial stages of the criminal process. Even during criminal trials, the focus should not only be on important procedural fair trial guarantees, but also on the breadth of the underlying terrorism offences. The formal equality and attributes that Gearty celebrates are constantly challenged by the informal nature of the discretion exercised by the police and prosecutors, at bail and sentencing hearings, and in jury rooms.

One of the promises of the criminal law is that it only punishes people for what they have done, not what they might do. The reality, however, is far more complex than this simple retributive message. Canadian law allows bail to be denied for preventive detention reasons. Canadian authorities have yet to employ preventive arrests and only used a few preventive peace bonds in terrorism cases, but as suggested in Part I of this article, this may simply be more reflective of the longer detention periods that come with denying bail after an accused has been charged with a terrorism offence.

Another promise associated with the criminal law is that it will produce remedies for state misconduct. Canadian criminal law in particular holds out the promise of the strongest of remedies for unacceptable conduct—a permanent stay of proceedings—for both entrapment and non-disclosure of relevant material to an accused in a manner that threatens a fair trial. Courts in immigration cases, including the recent Supreme Court decision in *Harkat*,<sup>141</sup> have been reluctant to employ strong remedies, but so too have criminal courts. There is a danger that the strong remedial tail may wag the dog. The result may be a criminal law that is strong on rhetoric but weak on remedies. The rejection of the entrapment defence in the Toronto 18 terrorism prosecutions may be justified, but there is a danger that Canadian courts may follow American courts in the future and accept random virtue testing and intense inducement of people who may be targeted more for their religious and political beliefs and associations than for any reasonable suspicion that they are involved in terrorist violence.

Perhaps the most important promise held out by the criminal law is that guilt must be proven beyond a reasonable doubt on the basis of public evidence. Criminal law does not allow secret evidence not disclosed to the accused to be used. It ensures a fair trial. This is an extremely important safeguard. At the same time, we ignore the question of offence definition

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141. *Supra* note 4 at paras 94–95.

and the danger that innocence can be defined away by Parliament at our peril. To its credit, Canada has respected the need for high fault levels for most terrorism offences, but the US Supreme Court decision in *Humanitarian Law Project* reveals how subjective knowledge requirements may do surprisingly little to restrain the breadth of terrorism offences, and people may still be punished for conduct that has little to do with terrorist violence.<sup>142</sup> Moreover, the problem of criminalizing freedom fighters within definitions of terrorism is resurfacing following the aftermath of 9/11.

Criminal law's final promise is of proportionate punishment. However, overbroad terrorism offences place pressure on the sentencing process. To their credit, Canadian courts have not shrunk from the difficult and controversial task of individualized sentencing, and they have upheld shorter sentences that compensate for overbroad terrorism offences.<sup>143</sup> The Supreme Court, while upholding the life imprisonment sentence in *Kharwaja*, has warned about the importance of individualized sentencing including the possibility of rehabilitation of young people convicted of terrorism.<sup>144</sup> Hopefully the legislature will not impose more restraints on sentencing, such as mandatory minimum sentences.

All of the concerns raised in this article do not mean that we should not follow Professor Gearty and champion the criminal law as a more just response to terrorist threats than the use of immigration law. At the risk of damning with faint praise, it can be confidently stated that criminal law, particularly in Canada, is significantly more restrained and more just than the use of immigration law as anti-terrorism law.

Nevertheless, a preference for criminal over immigration law does not mean that "charge or release" or the "criminal law solution" does not carry its own fair share of often under-appreciated dangers. These dangers include widespread use of preventive detention and reverse onuses at bail, a reluctance to stay proceedings to provide protection against entrapment and non-disclosure to the accused, legislative overbreadth in creating terrorism offences, and the danger of punishment that is disproportionate given the remote connection between overbroad terrorism offences and the scourge of terrorist violence.

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142. *Supra* note 17.

143. *Thambaitthurai CA*, *supra* note 19 at para 12.

144. *Kharwaja SCC*, *supra* note 7 at para 124.