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Canadian Terror: Multi-Disciplinary Perspectives on the Toronto 18 Terrorism Trials

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Introduction

MICHAEL NESBITT, KENT ROACH, DAVID C. HOFMANN, AND KEVIN LEE [*]

On June 2, 2006, in Toronto and its Western suburb, Mississauga, Ontario, hundreds of police officers and security operatives mobilized in simultaneous raids as part of an inter-agency operation dubbed "Project Osage." This was the single largest terrorism-related sting in Canadian history. It resulted in the largest apprehension of individuals implicated in a "homegrown" terrorist plot that the Western, English-speaking world had ever seen, including the immediate arrest of 15 individuals (including three minors); a further arrest of two other individuals already in prison; and the subsequent arrest of an 18th individual two months later.[1] Notoriously, these 18 individuals became known as the "Toronto 18" and their criminal proceedings as the Toronto 18 trials.

The arrests made shock waves in Canada and internationally, with national and global headlines revealing the Toronto 18's plans to bomb buildings in Toronto and attack Parliament in Ottawa.[2] Of course, all this took place within a climate that was already alive to the threat of terrorism, particularly Islamist Jihadi terrorism. Recall that in June 2006, memories remained fresh of the 9/11 terrorist attacks in neighbouring New York state, the 2004 Madrid bombings, and the 2005 London "7/7" bombings. At the time, media reporting reflected this fear: a *Toronto Star* columnist wrote that "the Jihad Generation – nothing alleged about it" could make Toronto "look like London… Madrid… Bali… New York City. Blood streaming,

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1 For more information on the accused, see Appendix A: Cast of Characters.

2 "Toronto 18: Key events in the case," *CBC News*, June 4, 2008, https://www.cbc.ca/news/canada/toronto-18-key-events-in-the-case-1.715266.

mangled metal, severed limbs, inchoate and immeasurable grief."[3] International media laid their fears on the table too. On June 4, 2006, the *New York Times* reported that the Toronto 18 planned to attack Parliament in Ottawa and a Canadian Security Intelligence Service (CSIS) building in Toronto. It also noted the concerns of American security officials about the "porous northern border," a trope that had concerned Canada since (false) allegations after 9/11 that some of the perpetrators had crossed from Canada.[4]

The day after the Toronto 18 arrests, a well-publicized press conference took place. It was unlike any press conference Canada had seen – or arguably has seen since. Officials from the Royal Canadian Mounted Police (RCMP) and CSIS participated, as did the chiefs of the Toronto, Durham, York, and Peel police services. What was extraordinary about the press conference was that the police came with evidence normally reserved for the courtroom to display to the television cameras. They displayed a bag of ammonium nitrate, a Luger handgun with an ammunition clip, a "Rambo-style" knife, a door riddled with bullet shells, a computer hard drive, a detonator, and camouflage clothing.[5] This was not the usual press conference where the police read a prepared statement and perhaps answered or refused to answer questions after the statement.

The police described the accused as "adherents of a violent ideology inspired by al-Qaeda" and noted that some of the accused had been arrested attempting to purchase what they thought was three tonnes of explosive fertilizer but was actually an inert substance. The assistant commissioner for the RCMP added: "If I can put this in context for you, the 1995 bombing of the Murrah Federal Building in Oklahoma City that killed 168 people was completed with only one tonne of ammonium nitrate… it was their

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3 Rosie DiManno, "Take a good hard at what's going on here," *Toronto Star*, June 4, 2006, A10. A fellow columnist, however, noted past abuses such as the arrest of 23 Muslims in Toronto in 2003 as part of Operation Thread with allegations of terrorism that only resulted in immigration fraud concerns and raised the question: "suppose, just suppose, that one or more of the 17 charged yesterday is innocent." See Thomas Walkom, "So many possibilities…for the courts to hash out," *Toronto Star*, June 4, 2006.

4 Ian Austen and David Johnston, "17 Held in Plot to Bomb Sites in Ontario," *New York Times*, June 4, 2005, https://www.nytimes.com/2006/06/04/world/americas/04toronto.html.

5 Stewart Bell and Kelly Patrick, "Arrests part of global operation," *Ottawa Citizen*, June 3, 2006; Timothy Appleby and Colin Freeze, "Plot targeted peace tower," *Globe and Mail*, June 5, 2006.

intent to use it for a terrorist attack... [t]his group posed a real and serious threat... [i]t had the capacity and intent to carry out these acts."[6] This statement captured the imagination of the national and international media, who continued to report the three times as much as Oklahoma City quote in many references to the case. But the media rarely mentioned that it was the police who had supplied the Toronto 18 with the inert substance.

The following day, on June 4, the 15 individuals arrested made their first court appearances: "Family members wept as 15 of the 17 accused, five of whom were youths at the time of the alleged crimes and cannot be named, were escorted into a Brampton courtroom in small groups, handcuffed and shackled at the feet."[7] The press reported on "[u]nprecedented security, including rooftop snipers and machine-gun toting tactical police officers [that] greeted members of the Muslim community, reporters and worried family members Saturday as the accused appeared in court."[8]

That same day, with the Canadian War Museum as a background, Canadian Prime Minister Stephen Harper spoke to military recruits about the Toronto 18, saying: "Their alleged target was Canada, Canadian institutions, the Canadian economy, the Canadian people.... [w]e are a target because of who we are and how we live, our society, our diversity and our values – values such as freedom, democracy and the rule of law. The values that make Canada great, values that Canadians cherish and values that citizens like you are willing to defend."[9] Now not only had the police engaged in an extraordinary display of evidence, but the Prime Minister had weighed in too.

The subsequent media and political coverage were both immediate and polarizing. On the one hand, the RCMP had made a spectacle of the arrests with the press conference complete with evidence. On the other hand, the police took pains to avoid describing the suspects as Muslims and rather described them as representing a "broad strata of our community... [s]ome are students, some are employed, some are unemployed. Aside from the fact

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6 Gregory Bonnell, "Terrorism threat becomes reality for Canadians as cops allege homegrown plot," *The Canadian Press*, June 3, 2006.

7 Bonnell, "Terrorism threat becomes reality."

8 Kelly Patrick, Adrian Humphreys, and Stewart Bell, "Terror probe details emerge: Alleged leaders described as 'nice guys'," *National Post*, June 5, 2006.

9 Allan Woods and Dave Rogers, "Our values are 'under attack,'" *Ottawa Citizen*, June 4, 2006.

that virtually all are young men, it's hard to find a common denominator."[10] The police description of the accused was taken by some in the Canadian media as an example of favouring political correctness over simple correctness. Writing on the front page of the *Globe and Mail* on June 5, 2006, well-known commentator Christie Blatchford asserted: "the accused men are mostly young and mostly bearded in the Taliban fashion. They have first names like Mohamed, middle names like Mohamed and last names like Mohamed."[11]

Blatchford belittled concerns that a mosque had been vandalized in the wake of the arrests, causing an estimated $15,000 in damages.[12] Yet this approach to covering the arrests did not go unchallenged. Robert Fisk, writing in the British press, criticized the Canadian media in particular for describing the accused as "Canadian born," suggesting that "there are now two kinds of Canadian citizen: the Canadian-born variety (Muslims) and Canadians (the rest)."[13]

But this initial flurry of domestic and international media attention quickly dissipated. As the criminal process started in late June 2006 – the same month as the arrests – judicially-mandated publication bans connected with both the bail hearings and then the preliminary inquiry shut down much of the publicity regarding the case. The result left some defendants feeling like there was a deliberate effort to prevent the accused from telling their side of the story.

The RCMP had been in front of the story with the spectacular initial press conference. During a pre-trial process that lasted for years, the criminal charges and evidence presented at that initial press conference that formed the factual basis upon which the media had reported on the accused. The accused and their lawyers generally offered their side(s) of the story in the courtroom with a media ban in place, and thus outside of the public eye.

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10 Surya Bhattacharya, Nasreen Gulamhusein, and Heba Aly, "The ties that bind 17 suspects?: 'They represent the broad strata of our community,' the RCMP says," *Toronto Star*, June 4, 2006.

11 Christie Blatchford, "Ignoring the biggest elephant in the room," *Globe and Mail*, June 5, 2006, https://www.theglobeandmail.com/news/national/ignoring-the-biggest-elephant-in-the-room/article1100051/.

12 Michelle Sheppard and Isabel Teotonio, "Bombing making material delivered in police sting," *Toronto Star*, June 4, 2006.

13 Robert Fisk, "How Racism has Invaded Canada," *The Independent*, July 9, 2013, https://www.independent.co.uk/voices/commentators/fisk/robert-fisk-how-racism-has-invaded-canada-8696865.html.

The closed nature of the proceedings undoubtedly played a role in shaping public opinion and public understanding of the events surrounding the Toronto 18, regardless of the actual outcome of the trials.

One of the accused challenged the court-ordered publication ban saying that a fair trial was impossible because of the one-sided media coverage derived mainly from the press conference. This legal challenge to the publication ban was unsuccessful even after it was appealed to the Supreme Court.[14] The problem for the defence – one they could not ultimately overcome at the Supreme Court – was that they had to prove that the publication ban affected their rights to a fair trial before a court of law, not a court of public opinion. The ruling was thus legally sound but did little to assuage fears that the court of public opinion (and, perhaps, also the pool of potential jurors) had already been tainted.

Fifteen years later, the public record remained very much reliant on those initial press reports in the wake of the Toronto 18 arrests. A trove of critical data on the investigation, arrests, police documentation, and trials remains largely unexamined. This lacuna of detailed historical, contextual, evidentiary, and documentary analysis leaves a gaping hole in the Canadian – and we argue the international – understanding of homegrown terrorism and its criminal trials.

From a legal perspective, by the numbers alone, the Toronto 18 trials remain the most important test of Canada's terrorism legislation: the Toronto 18 cases were the first "mega-trial" of terrorism accused in Canada and, indeed, among the very first prosecutions ever attempted under Canada's then relatively new criminal terrorism offences. The Toronto 18 cases offer some of the first appeals, first decisions on various terrorism offences, first terrorism sentencing decisions, first convictions, and first parole and prisoner releases.[15] Indeed, even 15 years after the arrests, the Toronto 18 judgements accounted for over 20% of terrorism judgments ever rendered in Canada. They set precedents on a variety of topics that are followed to this day; their first-movers advantage in this regard set the stage for how a variety of offences, criminal defences, and tactics would be addressed in Canada. They also set the stage for subsequent conclusions by the Supreme Court that Canada's *Anti-Terrorism Act*, enacted shortly after 9/11, was consistent with the *Canadian Charter of Rights and Freedoms*.

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[14] Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21.

[15] For greater detail on the importance of these trials, see Chapter 14 of this book by Michael Nesbitt.

Likewise, they set the template for how terrorism in Canada would be sentenced. Simply put, the Toronto 18 cases play an outsized role in Canada's legal understanding of terrorism offences, both in terms of sheer numbers and in terms of the all-important precedents that they set by virtue of coming first.

From a social-scientific standpoint, the Toronto 18 was, and remains, one of the "purest" cases of Canadian homegrown terrorism, emerging around the time when similar plots such as the Madrid Train Bombing and the 7/7 attacks were planned and successfully executed. As such, the Toronto 18 remains extremely important to contemporary terrorism scholars and offers enduring insights into how and why people engage in violent political activism – even as the global security environment continues to change.[16]

The goal of this book is to fill the evidentiary lacunae that still exists around the Toronto 18 and the (still missing) lessons learned from this series of events; in so doing, this book strives to provide fresh, thorough, and heretofore unheard narratives surrounding the investigation, trial, punishment, and eventual release of arguably the most infamous set of terrorist offenders in Canada. To achieve these goals, we required two things: access to the story told and not told by the initial flurry of press reporting on the Toronto 18 and a multi-disciplinary group of subject-matter experts to analyze these and related documents.

To speak to the first problem, the editors collected from publicly available sources and courthouses a database of almost ten gigabytes of trial decisions, pre-trial decisions where available, expert witness reports, sentencing reports, constitutional judgements, interim judgements, trial transcripts, parole decisions and other materials submitted at trial, police

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[16] In the early 2010s, and then significantly in the mid-to-late 2010s, scholarly attention shifted away from cases of homegrown terrorism to the next big threats, lone-actor terrorism, and then from so-called "Jihadi Islamist extremism" to the burgeoning threat of right-wing extremist terrorism. This, however, does not mean that nothing can be learned from a thorough scholarly examination of the Toronto 18; quite the contrary. This book is an attempt at highlighting the utility of understanding previous incarnations of terrorist violence in order to predict and understand the future security environment. While not completely analogous, there are similar issues of identity, perceptions of threat, and ideology present within Islamist homegrown terrorist groups and the larger radical milieus in which North American far-right extremist terrorists emerge; these similarities mean that, even if the threat environment continues to change, the lessons from the Toronto 18 must be understood.

documents, videos, primary source documents written by the Toronto 18, and thousands of press clippings, both Canadian and international. Access to this database was then provided to each contributing author to ensure a common starting point for their analyses.

Multi-disciplinarity and a diversity of perspectives then play a vital role in examining these documents, for no one ideology, perspective, field of study, or methodological approach is sufficient to unpack mass security events of the size and complexity of the Toronto 18 case. For precisely this reason, this book includes chapters by a range of authors with expertise in criminology, law, religion, security studies, and sociology; contributing authors also include both academics and those who have played a role in investigating and prosecuting terrorism in Canada. Each author then brings their unique insights – and the perspectives, methodological approaches, and advantages of their fields of expertise – to this common set of documents and publicly available information, allowing us to see from a variety of angles the formation, composition, investigation, arrest, trial, punishment, and release of the Toronto 18.

All contributors were asked to provide chapters in their fields and from their perspectives. This also means that there is no central thesis across the book, for authors were provided with shared research and a topic, not a common conclusion or even point to be made. Indeed, not having a central thesis is precisely the point: to showcase how different experts can look at the same case study in very different ways, using different methodologies and ideologies to approach the same series of events and draw disparate lessons learned. We hope that this process not only provides more robust insights into the Toronto 18 case but helps build a shared understanding between different fields and, in so doing, showcases how important it is to have a multiplicity of perspectives and approaches when tackling complex problems like terrorism. In this way, each chapter is also intended to be linked by common subject matter (the Toronto 18 and the shared documentation) but also to be read as stand-alone pieces for those interested in discrete fields or issues for discrete purposes.

The result is a truly multidisciplinary and often critical analysis surrounding the totality of the Toronto 18 trials, as well as the events and interactions leading up to them. In particular, this book offers a unique analytical inquiry into various disparate legal and social dimensions of trying terrorism cases in Canada, including the common tactical and legal dilemmas for defence lawyers, prosecutors, and judges. The authors who

have contributed to this book have used the Toronto 18 to address critical questions such as:

How do terrorist groups form and behave, and what are the processes of radicalization to violence?

How do terrorists finance their operations, and how can we use financial information to detect and disrupt them?

How does secret intelligence information factor into the public criminal process?

What can police and other national security agencies (i.e., CSIS) do (and what must they avoid) during a terrorism investigation?

What role does religion and, in particular, Islam play in the media and the trials, and are the results fair or discriminatory?

How does the criminal process respond to terrorism cases?

What role does the *Canadian Charter of Rights and Freedoms* play in terrorism trials?

What is the role of the jury in terrorism trials?

What is the appropriate approach to punishing those who are convicted of broadly defined terrorist crimes?

What happens to those convicted and, in particular, what happens upon their eventual release from prison?

What does the Toronto 18 look like from a social network perspective, and what are the social-structural insights that can be gained from this analysis?

How can we understand the behaviours of the Toronto 18 through the lens of common criminological theoretical perspectives?

How can we understand the Toronto 18's progression towards violent action using a contemporary ecological model of terrorist radicalization?

SO, WHO EXACTLY WERE THESE "TORONTO 18," AND WHAT WERE THEY CHARGED WITH?

The Toronto 18 label is, clearly, derived from those 18 individuals arrested in the aftermath of that 2006 operation. But, as Justice Dennis O'Connor noted in his report on Maher Arar, labels, especially in the terrorism context, "have a way of sticking" and, more than that, "when labels are inaccurate, serious unfairness to individuals can result."[17]

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[17] Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations*, Catalogue No CP32-88/1-2006E (Ottawa: Public Works and Government Services Canada, 2006), 19.

The Toronto 18 label was indeed probably inaccurate in that it implies a singular – and perhaps single-minded – group of 18 individuals with a common terrorist plot in mind. But the number 18 – and thus the moniker, the "Toronto 18" – is misleading because it implicates individuals against whom charges were dropped. It also fails to recognize others whose involvement was arguably equally as crucial as many "members" of the group. In other words, the label Toronto 18 is both overinclusive and underinclusive: it is overinclusive because authorities proceeded with charges against only 11 of the 18 individuals,[18] and it is underinclusive in that there were arguably more individuals implicated but not charged in the two plots and the two training camps[19] – a December 2005 plot conceived at the Washago Camp and a May 2006 plot at the Rockwood Conservation Area.[20]

Moreover, the term Toronto 18 itself implies a certain homogeneity of missions and dynamics within the group, one that is belied by the facts as they came to light during the trials. By the time the individuals were arrested, they had split into two relatively distinct groups: there was the Mississauga group led by Zakaria Amara and the Scarborough group led by Fahim Ahmad (the latter group planned the Rockwood training camp). The membership, ambitions, capacity, and, at least according to the carceral sentences received by the members of those groups, moral blameworthiness of the two groups differed.

Many of the accused knew each other through family connections or from high school, so the exact moment the original, inclusive group was

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18 By April 2008, the press was reporting that "A winnowing process has now reduced the original 'Toronto 18' down to only 11 still facing criminal charges, most of them now in their early 20s." See Colin Freeze, "Charges stayed against four terrorism suspects," *Globe and Mail*, April 16, 2008. Some of the accused had attended the Washago camp only for a few days and played paintball.

19 See Chapter 2 of this volume: David Hofmann identified approximately 34 unique individuals who were part of the Toronto 18's communication network.

20 Marie Oullet and Martin Bouchard have persuasively argued that the group dynamics were extremely complicated, and it is only by casting a wider net that the evolution of the so-called Toronto 18 can be properly understood. See Marie Ouellet and Martin Bouchard, "The 40 Members of the Toronto 18: Group Boundaries and the Analysis of Illicit Networks," *Deviant Behaviour* 39, no. 11, (2018): 1468–482, https://doi.org/10.1080/01639625.2018.1481678.

formed is unclear, but it was probably sometime in 2005.[21] We know from the trials, for example, that Dirie and Mohamed made their cross-border gun run to purchase weapons in the United States on August 13, 2005.[22] Another accused, Jahmaal James, travelled to Pakistan on November 5, 2005.[23] He attempted to make contacts to obtain terrorist training but almost immediately fell ill and, by all accounts, spent the entire time sick. He called one of the leaders, Fahim Ahmad, in January 2006, saying, "I'm dying over here," but he stayed away from the others in Toronto at Ahmad's direction.[24]

The best known of all of the Toronto 18's activities was the Washago Camp where training events were held between December 18 and 31, 2005.[25] Ahmad and Amara were the leaders of the inclusive Toronto 18 group, still together at this time, and they were the two individuals that would come to lead the two splinter cells. While at the Washago Camp, they also led the group drills, physical activity, and capture-the-flag style paintball. These activities were videotaped and later edited as a video for propaganda and training.[26]

Two contrasting narratives about the Washago Camp emerged at trial. One was of a group of ill-prepared young Muslim men playing paintball and engaging in winter camping during the 2005 Christmas break. They were misled until the end by the leaders – Ahmad and Amara, in particular – about the purpose of the camp. There were reports (later found to be false) that the only weapon ever introduced to the camp was brought by Mubin Shaikh, who had first been recruited by CSIS and, by this time, was acting for the RCMP. The competing narrative stressed that while at the Camp, the participants were shown al-Qaeda videos and excerpts from extremist texts and videos advocating violence; they fired 250-rounds of ammunition and ended their time at the camp with an infamous speech by Ahmad stating: "Rome has to be defeated. And we have to be the ones that do it, no holding back, whether it's one man that survives, you have to do it. This

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21 Michelle Shephard and Isabel Teotonio, "Grade 9 Buddies; High School Friends Became Increasingly Militant as the Years Passed: [Final Edition]," *The Spectator*, June 5, 2006. On file with authors.

22 R v. Dirie, 2009 CanLII 58598 at para 11 (ON SC).

23 Tobi Cohen, "Another Accused in so-Called Toronto 18 Case Pleads Guilty to Terrorist Offences," *Canadian Press*, February 26, 2010. On file with authors.

24 R v. Ansari, 2010 ONSC 5455 at para 10.

25 R v. N.Y., 2008 CanLII 51935 at paras 20–55.

26 *Ansari*, ONSC.

is what the Covenant's all about, you have to do it. And God willing we will do it. God willing we will get victory."[27]

In any event, as noted above, by March 2006, the original group had split into two, one based in the eastern Toronto suburb of Mississauga and led by Zakaria Amara (the Mississauga Group) and the other based in the Toronto suburb of Scarborough and led by Fahim Ahmad (the Scarborough Group).

The Scarborough Group

The Scarborough group's seven members included Fahim Ahmad, Steven Vikash Chand, Amin Mohamed Durrani, Jahmaal James, Nishanthan Yogakrishnan, Mohammed Ali Dirie, and Asad Ansari, all of whom were found guilty of various terrorism offences. Nishanthan Yogakrishnan was originally underage when arrested, and, therefore, his identity was protected. However, he turned 18 during the trials and eventually had his name made public. He is thus alternately referred to in this book either by his given name or as "N.Y." This group's plan was to attack Parliament Hill, though the endeavour was mostly far-fetched, lacked funding, and was poorly planned as compared to the Mississauga Group. As a result, at trial, the Scarborough group was considered the (relatively) less serious of the two plots.

Fahim Ahmad was the leader and ideological centre of the Scarborough group. He was the individual that offered the religious arguments that served as the internal justification for the group's efforts and actions. But Zakaria Amara lost confidence in Fahim Ahmad in part because he had failed to make good on his extravagant claims that he would obtain guns and funds for the broader Toronto 18 group. After the split, Ahmad relied heavily on the underaged members of the group (such as N.Y.), but they were caught shoplifting on his behalf at a Canadian Tire.[28] He repeatedly attempted – unsuccessfully – to procure money for the group, including meeting with a potential fraudster about mortgage fraud schemes.[29] Indeed, his fundraising was so inept that part of his income was one of the younger

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27 *Ansari*, ONSC at para 36; "Cell leader said 'We're down with' al Qaeda: trial," *Canadian Press*, April 14, 2010, https://toronto.ctvnews.ca/cell-leader-said-we-re-down-with-al-qaeda-trial-1.502088.

28 *N.Y.*, CanLII.

29 R v. N.Y., [2008] O.J. No. 3902.

member's $20/week allowance.[30] Ahmad also sent an unedited video to groups overseas showing Amara's full face.[31] But, while his competencies as a leader were questionable, his ambitions were not. Ahmad was clearly the source of the most sensationalist of the threats associated with the Toronto 18, including plans to storm Parliament and behead then-Prime Minister Stephen Harper. For this reason, Ahmad's group is also sometimes known as the Toronto 18 "Parliament Hill" plot group.

The Mississauga Group

The Mississauga splinter group consisted of only four people from the original Toronto 18: Zakaria Amara, Shareef Abdelhaleem, Saad Khalid, and Saad Gaya. They planned to blow up the Toronto Stock Exchange, a building that unbeknownst to them contained the Toronto offices of the Public Prosecution Service of Canada – which would subsequently lead the prosecution efforts against the Toronto 18 – as well as the Toronto CSIS office. It was, as a result, considered the more serious – and was the more advanced – of the two plots, a fact that was reflected by the life sentences for the leader (Amara) and recruiters (Amara and Abdelhaleem) of the group.

Both Amara and Abdelhaleem were recruiters for the original Toronto 18 and considered among the leaders of that broader group as well. However, Abdelhaleem was the only member of Amara's group who did not attend the original Washago Camp. He was also perhaps the most adept member, with news outlets noting that he was older, had an established career, and drove a BMW.[32] But when it came to the Mississauga group at trial, Amara was seen as the leader of the splinter group because the plans came from him, he had taught himself to construct remote detonators, and had ordered the ammonium fertilizer to build the bombs. Indeed, by February 2006, he had a working prototype of a bomb. On April 7, 2006, he disclosed to an undercover police agent that he had plans to bomb the Toronto Stock Exchange building, the CSIS building in downtown Toronto, as well as a separate military base.[33]

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30 See Chapter 9 of this volume.

31 R v. Ahmad, 2010 ONSC 5874 at para 57.

32 Torstar Network, "Informant Testifies," *Mississauga News*, January 11, 2010. On file with authors.

33 R v. Amara, 2010 ONSC 441; *N.Y.*, O.J.

Amara was also much more conscious of avoiding detection than Ahmad and his group. In fact, he became (rightly) convinced that CSIS were onto Ahmad and phoned Ahmad to say that the Scarborough crew should "quit everything totally"[34] in an attempt to throw authorities off their scent. Amara had organized his group into two "cells" with himself at the head; in the result, Abdelhaleem was not aware of Khalid or Gaya. In contrast to Ahmad, Amara successfully raised thousands of dollars using loans and credit cards. With these funds, he and his group were able to rent a van and a warehouse, finance a "Student Farmer" cover, and pay for what he thought was three tonnes of fertilizer in cash.[35] Concerns emerged about how to track such a small-scale financial operation since Canada's terrorist financing tracking organization (FINTRAC) was only set up to capture large-scale international transfers.[36] Amara was able to finance his operation using only consumer credit cards and student loans.

The Demise of the Groups

Although Amara took express steps to avoid apprehension by the authorities, both CSIS and the RCMP had active, ongoing investigations into the Toronto 18. As Ahmad and Amara made their plans, they were infiltrated by Canadian counterterrorism operatives.

CSIS met with Fahim Ahmad, the leader of the Scarborough group, as early as February and March of 2005. Ahmad admitted at that time to his extremist website activity (ongoing since 2002) but said he was not currently pursuing Jihad since he was a father to a baby girl.[37] By November 17, 2005,[38] CSIS had provided an advisory letter to the RCMP stating that "[t]he Service recently learned that Ahmad is planning for a camping trip in the immediate future with unnamed associates." At the same time, CSIS did not provide the RCMP with the camp's location, and, at one point,

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34 *Amara*, ONSC at para 18.

35 *Amara*, ONSC at para 18.

36 "Financial transactions that must be reported," Financial Transaction and Reports Analysis Centre of Canada, last modified August 16, 2019, http://www.fintrac-canafe.gc.ca/reporting-declaration/rpt-eng.asp.

37 Isabel Teotonio, "Toronto 18: An exclusive account of how Canada's first homegrown terror cell was created, who followed the trials more closely and continuously than any other journalist, monitoring 1,200 hours of court proceedings in a case involving 82,200 electronic intercepts and 700 officers," Part 1 of 2, *Toronto Star*, July 3, 2010. On file with authors.

38 Teotonio, "Toronto 18," Part 1.

CSIS knew that the RCMP were following the wrong person and did not say anything.[39]

Mubin Shaikh, who first acted as a confidential human source for CSIS and later as a confidential police informant for the RCMP, had initially made contact with the Toronto group at the Taj Banquet Hall on November 27, 2005.[40] He subsequently attended the Washago Camp from December 18 to 31, 2005. Shaikh thought Ahmad was "no amateur, it was the kids who were amateurs."[41]

A friend of Abdelhaleem, Shaher Elsohemy, had also been recruited as a human source by CSIS. Elsohemy was eventually introduced to Amara by Abdelhaleem and was taken into their confidence. In particular, on April 8, 2006, Amara expressed an interest in acquiring large quantities of ammonium nitrate[42] and revealed his plan to bomb three targets. This information was promptly passed on to the police by CSIS, and four days later, Elsohemy became a police informer. In the ensuing weeks, Elsohemy had discussions with Abdelhaleem and Amara about the bomb plot and provided a great deal of helpful information to the police. Because Elsohemy was a confidential informant, police worried that none of that information could be used as evidence at trial. The police, therefore, sought to have Elsohemy become a police agent and, on May 10, 2006, Elsohemy agreed to do so. The police then obtained authorization to intercept communications, and from that point on, Elsohemy's conversations with Abdelhaleem and Amara about the bomb plot were intercepted and recorded. Ultimately, this infiltration by two individuals, as well as ongoing

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39 R v. Ahmad, 2009 CanLII 84776 at para 43 (ON SC).

40 *N.Y.*, O.J. at para 8.

41 Isabel Teotonio, "Toronto 18: An exclusive account of how Canada's first homegrown terror cell was created, who followed the trials more closely and continuously than any other journalist, monitoring 1,200 hours of court proceedings in a case involving 82,200 electronic intercepts and 700 officers," Part 2 of 2, *Toronto Star*, July 4, 2010. On file with authors.

42 Ammonium nitrate is the main component of a fertilizer bomb, such as was used in the bombing of the federal building in Oklahoma City. Amara's plan was to build three bombs, each containing one tonne of ammonium nitrate. In order to establish the explosive force of such a bomb, the INSET investigators had a similar bomb constructed and detonated under scientific conditions. The expert report established that a bomb made of one tonne of ammonium nitrate would cause death and serious bodily harm to persons in the vicinity of the explosion and cause serious damage to an office building.

surveillance and intelligence gathering, led to the demise of the Toronto 18 and provided the evidence for their incarceration.

The Arrests

The arrests on June 2, 2006 were made by an Integrated National Security Enforcement Team (INSET) – a specialized, inter-departmental team made up of members of the RCMP, CSIS, the Canada Border Services Agency, and provincial and municipal police services. The case against the accused involved extensive electronic surveillance and, of course, testimony from the two informants. One (Mubin Shaikh) was paid almost $300,000 for his cooperation and another (Elsohemy) was paid $4 million and was placed in witness protection. Mubin Shaikh had previous contact with CSIS and was frequently interviewed in the press throughout the trial process. He played an important role in the Washago Camp, which had been subject to extensive police surveillance.[43] The second informant, who had a degree in agricultural science, played an important role in the investigation of the Amara group that led to the rental of a storage locker and the purchase of an inert substance held out to be fertilizer.[44] The use of informers has been central to most post-9/11 terrorism prosecutions in North America, but this investigative technique remains shrouded in mystery and controversy. The Toronto 18 case was typical in this regard, as two accused claimed that they had been unfairly entrapped by informers whom they alleged had engaged in illegal and improper conduct. As is also typical, the Courts rejected both of these attempts to claim an entrapment defence that, if successful, would have resulted in the accused going free.[45]

The Trials

In the end, three separate trials of 11 accused were eventually held, with only one before a jury. The cases took four years to see through to completion. The trials were long and complicated: there were lengthy pre-trial waiting periods and several appeals, two of which reached the Supreme Court. The trials covered legal issues ranging from entrapment to press publication to the constitutionality of Canadian national security law. A timeline of the judicial proceedings is provided below.

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43 Teotonio, "Toronto 18," Part 2.

44 Teotonio, "Toronto 18," Part 2.

45 *N.Y.*, O.J.; R v. Abdelhaleem, [2010] O.J. No. 5693 [*Abdelhaleem* 2010].

	June 2, 2006 – 15 of the members of the Toronto 18 are arrested in a massive police operation.[46]
August 3, 2006 – Ibrahim Aboud, the 18th member, is arrested.[47]	
	September 24, 2007 – Crown prosecutors stop the preliminary hearing and proceed straight to trial, prompting concerns of political interference in the prosecution and fairness against the accused and related litigation.[48]
April 15, 2008 – Prosecutors stay the charges against Abdul Qayyum Jamal, Ahmad Ghany, Ibrahim Aboud, and Yasin Abdi Mohamed.[49]	
	March 25, 2008 – The trial of Nishanthan Yogakrishnan begins, the first of the Toronto 18.[50]
September 25, 2008 – Nishanthan Yogakrishnan is the first member of the group found guilty of participating in the activity of a terrorist group in a judge-alone trial.[51]	
	January 26, 2009 – The Ontario Court of Appeal dismisses an application by several newspapers and some of the accused to strike down the Court's publication ban in cases where there may be a jury, and the mandatory publication ban is upheld by the Supreme Court of Canada in 2010.[52]

46 CBC News, "Toronto 18: Key events."
47 CBC News, "Toronto 18: Key events."
48 CBC News, "Toronto 18: Key events."
49 "Charges stayed against 4 more suspects in bomb plot trial," *CBC News*, April 15, 2008, https://www.cbc.ca/news/canada/toronto/charges-stayed-against-4-more-suspects-in-bomb-plot-trial-1.736912.
50 *N.Y.*, O.J.
51 *N.Y.*, O.J.
52 Toronto Star Newspapers Ltd. v. Canada, 2009 ONCA 59 aff'd in 2010 SCC 21.

May 22, 2009 – Nishanthan Yogakrishnan is sentenced to two years and six months in the first sentencing decision.[53]	
	September 3, 2009 – Khalid pleads guilty and is sentenced to 14 years.[54]
September 21, 2009 – Dirie pleads guilty.[55]	
	September 28, 2009 – Gaya pleads guilty.[56]
October 2, 2009 – Dirie is sentenced to seven years.[57]	
	October 8, 2009 – Amara, leader of the bomb plot, pleads guilty.[58]
January 18, 2010 – Gaya is sentenced to 12 years and Amara is sentenced to life.[59]	
	January 20, 2010 – Durrani is sentenced to seven years and six months.[60]
February 26, 2010 – Abdelhaleem is found guilty in a judge-alone trial.[61]	
	April 14, 2010 – The jury trial of Ahmad, Ansari, and Chand begins after all three plead not guilty.[62]

53 See Appendix A: Cast of Characters.
54 See Appendix A: Cast of Characters.
55 See Appendix A: Cast of Characters.
56 See Appendix A: Cast of Characters.
57 *Dirie*, CanLII.
58 See Appendix A: Cast of Characters.
59 *Amara*, ONSC; R v. Gaya, 2010 ONSC 434.
60 Public Prosecution Service of Canada, *Durrani Pleads Guilty to Terrorism Offence* (News Release) (Ottawa: PPSC, January 20, 2010), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/20_01_10.html.
61 *Abdelhaleem* 2010, O.J.
62 See Appendix A: Cast of Characters.

May 10, 2010 – Ahmad changes his plea to guilty partway through the trial.[63]	
	June 23, 2010 – Chand and Ansari are the last two members of the group to be found guilty.[64]
October 25, 2010 – Ahmad is sentenced to 16 years in prison.[65]	
	November 26, 2010 – Chand is sentenced to ten years in prison.[66]
December 17, 2010 – The Ontario Court of Appeal releases four decisions on terrorism simultaneously, three of which were from the Toronto 18. Khalid and Gaya from the Toronto 18, and the accused in the fourth case, Khawaja, all had their sentences increased (to 20 years, 18 years, and life, respectively). Amara's life sentence was upheld.[67]	
	February 10, 2011 – The Supreme Court upholds section 38 of the *Canada Evidence Act*, which requires that issues about evidence withheld from the accused for national security reasons must be dealt with in a separate trial in the Federal Court.[68]
March 4, 2011 – Abdelhaleem is sentenced to life in prison, the last sentence handed down.[69]	
	August 19, 2015 – Ansari's appeal of his conviction is dismissed.[70]

63 See Appendix A: Cast of Characters.
64 See Appendix A: Cast of Characters.
65 *Ahmad*, ONSC.
66 R v. Chand, 2010 ONSC 6538.
67 R v. Khalid, 2010 ONCA 861; R v. Amara, 2010 ONCA 858; R v. Khawaja, 2010 ONCA 862; R v. Gaya, 2010 ONCA 860.
68 R v. Ahmad, 2011 SCC 6.
69 R v. Abdelhaleem, 2011 ONSC 1428.
70 R v. Ansari, 2015 ONCA 575.

May 26, 2017 – Fahim Ahmad is denied parole with just seven months left on his sentence.[71]

In Canada, there is no single crime of terrorism, nor is "terrorism" itself even defined. Rather, a series of discrete terrorism offences were developed in the wake of 9/11.[72] At a very general level, these offences each fall into one of two categories. The first category is group-based – that is, all offences under this category require some action that supports a terrorist group or its mission.[73] It is this category of offences with which all of the Toronto 18 members were charged and convicted. For example, one can see from the below tables that all of the members of the Scarborough group – and, indeed, almost all of the Toronto 18 members – were convicted of participating in the activity of a terrorist group under section 83.18 of the *Criminal Code*, which requires that an individual act "for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity."[74]

Both Ahmad and Chand in the Scarborough group, and Amara, Abdelhaleem, and Khalid in the Mississauga group, were also convicted of committing an offence for a terrorist group,[75] while Ahmad alone was convicted of instructing others to carry out an activity for a terrorist group.[76]

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71 Michelle Shephard, "Leader of Toronto 18 terror group denied release," *Toronto Star*, May 26, 2017, https://www.thestar.com/news/canada/2017/05/26/leader-of-toronto-18-terror-group-denied-early-release.html.

72 These offences are found between sections 83.02–83.04 and 83.18 and 83.23 (in Part II.1) of Canada's *Criminal Code*. See Criminal Code, R.S.C. 1985, c. C-46.

73 A terrorist group is defined in section 83.01 of the *Criminal Code* as one that is either listed as such as per the requirements of section 83.05, or one that "has as one of its purposes or activities facilitating or carrying out any terrorist activity."

74 See Criminal Code, s. 83.18(1).

75 See Criminal Code, s. 83.2.

76 See Criminal Code, s. 83.21.

Scarborough Group (Parliament Hill Plot)

Name of Accused	*Criminal Code* Charge(s) (offence section(s))	Outcome
Fahim Ahmad	83.18, 83.2, 83.21	Pled Guilty[77]
Steven Vikash Chand	83.18, 83.2	Found Guilty at Trial
Amin Mohamed Durrani	83.18	Pled Guilty
Jahmaal James	83.18	Pled Guilty
Nishanthan Yogakrishnan (N.Y.)	83.18	Found Guilty at Trial
Mohammed Ali Dirie	83.18	Pled Guilty
Asad Ansari	83.18	Found Guilty at Trial

Mississauga Group (Downtown Toronto Bomb Plot)

Name of Accused	*Criminal Code* Charge(s) (offence section(s))	Outcome
Zakaria Amara	83.18, 83.2	Pled Guilty
Shareef Abdelhaleem	83.18, 83.2	Found Guilty at Trial
Saad Khalid	83.2	Pled Guilty
Saad Gaya	83.18 (83.2 charge dropped)	Pled Guilty

The second general category of offences relies on the prosecution proving both that a "terrorist activity" was planned or committed[78] and that the individual was involved with that terrorist activity. A common example is the offence of facilitating a terrorist activity under section 83.19 of the *Criminal Code*. No member of the Toronto 18 was charged with any of the "terrorist activity" categories of offences, presumably because the Toronto 18 group was deemed a terrorist entity, and thus, the actions in support of the group by the members were properly caught by the group-based offences.

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77 Originally pled not guilty but changed his plea partway through the trial. See Isabel Teotonio, "Toronto 18 ringleader pleads guilty in terror trial," *Toronto Star*, May 10, 2010, https://www.thestar.com/news/crime/2010/05/10/toronto_18_ringleader_pleads_guilty_in_terror_trial.html.

78 "Terrorist activity" is defined in section 83.01 of the *Criminal Code.* It can refer either: (1) to a specified offence under a host of recognized terrorist treaties to which Canada is a party; or, (2) to an act committed for "a political, religious or ideological purpose, objective or cause" with the "intention of intimidating the public, or a segment of the public, with regard to its security... or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act" all with the intention of causing death, serious bodily harm, endangering life, causing a serious risk to public safety or health, and so on.

As can be seen in the above tables, all 11 members of the Toronto 18 who were prosecuted were found guilty of various (group-based) terrorism offences. They were all sentenced to various (escalating) terms of incarceration based on their level of leadership and perceived individual complicity in the plots.[79] The custodial sentences ranged from two years and six months (N.Y., a youth at the time of the training camp) to life in prison (in the cases of Amara and Abdelhaleem). Further charges against the remaining seven Toronto 18 members were stayed. As of early 2020, all but two of the convicted offenders had been released.[80]

In the end, the range of court judgements, sentencing decisions, constitutional challenges, and other court decisions form the largest block of cases shaping Canadian terrorism law so far. They have largely guided and been upheld by subsequent jurisprudence. They tackled issues that will almost certainly arise in any future terrorism prosecutions: the selection of jurors in cases where there are concerns about pre-trial publicity and other forms of racial or religious prejudice against the accused, the breadth of terrorism offences, the admissibility of prejudicial evidence (especially as it relates to the accused's alleged religious or political motives), limits on the information that is disclosed to the accused because of concerns of exposing CSIS's sources and methods, testimony by religious experts and psychologists, the role of the *Charter* in restraining the state's counter-terrorism activities, and the role of pro-active stings and entrapment in terrorism investigations. All of these issues are examined in this book.

This special issue looks back at where the individuals came from, including their social networks and radicalization. It examines the investigations by CSIS and police with special attention to the transition from secret intelligence investigations into more public prosecutions. The book also examines the pre-trial and trial processes that spanned from 2006 to 2010. Finally, it examines their sentencing and the eventual parole of most of the 11 of the 18 who were convicted. The special issue is divided into four main parts (see below), starting with a focus on the individuals and moving to the investigative, prosecution, and eventually punishment and release of the Toronto 18.

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79 For a detailed breakdown of the duration of the custodial sentences that each member of the Toronto 18 received, see Chapter 14, "The Sentencing of the Toronto 18" (Michael Nesbitt); details of their parole can be found in Chapter 15, "Rehabilitation, Reintegration & Parole" (Reem Zaia).

80 Those two being Abdelhaleem and Amara.

PART ONE: SOCIOLOGICAL AND CRIMINOLOGICAL PERSPECTIVES ON THE TORONTO 18

The first part of the special issue contains five chapters that use sociological and criminological approaches to gain insight into various aspects of the Toronto 18. It provides theoretical and empirical context that explores the Toronto 18's social backgrounds, their interpersonal networks, how they radicalized towards violence, and how Canadian security services approach and deal with violent threats akin to the Toronto 18.

In Chapter 1, Lorne Dawson and Amar Amarasingam tap into the robust literature on homegrown terrorist radicalization to comparatively re-examine the Toronto 18 before applying Dawson's ecological model of terrorist radicalization[81] to the particular case of the Toronto 18. The authors not only contribute to the growing knowledge of how and why young Canadians like the Toronto 18 members radicalize towards violence, but they also provide tantalizing information that may help inform future radicalization research.

In Chapter 2, David Hofmann uses social network analysis to compare and contrast the social-structural characteristics of the Toronto 18 across four distinct operational periods to provide empirical insights into the interpersonal connections and composition of the group. This chapter provides the first glimpse into the utility of social network analysis by providing a nuanced understanding of the multiplex and intermeshed social relationships within terrorist groups. Similar approaches that use social network analysis may offer a myriad of different perspectives and conclusions for scholars and practitioners who are engaged in research and policies aimed at detecting and preventing acts of terrorist violence.

Chapter 3, written by Tiana Gaudette, Garth Davies, and Ryan Scrivens, examines the Toronto 18 through some of the most commonly used criminological theoretical perspectives, focusing on insights that can help explain and understand their behaviours through pre-existing criminological theoretic lenses.

Chapter 4 consists of an interview with Mubin Shaikh, the RCMP confidential police informant who was embedded within the Toronto 18, conducted by Amar Amarasingam. This discourse provides unique personal

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81 Lorne L. Dawson, "Sketch of a Social Ecology Model for Explaining Homegrown Terrorist Radicalisation," *The International Centre for Counter-Terrorism: The Hague* 8, no.1 (2017), http://dx.doi.org/10.19165/2017.1.01.

and professional insights into Shaikh's experience and his perceptions about the radicalization and dangers presented by different members of the Toronto 18.

In Chapter 5, Stephanie Carvin outlines the general operations, activities, and approaches used by CSIS when tasked with detecting and investigating violent, al-Qaeda-inspired threats, like the Toronto 18. She notes that while the Toronto 18 case is seen as a success for CSIS, much has changed since 2010 and CSIS faces new challenges with its terrorism investigations.

Part Two: The Investigation and Charging of the Toronto 18

The second part of the book contains Chapters 6 through 9. The first three chapters are written from the perspectives of one of the lead prosecutors in the Toronto 18 cases (Croft Michaelson), former CSIS officers (Derek Huzulak and Dave Murray), and the studious perspective of two academics looking in on the system with a review to legal and policy reform (Craig Forcese and Jay Pelletier). These authors focus on how an intelligence investigation such as this progressed to a criminal investigation that resulted in charges and, eventually, successful prosecution, as well as the difficulties of transitioning from secret intelligence investigations into more public criminal investigations, which has bedevilled Canadian terrorism investigations in the past. It was a factor in the bungled investigation of the 1985 Air India bombings that killed 331 people in what was, until 9/11, the world's deadliest act of aviation terrorism.[82] The Toronto 18 case was an important, and some might argue all-too-rare, incident of a successful transition from intelligence to evidence, though it also provides valuable lessons for the legal system and considerations for law-makers in terms of needed reform. All three call for reform, with Forcese and Pelletier stressing the need for legal reforms, Michaelson outlining concerns relating to the amount of disclosure and Canada's complex bifurcated court structure that was avoided in the Toronto 18 case, and Huzulak and Murray calling for moves away from the divided and parallel CSIS and police investigations that were used in the Toronto 18

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82 Canada, *Commission of Inquiry into the Bombing of Air India Flight 182*, in *Air India Flight 182: A Canadian Tragedy*, vol. 3, Catalogue No. CP32-89/5-2010E (Ottawa: Supply and Services, 2010). Kent Roach was the research director for this inquiry.

investigation and, with some modifications, continue to this day. In the final chapter of part two, Jessica Davis offers a long-overdue examination of the financing of the Toronto 18 with a view to the lessons learned from Canada's (poor) record of investigating and prosecuting terrorist financing.

PART THREE: LEGAL ISSUES AT TRIAL

The third part of the book consists of four chapters that examine the extensive pre-trial and trial processes that took place in the Toronto 18 cases.

In Chapter 10, Kent Roach examines how the jury was selected in one of three Toronto 18 cases that resulted in trials. He raises questions about whether jury trials really are beneficial for those charged with terrorism who may be subject to racial and/or religious prejudice. The jury trial in the Toronto 18 case was also influenced by the fact that one of the ringleaders, Fahim Ahmad, pled guilty in the middle of the trial but only after the jury had heard much of the evidence about his role and statements. After five days of deliberations, the jury convicted the remaining accused in that trial, Steven Chand and Asad Ansari.

In Chapter 11, Anver Emon and Aaqib Mahmood pick up on discussions of prejudice by pointing out the prejudicial effect that evidence about religion may have had in one of the jury trials and concerns about the admissibility of expert opinion evidence on religion by those who were not properly qualified at law to offer such evidence at trial.

In Chapter 12, Vincent Chiao examines the difficulties of making up a successful claim of entrapment in the terrorism context. Entrapment claims have been recognized in one subsequent terrorism case, but it stands as the only North American case where such a defence, that results in the accused walking free, has been successful. These three chapters suggest that legal and social determinations of guilt and innocence in terrorism cases may, when a closer and critical look is taken, often turn out to be more complex and ambiguous than is commonly realized.

Finally, in Chapter 13 Kent Roach suggests that while *Charter* applications slowed down and burdened the Toronto 18 prosecution, they did not provide a barrier to the successful prosecutions. Indeed, there were no guilty verdicts or stays of proceedings because of entrapment in any of the Toronto 18 cases. The only two *Charter* challenges where the accused enjoyed some initial successes were eventually overturned in the Supreme

Court of Canada – some of the first Supreme Court jurisprudence on the new terrorism provisions enacted after 9/11.[83] Roach suggests that courts today would, and should, take the claims made by Toronto 18 members that their rights were violated by the conditions of their pre-trial detention more seriously. He also outlines how bail decisions made after the accused is arrested will often be critical and warns that they may place pressure on those detained without bail to plead guilty, especially if they receive a significant reduction in their sentence as a result. Although broad terrorism offences, such as participating in a terrorist group, have been upheld under the *Charter* by the Supreme Court of Canada, he suggests that they can be problematic when applied to those at the periphery of terrorism plots.

PART FOUR: SENTENCING, PAROLE, REINTEGRATION, AND AN UNKNOWN FUTURE

The last part of this special issue examines the process of coming to terms with the appropriate sentencing and punishment for the Toronto 18, as well as how Canada might go about reform and rehabilitation and reintegration of the Toronto 18 and, more broadly, how it should treat its citizens.

In Chapter 14, Michael Nesbitt traces the enduring importance of the Toronto 18 sentencing decisions. He also reveals how these decisions influenced a Canadian approach to sentencing terrorism that seems to stray from the fundamental principle utilized in the sentencing of other crimes by deemphasizing the individual (including youth), their prior good behaviour, and their efforts at reform and rehabilitation while overemphasizing the need to deter and denounce the "crime of terrorism" (in contrast to the specific terrorism offence committed and charged). In the end, he finds that long custodial terms for anyone convicted of terrorism have been the norm in Canada and, due to the judicial approach to sentencing, will likely continue to hold sway.

In Chapter 15, Reem Zaia describes how the continued diminution of rehabilitation and personal reform extends beyond the courtroom and into Canada's prison and parole systems. This finding only serves to reinforce concerns about both how well justice is being served by this rather unique approach to terrorist crimes.

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[83] See *Toronto Star Newspapers Ltd*, SCC; *Ahmad*, SCC.

Putting the chapters together, one sees in the result a series of long prison terms based on fear of terrorism as a general phenomenon, coupled with the inability of the individuals that perpetrate the discrete terrorism offences to access needed interventions. For society, this means the risk of depriving an individual of their liberty for longer than might strictly be necessary where the offender was young, repentant, and largely uninvolved in the planning and, certainly, the execution of, a plot (a serious rights concern) while also eventually releasing terrorist offenders that have never received assistance in addressing their underlying grievances and ideologies (a serious safety concern). One is left to question how both rights and safety are best served by such a system.

In the final chapter of the special issue, Chapter 16, Audrey Macklin looks further down the road for convicted terrorists by recounting Canada's history of citizenship revocations. In so doing, she reminds us of the political climate during Stephen Harper's Prime Ministership in which the Toronto 18 were arrested, tried, and convicted, and attempts were made to deprive some of them of their Canadian citizenship. Macklin holds an important warning that even so-called "homegrown terrorists" are susceptible, socially and legally, to be expelled from the Canadian community – a lesson from the past that, given Canada's history, is sure to have value and salience in the future.

In the end, each of the four parts of the special issue identify and make valuable contributions to extremely difficult issues that continue to affect and perplex counter-terrorism investigations, trials, and punishment. They are:

(a) The difficulties of knowing when radicalized people (including from the far right) will move to violence (Part I);

(b) The difficulties of transitioning from secret evidence to public evidence (Part II);

(c) The difficulties in ensuring fair trials in emotive terrorism trials (Part III); and

(d) The dilemmas with respect to punishment and rehabilitation (Part IV).

The authors examine the case with the distance of the past decade since the last trials were completed and a decade and a half since the June 2, 2006 arrests first made headlines. While future historians will undoubtedly be able to place the Toronto 18 in a broader context, by drawing from a range of perspectives, this book hopes to provide some contemporaneous insight and answers to these and other questions for all those in Canada and abroad

that might be interested in national security and terrorism studies, religious studies, the psychological and sociological study of radicalization and ideology, journalism, law and criminology, and other related fields. Indeed, by building upon and going beyond a legal examination of the Toronto 18, this book provides insights and perspectives for academics interested in the social-scientific study of terrorism and political violence, as well as government and security agencies that are tasked with the detection and prevention of acts of terrorism on Canadian soil. Legal practitioners and scholars in the area of terrorism will also find unique and useful perspectives on the practicalities of this complex field, including critical insights that may help guide the courts away from some of their previous mistakes.

Homegrown Terrorist Radicalization: The Toronto 18 in Comparative Perspective

LORNE L. DAWSON AND AMARNATH AMARASINGAM [*]

ABSTRACT

Canadian concern with the domestic threat of religious terrorism came of age with the arrest of the members of the Toronto 18 in 2006. This chapter seeks to increase our understanding of this case by placing it in comparative perspective in three ways. First, by arguing that the Toronto 18 represents one of the purest instances of so-called "homegrown terrorism." Second, by comparing the data available on the ten adults convicted with the data available on similar terrorists in Europe, the United Kingdom, and the United States. Findings are examined for age, ethnicity, socio-economic status, education, occupations, criminality, mental health, and family and religious background. Third, insights from two recent and comprehensive theories of the process of radicalization, Lorne Dawson's "social ecology model" and Arie Kruglanski et al.'s "3 N model" are used to make better sense of what happened and why. In the end, however, much remains unclear because we still lack the appropriate data.

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I. INTRODUCTION

The seemingly constant threat posed to governments by terrorism is troublesome. The threat posed by so-called "homegrown terrorism," which increased in prominence in Western countries after the London 7/7 bombings (7 July 2005), raised the stakes. Nothing brings the "why" question so sharply to the fore. Why would these young men turn against their fellow citizens with such deadly intent and force? The question looms large not just because of the potential harm to life, liberty, and property, but perhaps, even more, the damage done to our self-conception as safe and relatively harmonious societies (at least in terms of politically or ideologically inspired violence). In this regard, the arrest of the so-called "Toronto 18" in 2006 marked a watershed moment for Canadians. An attack on the core values and institutions of our society, by young people, who were either born or raised in Canada, seemed a strange and unsettling development.

There have been many noteworthy instances of "domestic" terrorism in Western societies. One need only think of the bombing of the Murrah Federal Building in Oklahoma City in 1995, or the bomb that brought down Air India Flight 182 just after it left Canada in 1985.[1] These were the two deadliest acts of domestic terrorism in North America, prior to 9/11. To the extent that people were aware of these events, they were inclined to see them, however, as tragic exceptions, and to think of the perpetrators as rare, marginal, and unbalanced. After the Toronto 18 case, many Canadians realized they could no longer afford to adopt such an attitude. Even more fundamentally, the wave of terrorist plots involving individuals and groups inspired by Jihadism in Europe, the United Kingdom, the United States, Australia, and Canada, set off disturbing concerns about a "clash of civilizations" and the suspect status of whole communities of new citizens.

Can we gain greater clarity about the Toronto 18 case, more than a decade later, by turning to the copious research into who is involved in these Jihadist plots? In this chapter, we make an initial effort to do so, and, in the process, we gain a better sense of why the Toronto 18 case remains significant. Surprisingly, there are only three academic publications

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1 "The Oklahoma City Bombing," FBI – History, accessed January 12, 2021, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing; "Air India Flight 182," CBC Digital Archives, broadcasted June 23, 1985, https://www.cbc.ca/archives/entry/air-india-flight-182.

dedicated to the analysis of this case.[2] It is discussed as well in several more general analyses of Jihadism in Canada,[3] and one of the two RCMP agents involved in the case, Mubin Shaikh, published an autobiography.[4] The case has yet to receive the analytic attention it deserves.

The Toronto 18 may well represent one of the purest instances of so-called "homegrown terrorism," and the profile of those convicted points to significant differences between Jihadists in North America, on the one hand, and the United Kingdom and Western Europe, on the other. These differences are consequential for theorizing about the nature and causes of the process of radicalization leading to violence for Jihadists, and perhaps for other violent extremists as well. Consequently, in the first part of this chapter, we briefly make the case for seeing the Toronto 18 as an early and paradigmatic instance of homegrown terrorism. In the second part, we examine the demographic profile of the ten adults convicted in the Toronto 18 case and compare the information with what is now available on the larger set of Jihadists studied in Europe, the United Kingdom, and the United States. The discussion sets the basic parameters for any comparative analyses of the Toronto 18, and thus the wider explanatory context for making sense of what happened and why, as well as its relative significance. Is the profile of this group typical or atypical? In the third part of the chapter, we discuss the process of radicalization leading towards violence and apply insights from the research literature to what little we know about the members of the Toronto 18. The analysis remains preliminary and

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2 Lorne L. Dawson, "Trying to Make Sense of Home-Grown Terrorist Radicalization: The Case of the Toronto 18," in *Religious Radicalization and Securitization in Canada and Beyond*, eds. Paul Bramadat and Lorne Dawson (Toronto: University of Toronto Press, 2014), 64–91; Stewart Bell, "Leadership and the Toronto 18," in *The Evolution of the Global Terrorist Threat: From 9/11 to Osama Bin Ladin's Death*, eds. Bruce Hoffman and Fernando Reinares (New York: Columbia University Press, 2014), 143–62; Marie Ouellet and Martin Bouchard, "The 40 Members of the Toronto 18: Group Boundaries and the Analysis of Illicit Networks," *Deviant Behavior* 39, no. 11 (2018): 1467–482.

3 Alex Wilner, *Enemies Within: Confronting Homegrown Terrorism in Canada* (Halifax: Atlantic Institute for Market Studies, 2008), https://www.deslibris.ca/IDFR/214817; Sam Mullins, "Global Jihad: The Canadian Experience," *Terrorism and Political Violence* 25, no. 5 (2013): 734–76; John McCoy and W. Andy Knight, "Homegrown Terrorism in Canada: Local Pattern, Global Trends," *Studies in Conflict and Terrorism* 38, no. 4 (2015): 253–74.

4 Anne Speckhard and Mubin Shaikh, *Undercover Jihadi: Inside the Toronto 18 Al Qaeda Inspired, Homegrown Terrorism in the West* (McLean, VA: Advances Press, 2014), chapter X.

incomplete since we lack sufficient data – such as interviews with many of the participants themselves or those closest to them.

Attempts to explain what happened in this case, and most others, involve grappling with the specificity problem.[5] When we talk about causes of radicalization to violence, the most plausible set of explanatory factors and processes – such as political grievances, socio-economic status, education, mental health concerns, religiosity, and so on – continue to apply to a wider set of individuals than the few who engage in this kind of political violence.[6] Wide swaths of the Canadian public hold political grievances, for instance, but a vanishingly small percentage ever turn to violence to address them. The explanations offered, in other words, lack sufficient specificity. This limitation is endemic to terrorism studies,[7] but as research continues, we can slowly reduce the gaps in our knowledge. That is our objective in this chapter.

II. THE TORONTO 18 IN COMPARATIVE PERSPECTIVE: WHAT IS HOMEGROWN TERRORISM?

The notion of "homegrown terrorism" entered discourse on security threats in academic and policy circles after the London bombings in 2005. The label identified a seemingly new development, at least in terms of Jihadist terrorism: attacks perpetrated by Muslims living in the West on the other citizens of the same countries. It also came to be associated with the idea that these terrorists operated quite independently of any guidance from more centralized international terrorist organizations, such as al-Qaeda. The use of the term reflected an emerging debate over whether al-Qaeda was in decline and whether security officials should turn their attention to a new

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5 Max Taylor, *The Terrorist* (London: Brassey's, 1988); John Horgan, *The Psychology of Terrorism* (London: Routledge, 2005), 74, 101; Lorne L. Dawson, "Clarifying the Explanatory Context for Developing Theories of Radicalization: Five Basic Considerations," *Journal of Deradicalization* 18 (Spring 2018): 146–84. For the specificity problem, see the summary on 149–52.

6 For overviews of the radicalization literature see e.g., Anja Dalgaard-Nielsen, "Violent Radicalization in Europe: What We Know and What We Do Not Know," *Studies in Conflict and Terrorism* 33, no. 9 (2010): 797–814; Mohammed Hafez and Creighton Mullins, "The Radicalization Puzzle: A Theoretical Synthesis of Empirical Approaches to Homegrown Extremism," *Studies in Conflict and Terrorism* 38, no. 11 (2015): 958–75.

7 Marc Sageman, "The Stagnation in Terrorism Research," *Terrorism and Political Violence* 26, no. 4 (2014): 565–80; Dawson, "Clarifying the Explanatory Context."

threat that is more challenging: networks of more amorphous and autonomous Jihadi cells, or even just radicalized individuals.[8] The new threat was associated with the train bombings in Spain (2004), the London bombings (2005), the Hofstad Group in The Netherlands (2004–2005), Operation Pendennis in Sydney and Melbourne (2005–2006), the Boston Marathon bombings (2013), and later the attacks inspired by the Islamic State in Paris (2015), Brussels (2016), and elsewhere. In fact, the label seemed to apply to a wide array of attacks and plots in Western Europe, the United Kingdom, North America, and Australia, including the Toronto 18.

Use of the term, however, soon came under criticism. With time and further investigation, researchers found links, in some of the key cases, with various international sources of support, training, and guidance. They discovered, for example, that the two leaders of the London bombings, Mohammed Siddique Khan and Shezad Tanweer, twice travelled to Pakistan where they may have received some training and first planned their attack.[9] Moreover, the term seems to apply equally well to earlier instances of "domestic terrorism," such as le Front de liberation du Quebec or the Red Army Faction. The members of these groups came from the nations they were attacking, and they operated through semi-autonomous cells. What then was the difference, and why was a new term necessary? No clear answer is available, yet the term continues to be used in the scholarly literature. There have been some efforts to develop a more systematic approach, teasing apart the precise definitional aspects of the issue. Crone and Harrow, for example, developed a classic fourfold typology with the following ideal types of homegrown terrorism: internal autonomous, internal affiliated, external autonomous, and external affiliated.[10] The latter type is, of course, actually an instance of non-homegrown terrorism.

Overall, however, the term's usage remains loose, and we might best think of it as a continuum, with some cases of terrorism being more homegrown-like than others. In this sense, the Toronto 18 stands out as a quintessential case of "homegrown terrorism." Were the perpetrators citizens or foreign nationals? Were they born and raised largely outside the

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8 Elaine Sciolino and Eric Schmitt, "A Not Very Private Feud Over Terrorism," *New York Times*, June 8, 2008, https://www.nytimes.com/2008/06/08/weekinreview/.html.

9 Bruce Hoffman, "The 7 July 2005 London Bombings," in *The Evolution of the Global Terrorist Threat*, eds. Bruce Hoffman and Fernando Reinares (New York: Columbia University Press, 2014), 192–223.

10 Manni Crone and Martin Harrow, "Homegrown Terrorism in the West," *Terrorism and Political Violence* 23, no. 4 (2011): 521–36.

country? Did they receive training abroad? Were they agents of international terrorist networks? Were they veterans of foreign wars or insurgencies involving terrorist groups or tactics? Did they receive direct guidance and encouragement to perpetrate an attack, online or otherwise, from foreign terrorist groups or individuals? In the case of the Toronto 18, the answer to each question is no, suggesting it should be located towards the homegrown end of a spectrum.

The group did have some online contact with a British extremist, Aabid Khan. Known as Abu Umar, he was an active recruiter for terrorist groups in Pakistan. Investigative reporter Stewart Bell reported that Umar "led the Toronto group's online discussion about how to train, where, with whom, and how to finance it."[11] He also came to Toronto in March of 2005, where two of his online associates, Syed Haris Ahmed and Ehsanul Islam, from Atlanta, Georgia, joined him. During their weeklong visit, they discussed possible terrorist attacks, in the United States and Canada, with some members of the Toronto 18. They also discussed travelling together to Pakistan to receive training. Only one member of the Toronto 18, however, ever went to Pakistan, Jahmaal James, and he fell ill and failed to make contact with any radical groups.

From the limited information available, it is hard to gauge the significance of these contacts. In a brief interview we conducted with the chief RCMP undercover agent, Mubin Shaikh (see also Chapter 4), he suggested several reasons for why he attaches a lot of importance to this visit by Khan and the two budding terrorists from Atlanta:

> They were online for some time. When the two from Atlanta came up, Abid Khan from Manchester came to Toronto as well. They all got together and decided that they were going to do something. This is why after this meeting you had Yasin Mohamed and Ali Dirie go down to bring guns back, you had Jahmaal James go to Pakistan for training, and why you had the training that happened in December. It was this meeting that led them to move from talk to action. [12]

He indicates it solidified the intent of the key members of the Toronto 18 to undertake some kind of training and perpetrate attacks. The record of evidence, from members of the Toronto 18 themselves, is too limited to determine if this is true. The individuals in the Toronto 18 were not members of al-Qaeda, and no foreign terrorist organization ever specifically directed the actions of the Canadians. They were collecting, circulating, and

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11 Bell, "Leadership," 147.

12 Speckhard and Shaikh, *Undercover Jihadi*, 253–54.

discussing ideological texts and videos created by al-Qaeda and other Jihadists, and their conversations reveal that the key members of the group thought they were followers of al-Qaeda. As Bell concludes, they were "al-Qaeda inspired."[13] From our casual conversations with some members of the Toronto 18, however, it seems clear that this label is only accurate for some of them. Others, who came across the label "al-Qaeda inspired" in newspaper articles, felt it did not characterize their involvement accurately.

Using the rhetoric and ideas of al-Qaeda marks the group as Jihadists; it does not help us to gauge whether the group was homegrown. They were a cohort of Canadian citizens, several born in Canada, and all raised in Canada, who independently formed a group and hatched a plot. They financed their own activities, developed their own resources (with the covert help of the RCMP), operated exclusively in Canada, and were intent on killing Canadians to force an adjustment in Canadian government policies with regard to the war in Afghanistan. Overall, this places them very close to the homegrown end of any spectrum, even though they were part of a burgeoning global movement of Jihadist radicalism.

III. The Toronto 18 in Comparative Perspective: Demographic Considerations

This comparative analysis is limited to the ten men convicted in this case (see the timeline in Appendix B for more information, as well as the cast of characters in Appendix A). There is insufficient information available on the one youth convicted, and the three youths and four other adults who had their charges stayed. The *Youth Criminal Justice Act* protects the privacy of young persons who are accused or found guilty of a crime, keeping their identity and other personal information confidential. The current analysis relies, moreover, on open sources, such as court documents and media reports, which poses problems for the reliability of the data. This limitation is, however, endemic to terrorism studies.[14] Below, we compare information on the age, ethnicity, socio-economic status, education and occupation, criminality, family and religious background, and mental health of the members of the Toronto 18 with the limited data available on other Jihadists. To maximize the information provided, this includes both

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[13] Bell, "Leadership," 149–50.

[14] See Sageman, "Stagnation."

participants in domestic attacks and plots and those Western "foreign fighters" who travelled from Europe and North America to fight for Jihadist groups in Syria and Iraq.

A. Age

The age of the ten men convicted in the Toronto 18 case ranged from 18 to 30 years old at the time of their arrest. The average age was 21.8. Nine of the ten were younger than 25 years old. In comparison, assessing the data available on the 336 participants in 65 cases of Jihadist terrorism in Europe between 11 September 2001, and 31 December 2009, Edwin Bakker found that the average age at the time of arrest was 27.7.[15] Examining 171 individuals convicted of al-Qaeda-related offences, or who died in suicide attacks, in the United States between 1997 and 2011, Robin Simcox and Emily Dyer found an average age of 29.6 years. The modal age, however, was 24, with over half being under the age of 30 and one-third between 20 to 24 years.[16] Summarizing the findings of 34 studies with at least some empirical data on foreign Jihadi fighters in Syria and Iraq coming from Europe and North America, Dawson[17] found that ten studies provide mean ages for the men ranging from 23.5[18] to 27.5.[19] The average of the ages reported is 26.5 years. Alex Wilner reports a similar finding from his dataset

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15 Edwin Bakker, "Characteristics of Jihadi Terrorists in Europe (2001–2009)," in *Jihadi Terrorism and the Radicalisation Challenge*, ed. Rik Coolsaet, 2nd ed. (Farnham, Surrey: Ashgate, 2011), 141.

16 Robin Simcox and Emily Dyer, *Al-Qaeda in the United States: A Complete Analysis of Terrorism Offences* (London: Henry Jackson Society, 2013), vii, https://henryjacksonsociety.org/wp-content/uploads/2013/02/Al-Qaeda-in-the-USAbridged-version-LOWRES-Final.pdf.

17 Lorne L. Dawson, "A Comparative Analysis of the Data on Western Foreign Fighters in Syria and Iraq: Who Went and Why?" (February 2021), https://icct.nl/publication/a-comparative-analysis-of-the-data-on-western-foreign-fighters-in-syria-and-iraq-who-went-and-why/."

18 Edwin Bakker and Roel de Bont, "Belgian and Dutch Jihadist Foreign Fighters (2012–2015): Characteristics, Motivations, and Roles in the War in Syria and Iraq," *Small Wars and Insurgencies* 27, no. 5 (2016): 837–57.

19 Norwegian Police Security Service, "What Background do Individuals Who Frequent Extreme Islamist Environments in Norway have Prior to their Radicalisations?" (12 September 2016). There are likely some differences between those who launch domestic attacks and those who become foreign fighters (see Thomas Hegghammer, "Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting," *American Political Science Review* 107, no. 1 (February 2013): 1–15), but they tend to come from the same pool of potential jihadists.

of 95 individuals "with a nexus to Canada who have, or are suspected of having, radicalized, mobilized, and/or participated in Islamist terrorist activity between 2006 and 2017."[20] The average age is 27. In every case, the overall range of ages is quite broad, with older individuals and youth involved. It is clear, however, that Jihadi terrorism is largely a young man's game, but the Toronto 18 stands out as one of the youngest groups of Jihadi terrorists. If we were also to consider the role of multiple underage youths in the group's activities (charged and not charged), then the relative age is even younger.[21]

B. Ethnicity

Like the vast majority of Jihadists in other contexts,[22] the ten adults convicted in the Toronto 18 case were the children of immigrants. Unlike the majority of European Jihadists, however, who are born and raised in Europe,[23] seven of the ten members of the Toronto 18 were born and partially raised elsewhere. They came to Canada as children. One each came from Egypt, Afghanistan, Jordan, Somalia, and Saudi Arabia, and two from Pakistan, though the parents of the child born in Saudi Arabia are Pakistani. Three were born in Canada with parents from Fiji, Pakistan, and the West Indies. Of the ten, six arrived in Canada between the ages of nine and twelve, and one came as a "youth."

The sheer prevalence of immigrant backgrounds suggests that some aspect of the shared immigrant experience plays a significant role in the

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20 Alex Wilner, *Canadian Terrorists by the Numbers: An Assessment of Canadians Joining and Supporting Terrorist Groups* (Ottawa: MacDonald-Laurier Institute, 2019), 21, https://macdonaldlaurier.ca/files/pdf/20190205_MLI_Canadian_Terrorists_Wilner_PAPERWebFinal.pdf.

21 In the studies, it is not always clear whether the age stated reflects the age when individuals left to fight abroad, were arrested or convicted for a terrorist offence, or simply when they were interviewed. Moreover, the relationship of the average ages reported to the time at which the individuals first radicalized remains unknown. Scholars engaged in the study of Jihadists in the West have sensed they are getting younger (see e.g., Robin Simcox, "The Islamic State's Western Teenage Plotters," *CTC Sentinel* 10, no. 2 (February 2017): 21–26.). However, only one study has documented this trend so far (see e.g., Shandon Harris-Hogan and Kate Barrelle, "Young Blood: Understanding the Emergence of a New Cohort of Australian Jihadists," *Terrorism and Political Violence* 32, no. 7 (June 2018): 11).

22 Bakker and de Bont, "Characteristics," 139; Dawson, "Clarifying the Explanatory Context."

23 Bakker and de Bont, "Characteristics," 139.

process of radicalization.[24] How this is the case, however, is far from clear. There is much speculation about the potential influence of generational culture clashes at home, generational refugee trauma, racism and discrimination, immigrant religious identity, and the failure of integration and inclusion in the process of radicalization.[25] The specificity problem looms large, however, since millions of young people from immigrant backgrounds experience these challenges, and only a few ever engage in ideologically inspired violence.[26]

Some scholars of European Jihadism have also noted a tendency for Western Jihadist terrorists to cluster along ethnic lines.[27] Three of the four bombers in London, for instance, were second-generation Muslims of Pakistani origin while seven of the nine men arrested in Melbourne, and five of the nine men arrested in Sydney, in Operation Pendennis, shared a Lebanese background. In the Toronto 18 case, the ethnic composition of the group is much more diverse. The bond seems to be primarily their shared identity as Muslim immigrants, and many were students together in high schools where Muslims were a distinct minority.

C. Socioeconomic Status, Education, and Occupation

From the data gathered on 336 Jihadi terrorists (between 2001 and 2009) from open sources (e.g., media and court records), Bakker was able to

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24 Lorne L. Dawson, "Sketch of a Social Ecology Model for Explaining Homegrown Terrorist Radicalisation," *The International Centre for Counter-Terrorism: The Hague* 8, no. 1 (2017), https://dx.doi.org/10.19165/2017.1.01.

25 Basia Spalek, "Disconnection and Exclusion: Pathways to Radicalization?" in *Islamic Political Radicalism: A European Perspective*, ed. Tahir Abbas (Edinburgh: University of Edinburgh Press, 2007), 192–206; Mirella L. Stroink and Richard V. Wagner, "Process and Preconditions Underlying Terrorism in Second Generation Immigrants," *Peace and Conflict* 13, no. 3 (2007): 293–312; Jocelyne Cesari, "Muslims in Europe and the Risk of Radicalism," in *Jihadi Terrorism and the Radicalisation Challenge in Europe*, ed. Rik Coolsaet (Aldershot: Ashgate, 2008), 97–107; Stuart Croft, "Constructing Ontological Insecurity: The Insecuritization of Britain's Muslim," *Contemporary Security Policy* 33, no. 2 (2012): 219–35.

26 Maria Sobolewska, "Religious Extremism in Britain and British Muslims: Threatened Citizenship and the Role of Religion," in *The New Extremism in 21st Century Britain*, eds. Roger Eatwell and Matthew J. Goodwin (London: Routledge, 2010), 23–46; Sadiq Rahimi and Raissa Graumans, "Reconsidering the Relationship Between Integration and Radicalization," *Journal of Deradicalization* 5 (Winter 2015): 28–62.

27 Petter Nesser, *Islamist Terrorism in Europe: A History* (Oxford: Oxford University Press, 2015); Angel Rabasa and Cheryl Benard, *Eurojihad: Patterns of Islamist Radicalization and Terrorism in Europe* (New York: Cambridge University Press, 2015).

glean limited information on the socio-economic status of only 93 individuals.[28] He estimates five of these came from upper-class backgrounds, 36 from middle class, and 52 from lower class. The occupational data for 125 individuals reflects this preponderance of persons with lower socio-economic backgrounds. Thirty-four were unskilled workers, 19 had semi-skilled occupations, and only 16 had jobs that might be skilled. Thirty percent were unemployed when arrested.[29] These findings correspond with Dawson's synthesis of findings from 34 studies with empirical data on Western foreign Jihadist fighters.[30] He found there is a substantial number of studies of European foreign fighters that indicate these fighters come disproportionately from the lower socio-economic ranks of society. The education levels are lower as well, and the levels of unemployment are higher than the norm in their countries.[31]

In every case, however, information is available for only a small subset of the foreign fighters in their samples, and, given the reliance on open sources or police records, the reliability and representativeness of the data is unknown. There are also sizable numbers of fighters who run contrary to this trend. Ahmed and Pisoiu found, for example, that while the majority of the German fighters in their sample (54) were working class, the majority of the British fighters were middle class (with data for 41 individuals). Likewise, educationally, one-third of the U.K. sample "were university educated or about to attend university," while most of the Germans had not progressed beyond high school and only one had gone to university. Occupationally, the discrepancies continue, with U.K. fighters being

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28 Bakker and de Bont, "Characteristics."

29 Bakker and de Bont, "Characteristics," 140.

30 Dawson, "Western Foreign Fighters."

31 Daan Weggemanns, Edwin Bakker and Peter Grol, "Who Are They and Why Do They Go?: The Radicalisation and Preparatory Processes of Dutch Jihadist Foreign Fighters," *Perspectives on Terrorism* 8, no. 4 (2014): 100–10; Anton W. Weenink, "Behavioral Problems and Disorders among Radicals in Police Files," *Perspectives on Terrorism* 9, no. 2 (2015): 17–33; Bakker and de Bont, "Belgian and Dutch"; Linus Gustafsson and Magnus Ranstorp, *Swedish Foreign Fighters in Syria and Iraq: An Analysis of Open-Source Intelligence and Statistical Data* (Bromma, Sweden: Arkitektkopia AB, 2017) Center for Asymmetric Threat Studies, Swedish Defence University, 2017), http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1110355&dswid=-450; Sean C. Reynolds and Mohammed M. Hafez, "Social Network Analysis of German Foreign Fighters in Syria and Iraq," *Terrorism and Political Violence* 31, no. 4 (2019): 661–86.

primarily students and then white-collar workers, and German fighters being blue-collar workers, students, or persons with no occupation.[32]

Simcox and Dyer report that 52% of those who committed an al-Qaeda related offence in the United States (from 1997 to 2011), "had attended some form of college." For those perpetrators born in the U.S., the number is even higher, with 60% receiving a college education. In fact, nearly a quarter (23%) "had been educated to between college graduate and doctorate level."[33] Forty-four percent of the perpetrators were employed and 13% were students; for American-born offenders, 49% were employed and 18% were students. Wilner reports, "that just under half of the sample [of Canadian Jihadists] had enrolled in post-secondary education programs." Comparing this data with findings from Europe, he concludes, "the educational achievement of Canadian and American Islamists is exceptionally high."[34]

Eight of the ten adults convicted in the Toronto 18 case had completed high school and six had some exposure to university or college. When arrested, one had completed three years of a four-year degree before dropping out, two were full-time university students, and one was a part-time college student. There is insufficient information on the education or occupations of two others. With regard to the others, we know one was a successful entrepreneur running his own software design business, one had a semi-skilled job and was a part-time student, two were university students, and four were unemployed. The limited information available on the families suggests they largely came from the kinds of lower-middle-class to middle-class households typical of the two suburban areas where they lived (i.e., Scarborough and Mississauga). Saad Khalid says he had a typical middle-class immigrant upbringing in suburbia.[35] The majority, it is fair to say, had not experienced any real material hardship in their childhoods. It

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32 Reem Ahmed and Daniela Pisoiu, *Foreign Fighters: An Overview of Existing Research and a Comparative Study of British and German Foreign Fighters* (Hamburg, Germany: Institute for Peace Research and Security Policy at the University of Hamburg, 2014), 11–12, https://www.semanticscholar.org/paper/ZEUS-WP-8-Foreign-fighters-Foreign-fighters-%3A-An-of-Ahmed-Pisoiu/8e04f0be7559a36fb78b90e6ee0459173b354b36.

33 Simcox and Dyer, *Al-Qaeda in the United States*, viii–ix.

34 Wilner, *Canadian Terrorists*, 23.

35 Janet Davison and Janet Thomson, "Homegrown terrorist: Toronto 18 bomb plotter Saad Khalid recalls his radicalization," *CBC*, April 16, 2014, https://www.cbc.ca/news/homegrown-terrorist-toronto-18-bomb-plotter-saad-khalid-recalls-his-radicalization-1.2532671.

is hard to draw any strong conclusions from the lower levels of education and employment of some of the members of the Toronto 18, however, since the data may simply be an artefact of their age. Certainly, it is fair to say that the ringleaders, Fahim Ahmad (unemployed) and Zakaria Amara (a gas bar attendant and part-time student), were underemployed and experiencing some hardship.

Both were married with children, though they were only 21 and 20 years old respectively. In their statements to the Court, each indicated the pressures they were experiencing as young husbands and parents struggling to provide for their families. In addition, they may have been experiencing some form of relative deprivation.[36] However, it is also fair to say that they may not have had much interest in achieving more, in a conventional sense, because of their radical commitments and rejection of the rest of society. They both were working hard at being extremists, so the causal relationship is unclear.

These findings point to the diversity of Jihadists, but, more tellingly, they are indicative of the differences many researchers have noticed between Jihadists in Western Europe, the U.K., and North America. Consequently, while experiencing low socio-economic prospects may play a causal role in the turn to Jihadism in Western Europe, its overall role in the process of radicalization, given the U.K. and American data, is less clear. Moreover, in the end, it is not clear what the findings mean. Is the failure to complete a level of education, for example, a causal indicator of radicalization or an effect of radicalization? In some cases, it may be the former, in others it may be the latter, or it may be both.

D. Criminality

Bakker reports that one-fifth of his sample of 336 Jihadists had a prior criminal record and only a few of these arrests related to terrorist activities.[37] Given the youthfulness of most of the Jihadists, this level of criminality is not particularly noteworthy because of the well-established age-crime curve

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[36] Rabasa, Benard, and others note that some data points to a substantial gap between the education levels and forms of employment of second-generation Jihadi terrorists in the U.K., so a sense of "relative deprivation" may be a contributing factor in their radicalization (see Rabassa and Benard, *Eurojihad*, 66). In the absence of appropriate interview data, however, it is hard to assess this possibility.

[37] Bakker and de Bont, "Characteristics."

detected by criminologists.[38] Young people, especially adolescents, perpetrate most crimes, and rates of offence start to decline sharply from the early to mid-20s. There has been little systematic effort, however, to apply findings from criminology and psychology on the links between youth and deviance to aspects of the process of radicalization.[39]

Nevertheless, evidence of the prior criminality of many Jihadists has set off discussions of a "crime-terror nexus."[40] In his analysis of 34 studies of Western foreign fighters, however, Dawson could find only ten that discuss data related to their criminal backgrounds.[41] Only seven of these studies present original data, and much of it is limited. Nonetheless, the studies suggest that foreign fighters do have unusually high levels of prior criminality. Bakker and de Bont state, for example, that "roughly 20%" of the Belgian and Dutch Jihadists in their sample had been "suspected of criminal activity prior to departure."[42] In this and other cases, though, much of the evidence on the criminal background of European fighters stems from police registries of "suspected criminal activities," and not convictions per se. At least seven other studies, presenting original qualitative data and case studies, fail to note any particular criminal proclivity or involvement in criminal networks.

Simcox and Dyer do not report any data about the prior criminality of perpetrators of al-Qaeda-related offences in the U.S. between 1997 and 2011.[43] This holds true for another large study of U.S. Jihadists, Lorenzo Vidino and Seamus Hughes' analysis of 71 individuals charged with ISIS-related activities between March 2014 and December 2015.[44] However, a similar study of Islamist terrorist offences in the U.K between 1998 and 2015, by Hannah Stuart, states, "[t]hirty-eight per cent of [Islamist-related offences] were committed by individuals with previous criminal convictions

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38 David P. Farrington, "Age and Crime," in *Crime and Justice: An Annual Review of Research*, vol. 7, eds. Michael Tonry and Norval Morris (Chicago: University of Chicago Press, 1986), 189–250.

39 Harris-Hogan and Barrelle, "Young Blood," 11–13.

40 Rajan Basra and Peter R. Neumann, "Criminal Pasts, Terrorists Futures: European Jihadists and the New Crime-Terror Nexus," *Perspectives on Terrorism* 10, no. 6 (2016): 25–40.

41 Dawson, "Western Foreign Fighter."

42 Bakker and de Bont, "Belgian and Dutch," 844.

43 Simcox and Dyer, *Al-Qaeda in the United States*.

44 Lorenzo Vidino and Seamus Hughes, "ISIS in America: From Retweets to Raqqa," Program on Extremism, George Washington University, December 2015, https://extremism.gwu.edu/isis-america.

(26%) or a history of police contact, including prior investigations, arrests and charges that did not result in a conviction or control order/TPIM (12%)."[45]

Addressing the Canadian context, Wilner notes:

> [T]he vast majority of the Canadian profiles did not have a criminal background prior to their radicalization or mobilization to violence. Only 11 percent are reported to have criminal charges laid against them prior to involvement in political violence (for theft, vandalism, drug possession, or domestic abuse, for instance).[46]

Only one member of the Toronto 18 had a criminal conviction, Mohammed Ali Dirie. This was for attempting to smuggle two handguns into Canada from the U.S. in August 2005, at the behest of Fahim Ahmad, one of the two ringleaders of the Toronto 18. Ahmad had rented the car Ali Dirie was driving when arrested at the border.

On balance then, while there is some evidence for the significance of the crime-terrorism nexus in the case of European Jihadists, including the Jihadist foreign fighters, the overall evidence for the linkage is limited, fragmentary, and a bit opaque. Certainly, it does not seem to be a causal factor shared by the Toronto 18, and perhaps North American Jihadist offenders in general. Even where there is evidence that Jihadists come disproportionately from those with criminal backgrounds, the results are open to different interpretations. Is there a continuum of motivations for criminal and terrorist activities, as Rik Coolsaet[47] and others imply, or is the turn to Jihadism indicative of an urge to overcome the criminality? The answer makes all the difference when considering the motivations of these individuals. Similarly, it is not entirely clear how knowing that a particular individual had a prior history of a non-violent offence, like vandalism, would help researchers understand their radicalization trajectory. Much of the data in the literature on the crime-terror nexus, much like the data on mental health and radicalization (discussed below), needs to be disaggregated in order to be potentially meaningful. Furthermore, some of the criminal activity reported may be the result of radicalization rather than

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45 Hannah Stuart, *Islamist Terrorism: Analysis of Offences and Attacks in the UK (1998–2015)* (London: Henry Jackson Society, 2017), x.

46 Wilner, *Canadian Terrorists*, 23.

47 Rik Coolsaet, "Facing the Fourth Foreign Fighters Wave: What Drives Europeans to Syria, and to Islamic State? Insights from the Belgian Case," *Egmont: The Royal Institute for International Relations* 81 (March 2016), http://www.egmontinstitute.be/facing-the-fourth-foreign-fighters-wave/.

a precursor. At this time, it is not clear how the two phenomena are related, and to the best of our knowledge, the majority of Jihadists simply have not been engaged in criminal activity, a fact too often overlooked.

E. Mental Health

In both the popular and academic imaginations, there has been a strong tendency to think of terrorists as somehow psychologically abnormal. Consequently, researchers sought to correlate terrorists with diagnosable psychopathologies or personality disorders.[48] The traits and behaviours proposed have proved to be either too vague or insufficiently present. As predicted by Martha Crenshaw, the limited data available suggests that the most "outstanding characteristic" of terrorists is their "normality."[49] Some terrorists surely are suffering from forms of mental disorders, but, as Victoroff concludes, the research literature shows that terrorists "are psychologically extremely heterogeneous."[50] More recent and methodologically sophisticated approaches are generating findings about the mental health issues of specific types of terrorists.[51] The findings indicate that mental health issues play a role, though still less than anticipated, in lone-actor terrorism, and that it is more prevalent with single-issue forms of lone-actor terrorism (e.g., animal-rights, anti-abortion) than Jihadist or extreme right-wing terrorism.[52] Contrary to popular prejudices, however, the prevalence of mental disorders amongst group-based terrorists is markedly lower than in the general population.

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48 Andrew Silke, "Cheshire-Cat Logic: The Recurring Theme of Terrorist Abnormality in Psychological Research," *Psychology, Crime and Law* 4, no. 1 (1998): 51–69; Jeff Victoroff, "The Mind of the Terrorist: A Review and Critique of Psychological Approaches," *Journal of Conflict Resolution* 49, no. 1 (2005): 3–42; Horgan, *Psychology of Terrorism*; Arie W. Kruglanski and Shira Fishman, "The Psychology of Terrorism: 'Syndrome' Versus 'Tool' Perspectives," *Terrorism and Political Violence* 18, no. 2 (2006): 193–215.

49 Martha Crenshaw, "The Causes of Terrorism," *Comparative Politics* 13, no. 4 (1981): 379–99.

50 Victoroff, "Mind of the Terrorist," 35.

51 Paul Gill, John Horgan and Paige Deckert, "Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists," *Journal of Forensic Sciences* 59, no. 2 (2014): 425–35; Emily Corner, Paul Gill and Margaret Bull Kovera, "A False Dichotomy? Mental Illness and Lone-Actor Terrorism," *Law and Human Behavior* 39, no.1 (2015): 23–34; Emily Corner and Paul Gill, "Is There a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?" *CTC Sentinel* 10, no. 1 (2017): 1–10.

52 Corner and Gill, "A False Dichotomy," 30–31.

Bakker reports that 12 of the 336 persons in his sample appear to "suffer from mental illness or disabilities" and notes that this level is higher than the world base rate. He notes, however, that four of the individuals only "started to show symptoms of mental illness after their arrests."[53] Simcox and Dyer provide no data on mental health for their sample of American Jihadists, nor do Vidino and Hughes.[54] Stuart does not discuss the issue in her analysis of Islamist-inspired terrorists in the U.K., and Wilner does not address the issue in his overview of Canadian Jihadists.[55]

Dawson found that only four of the 34 studies on Western foreign fighters he examined offer any data on the number of fighters with psychological disorders, and the figures are discrepant.[56] Weenink, for example, reports that 6% of his sample of 140 Dutch fighters had diagnosed mental health problems, but he thinks the presence of "serious problem behaviour" is much higher.[57] Bakker and de Bont (2016) conclude that only 2% of their sample of 370 Dutch and Belgian foreign fighters "had some sort of psychological disorder before traveling to Syria," but this rather broadly includes "feeble-mindedness, attention deficit hyperactivity disorder, schizophrenia, and claustrophobia."[58] A report on foreign fighters by the Norwegian Police provides a much higher figure but states that the "distribution of mental problems are no more prominent among the individuals in the study (21%) than what would be expected in a control group drawn from a comparable segment of the general population."[59] There are also conceptual and methodological differences between these studies that make comparisons of the data problematic. Still, overall, it appears that serious mental health problems do not play a significant role in the radicalization of militant Jihadists.

What about the members of the Toronto 18? The limited evidence available from the court documents suggests they largely conform to the same conclusion. None of the ten adults convicted were suffering from diagnosable mental illnesses or personality disorders. They were struggling with life issues that troubled them in ways that would not particularly differentiate them from many of their peers. One of the more peripheral

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53 Bakker and de Bont, "Characteristics," 141.
54 Simcox and Dyer, *Al Qaeda and the United States*; Vidino and Hughes "ISIS in America."
55 Stuart, *Islamist Terrorism*; Wilner, *Canadian Terrorists by the Numbers*.
56 Dawson, "Western Foreign Fighters."
57 Weenink, "Behavioral Problems."
58 Bakker and de Bont, "Belgian and Dutch," 884.
59 Norwegian Police, "What Background," 8.

figures, Asad Ansari, for example, was reported to have been very depressed because he could not afford to go to the university of his choice to study computer science. Instead, he pursued a business degree at a school closer to home but dropped out in his first year. In sentencing Saad Khalid and Saad Gaya, the two captured unloading the fertilizer for the bombs, the judge quoted a psychiatric report which found that their motivations did "not flow from anti-sociality, impulsivity or psychopathy".[60] There was "no substance abuse, intellectual impairment, or significant personality maladjustment."[61]

Rather, they were motivated by their religious beliefs, sympathy for the suffering of fellow Muslims elsewhere, and a perceived need to take a stand against the foreign policy that lead to this suffering.[62] The psychological report determined that Khalid was "a young man with many pro-social characteristics, raised in a middle-class supportive family and university educated."[63] Gaya had been "a studious, dependable, and pro-social individual who excelled in educational, employment, volunteering and social spheres."[64] Both became extremists, in part, because of their strong "affiliative needs," "need to emulate powerful and influential leaders," and "youthful naiveté."[65] In addition, Khalid might have been "vulnerable" because of the death of his mother by drowning in 2004.[66] This latter factor, however, represents more of a triggering event than a motivation for radicalization rooted in a mental health issue. Like the more general "needs" referenced by the judge, it is hard to determine what role these soft factors actually played in the radicalization of some of the Toronto 18 members. The problem of specificity comes to the fore again in this situation.

F. Family and Religious Background

Reliable information on the family and religious background of most Jihadists is not available, and this is largely true for the Toronto 18 as well. Bakker has some information for only 56 persons out of his sample of 336 European Jihadi terrorists. Nineteen of these were converts to Islam, and

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60 R v. Khalid, 2009 CarswellOnt 9874 at para 34 (Ont Sup Ct) [*Khalid* (ONSC)]; R v. Gaya, 2010 ONSC 434 at para 43.

61 *Gaya*, ONSC at para 43.

62 *Khalid* (ONSC), CarswellOnt at para 34; *Gaya*, ONSC at para 43.

63 *Khalid* (ONSC), CarswellOnt at para 34.

64 *Gaya*, ONSC at para 43.

65 *Khalid* (ONSC), CarswellOnt at paras 31, 128; *Gaya*, ONSC at para 43.

66 *Khalid* (ONSC), CarswellOnt at para 128; Speckhard and Shaikh, *Undercover Jihadi*, 146.

this is likely why this variable received even some attention in the open sources used to create his dataset. For the other 37 persons, "11 were raised in a religious family and 26 did not have a particularly religious childhood."[67] Simcox and Dyer present no pertinent information other than their analysis of the role of religious converts in al-Qaeda related offences in the U.S. In line with others,[68] they found that converts are significantly overrepresented. Coverts committed 24% of offences, and 54% of the offenders born in the U.S. were converted.[69] Stuart similarly reports that converts perpetrated 16% of Islamist-related offences in the U.K.,[70] while Wilner reports that 20% of his sample of Canadian Jihadists are converts.[71] Only one member of the Toronto 18, Steve Chand, was a convert. The vast majority of Jihadists come from Muslim families, and we know little about the levels and types of religiosities in these families.[72]

Only Shareef Abdelhaleem, the oldest member of the Toronto 18 (at 30), is known to have come from a devout family. His father was an Islamic scholar, had a Ph.D., and held conservative views. Court records indicate that two others, Fahim Ahmad and Saad Gaya, came from "moderate Muslim households."[73] It is unclear, however, what this means, and Ahmad's comments on his own family suggest they were only nominally religious. The other families appear to have been largely secular, but little is known.

As the courts noted, certain insecurities in the family backgrounds of five of the ten adults convicted may have contributed to their vulnerability to radicalization. No information is available for the other five. Since

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67 Bakker and de Bont, "Characteristics," 140.

68 Bart Schuurman, Peter Grol, and Scott Flower, "Converts and Islamist Terrorism: An Introduction," International Centre for Counter-Terrorism, Policy Brief (June 2016), https://openaccess.leidenuniv.nl/handle/1887/46602

69 Simcox and Dyer, *Al-Qaeda in the United States*, ix.

70 Stuart, *Islamist Terrorism*, ix.

71 Wilner, *Canadian Terrorists by the Numbers*, 23.

72 In an earlier analysis of 172 persons involved in the global Jihadist movement, Sageman suggests there is a discrepancy between the largely religious background of most of the non-European members of his sample and those residing in Europe. The latter appear to come from relatively secular, or at least non-practicing, families, while many of the members of al-Qaeda from the Middle East were very religious as youths (70%) and came from quite observant families. The data, however, is fragmentary and inferential at best. See Marc Sageman, *Understanding Terror Networks* (Philadelphia: University of Pennsylvania Press, 2004), 77–78.

73 *Khalid* (ONSC), CarswellOnt at para 31.

immigrating, for example, Ahmad's parents were forced to work long hours at low-paying jobs to make ends meet, despite being well educated. Amara's mother was Christian, and the family relocated several times during his childhood before his parents divorced. Similarly, Chand's parents divorced when he was nine years old. Dirie's father was killed in Somalia before the family immigrated to Canada, and Khalid's mother died suddenly when he was 15 years old. Each of these disruptive experiences may have contributed to their radicalization, but no clear causal link exists. The specificity issue arises again as such uncertainties differ little from those faced by many of their peers who did not radicalize.

IV. THE TORONTO 18 IN COMPARATIVE PERSPECTIVE: THE PROCESS OF RADICALIZATION

The full research corpus on radicalization is too copious to review here, but there is a need to provide some insight into the elements of this process to help contextualize many of the other contributions to this volume. When the Toronto 18 arrests happened in 2006, few people had heard of "radicalization," and the concept was broadly associated with the leftist violent extremism of the 1960s, 70s, and 80s and groups like the Red Brigades, the Red Army Faction, and the Weathermen. In those cases, the focus of attention was on how groups of young activists involved in large social movements (e.g., opposition to the war in Vietnam) became frustrated with peaceful means of protest and gradually turned to more violent actions.[74]

With the Madrid bombings in 2004 and the London bombings in 2005, the concept of radicalization gained more prominence and its meaning shifted. The focus became the more perplexing phenomenon of

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74 Klaus Wasmund, "The Political Socialization of West German Terrorists," in *Political Violence and Terror: Motifs and Motivations*, ed. Peter H. Merkl (Berkeley, CA: University of California Press, 1986), 191–228; Donatella Della Porta, "Recruitment Process in Clandestine Political Organizations: Italian Left-Wing Terrorism," in *International Social Movement Research*, vol. 1, eds. Bert Klandermans, Hanspeter Kriesi, and Sidney Tarrow (Greenwich, CT: JAI Press, 1988), 155–69; Ehud Sprinzak, "The Psychopolitical Formation of Extreme Left Terrorism in a Democracy: The Case of the Weathermen," in *Origins of Terrorism: Psychologies, Ideologies, Theologies, States of Mind*, ed. Walter Reich (Washington, DC: Woodrow Wilson International Center for Scholars, 1990), 65–85.

"homegrown terrorism."[75] Attention pivoted from social movements and processes of gradual socialization to violence, to the social and psychological factors and processes involved in a more rapid process of turning small and relatively autonomous groups of ordinary, and largely apolitical, young men into lethal Jihadists. Individual pathways to violence were examined,[76] and several rather simple models of radicalization advanced.[77] As case studies of radicalized groups and individuals proliferated,[78] the need for a more sophisticated approach grew.[79] Soon, more complex conceptions of

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75 Aiden Kirby, "The London Bombers as 'Self-Starters': A Case Study in Indigenous Radicalization and the Emergence of Autonomous Cliques," *Studies in Conflict and Terrorism* 30, no. 5 (2007): 415–28; Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Philadelphia: University of Pennsylvania Press, 2008); Crone and Harrow, "Homegrown Terrorism"; Stefan Malthaner, "Radicalization: The Evolution of an Analytical Paradigm," *European Journal of Sociology* 58, no. 3 (2017): 369–401.

76 John Horgan, "From Profiles to Pathways and Roots to Routes: Perspectives from Psychology on Radicalization into Terrorism," *Annals of the American Academy of Political and Social Science* 618, no. 1 (2008): 80–94.

77 For example, Fathali M. Moghaddam, "The Staircase to Terrorism: A Psychological Exploration," *American Psychologist* 60, no. 2 (2005): 161–69; Mitchell D. Silber and Arvin Bhatt, *Radicalization in the West: The Homegrown Threat* (New York City Police Department, 2007), https://seths.blog/wp-content/uploads/2007/09/NYPD_Report-Radicalization_in_the_West.pdf; Sageman, "Leaderless Jihad."

78 For example, Lorenzo Vidino, "The Buccinasco Pentiti: A Unique Case Study of Radicalization," *Terrorism and Political Violence* 23, no. 3 (2011): 398–418; Virginie Andre and Shandon Harris-Hogan, "Mohamed Merah: From Petty Criminal to Neojihadist," *Politics, Religion and Ideology* 14, no. 2 (2013): 307–19; Nesser, *Islamist Terrorism In Europe*; Bart Willem Schuurman, Quirine A.M. Eijkman and Edwin Bakker, "The Hofstadgroup Revisited: Questioning its Status as a 'Quintessential' Homegrown Jihadist Network," *Terrorism and Political Violence* 27, no. 5 (2015): 906–25.

79 Max Taylor and John Horgan, "A Conceptual Framework for Addressing Psychological Process in the Development of the Terrorist," *Terrorism and Political Violence* 18, no. 4 (2006): 585–601; Dalgaard-Nielsen, "Violent Radicalization in Europe"; Michael King and Donald M. Taylor, "The Radicalization of Homegrown Jihadists: A Review of Theoretical Models and Social Psychological Evidence," *Terrorism and Political Violence* 23, no. 4 (2011): 602–22.

radicalization started to emerge,[80] along with greater awareness of the explanatory limits of existing models.[81] In recent years, several innovative ways of conceiving of the process have emerged.[82]

It is now widely recognized that no two individuals radicalize in the same way, and the process of radicalization does not involve a simple or linear progression through stages.[83] Rather, we need to think in terms of many and diverse factors that impact, in various combinations and to varying degrees, the extent and type of involvement of individuals in violent extremism. Radicalization is the result of the dynamic interplay of individuals with their environments and contingencies that influence each person's case in ways that are hard to predict.[84] Nevertheless, as empirical research indicates, there are commonalities.

Zakaria Amara's comments on his own radicalization, as illicitly posted on a Facebook page in 2018, reflect this reality:

> Guilty, I am. Radicalized I was. Yet I still find my entire situation incredibly surreal. I often go back in time in order to retrace my steps and figure out how I ended up here. Every time I engage in this exercise, I find a young man who was caught up in a perfect storm of internal and external influences. The inevitability of it all is what I find most remarkable.

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80 Alex P. Schmid, "Radicalisation, De-Radicalisation, Counter-Radicalisation: A Conceptual Discussion and Literature Review," *The International Centre for Counter-Terrorism – The Hague* 4, no. 2 (2013): 1–65, http://dx.doi.org/10.19165/2013.1.02; Hafez and Mullins, "The Radicalization Puzzle"; Malthaner, "Radicalization".

81 Mark Sedgwick, "The Concept of Radicalization as a Source of Confusion," *Terrorism and Political Violence* 22, no. 4 (2010): 479–94; Oluf Gøtzsche-Astrup, "The Time for Causal Designs: Review and Evaluation of Empirical Support for Mechanisms of Political Radicalisation," *Aggression and Violent Behavior* 39, no.1 (2018): 90–99; Matteo Vergani et al., "The Three Ps of Radicalization: Push, Pull and Personal. A Systematic Scoping Review of the Scientific Evidence about Radicalization into Violent Extremism," *Studies in Conflict and Terrorism* 43, no. 10, https://doi.org/10.1080/1057610X.2018.1505686; Dawson, "Clarifying the Explanatory Context."

82 Dawson, "Sketch of a Social Ecology Model"; Arie W. Kruglanski et al., "The Making of Violent Extremists," *Review of General Psychology* 22, no. 1 (2018): 107–20; Noémie Bouhana, *The Moral Ecology of Extremism: A Systemic Perspective*, prepared for the U.K. Commission for Countering Extremism, July 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/834354/Bouhana-The-moral-ecology-of-extremism.pdf.

83 Horgan, "From Profiles to Pathways"; Jonathan Rae, "Will it ever be Possible to Profile Terrorists?" *Journal of Terrorism Research* 3, no. 2 (2012): 1–6; Dawson, "Clarifying the Explanatory Context," 152–57.

84 Dawson, "Sketch of a Social Ecology Model," 3.

In this chapter, we integrate insights from two of the newer theories, Dawson's social ecology model of radicalization and Kruglanski's significance quest theory, to make some sense of the complex realities of the radicalization of the Toronto 18. Each theory synthesizes data and insights from the broader literature while pointing to the pivotal role of three factors in the radicalization of individuals. Kruglanski and colleagues[85] have appealingly identified these three factors as "the need," "the narrative," and "the network." Each of these labels actually identifies a cluster of related factors. Adopting a somewhat more multifaceted and specifically ecological approach, Dawson discusses these three factors as well, but as aspects of five ecological niches or contexts of dynamic interaction between individuals and environmental factors. The relevant ecological niches are: (1) the structural features of late modern society; (2) immigrant experience; (3) youthful rebellion; (4) ideology; and (5) small group dynamics.[86]

These five niches align, quite readily, with Kruglanski et al.'s three factors. The first three ecological niches address the factors influencing someone's openness to be radicalized, Kruglanski et al.'s "need." Dawson's fourth ecological niche, discussing the crucial role of ideology in framing this need, addresses Kruglanski et al.'s "narrative." Kruglanski et al.'s "network" is part of Dawson's fifth niche, focusing on the role of small group dynamics in consolidating radical commitments. There are slight differences between the two theories, but the theories are remarkably similar in their identification and delineation of the crucial contributors to radicalization. Moreover, each theory integrates the role of an array of macro, meso, and micro aspects of human existence, while keeping a commonsensical focus on how these factors impact individuals. In each case, the focus is on why and how individuals interpret the world while searching for meaning and significance, in ways that are consonant with engaging in the extreme violence characteristic of terrorism.

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85 David Webber and Arie W. Kruglanski, "Psychological Factors in Radicalization: A '3 N' Approach," in *The Handbook of the Criminology of Terrorism*, eds. Garry LaFree and Joshua D. Freilich (West Sussex, England: Wiley-Blackwell, 2018), 33–46; Kruglanski et al., "The Making of Violent Extremists."

86 Dawson, "Sketch of the Social Ecology Model"; Amarnath Amarasingam and Lorne L. Dawson, *'I Left to be Closer to Allah' – Learning about Foreign Fighters from Family and Friends* (London: Institute of Strategic Dialogue, 2018), http://www.isdglobal.org/wp-content/uploads/2018/05/Families_Report.pdf.

In fact, both theories identify the search for personal significance as the "dominant need that underlies violent extremism."[87] Kruglanski has been a leading researcher exploring the "quest for personal significance" in experimental social psychology and based on some of his earlier publications, Dawson incorporates this notion into his model. In many cases, the research suggests that people come under the sway of a drive for greater personal significance "in the wake of negative, stressful, or traumatic circumstances." In these circumstances, engagement in extremist violence serves to compensate for a perceived loss of significance, for either the individual or a group they strongly identify with.[88] This is not always the case, however, and sometimes the path to extremism is simply rooted in a higher-than-normal personal need for significance, absent any preceding specific loss.[89]

Kruglanski et al. specify at least three reasons why violence can be attractive to individuals searching for significance. First, "it sends an unambiguous message about the importance of a cause" and hence those promoting it, and it is "almost sure to make [them] feel noticed and agentic." Second, engaging in violence for a cause dramatically heightens commitment to the cause and strengthens intragroup bonding. Being violent is "counternormative" and creates cognitive dissonance. The experimental evidence suggests this dissonance is allayed often by doubling down on the commitment underlying the violence. Third, the exercise of violence "demonstrates immediate power, status, and control," and it serves as "a deterrent for future instances of significance loss" by threatening competitors and opponents with the prospect of more violence and hence loss in their significance.[90]

Dawson's use of the concept of a quest for significance is more circumspect; it is only one important part of the puzzle of radicalization. He thinks that it helps to explain, however, why only some individuals, amongst the many who experience the conditions associated with extremism, actually radicalize. An inordinate need to make a difference may be one of the key differentiators, and hence help with the specificity problem. His interest in this factor stems, in part, from his study of the Toronto 18 case.[91] The use

87 Kruglanski et al., "The Making of an Extremist," 108.
88 Kruglanski et al., "The Making of an Extremist," 109.
89 Kruglanski et al., "The Making of an Extremist," 109.
90 Kruglanski et al., "The Making of an Extremist," 114.
91 Lorne L. Dawson, "Trying to Make Sense of Home-Grown Terrorist Radicalization."

of this concept also helps to dissociate the violence characteristic of terrorism from irrationality and pathology and to cast the motivation of the Jihadists as "moral," at least from the perspective of the terrorists. As Dawson states, "young terrorists in the making are gripped by a stronger sense of moral duty than their peers, and not less, as commonly assumed by outsiders."[92]

Becoming a terrorist elevates the sense of significance in association with an altruistic sacrifice of the self for the greater good of the group they identify with. This commitment is visceral and goes well beyond consent to the rhetoric of a justifying ideology. They are fighting to right a wrong, and thereby acquire a transcendent significance, that renders realistically achieving the stated political objectives almost inconsequential.[93]

Dawson situates this need for significance within a context where three sets of pressures are converging for the young men and women drawn to Jihadism. First, there is the heightened awareness of events worldwide brought on by globalization and the explosive intrusion of mass media into peoples' daily lives, combined with the maintenance and even promotion of diaspora identities amongst immigrants who are able, or even feel compelled to, sustain relationships with those left behind or with which they ethnically and religiously identify. Second, personal experiences of marginalization, associated with being immigrants or children of immigrants, reinforce these pressures.[94] A failure to integrate fully and achieve one's dreams, and experiences of perceived discrimination, can lead to a sense of lower significance.[95] In this regard, Dawson calls special attention to the plight of many young Muslim immigrants. They can find themselves managing the expectations of two, often discordant, worlds: the culture and norms of their parents and the expectations of their non-immigrant peers.[96] "For the young," Dawson states, "there is a desperate need to fit in and yet be seemingly unique, and the torque of the situation

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92 Dawson, "Sketch of a Social Ecology Model," 8.

93 Mark Juergensmeyer, *Terror in the Mind of God: The Global Rise of Religious Violence*, 3rd ed. (Berkeley: University of California Press, 2003).

94 Baljit Nagra, *Securitized Citizens: Canadian Muslims' Experiences of Race Relations and Identity Formation Post-9/11* (Toronto: University of Toronto Press, 2017); Tamar Mitts, "From Isolation to Radicalization: Anti-Muslim Hostility and Support for ISIS in the West," *American Political Science Review* 113, no. 1 (2019): 173–94.

95 Kruglanski et al., "The Making of an Extremist," 111.

96 Dawson, "Trying to Make Sense," 81.

can be particularly acute for those from cultural and ethnic minorities."[97] Third, aggravating all the uncertainty of this situation is the fact that most Jihadists radicalize in their adolescence or young adulthood when they are experiencing the normal identity struggles of that time of life. Most of the members of the Toronto 18, we should remember, came to Canada later in their childhood (nine to 12 years old), and they radicalized in high school and their first year of university. We can only speculate, but some of the central figures – Ahmad, Amara, and Khalid, and perhaps others (Ansari and Gaya) – appeared to be struggling to become somebody by finding an adult identity and making a mark in life beyond their humble circumstances.

Some of the comments made by Amara in his Facebook posting are illustrative of this state of affairs:

> After any major Terrorist attack, there usually is a fierce debate about what makes individuals susceptible to radical ideologies... If I had a noose around my neck and the only thing that could save my life was the answer to this apparently dumfounding question then I would have to say it is the emotional state of feeling utterly worthless.
>
> I have always felt worthless... Perhaps I feel this way because I carry within me a strong Inner Critic that has been ripping me apart since childhood. Perhaps it is due to the fact I have always felt like an outsider. You see, even though I am a citizen of this country, I have never felt Canadian.

Thinking of radicalization, Dawson and Kruglanski et al. both recognize that the strong yet inchoate need to matter, to make a difference, and to belong becomes relevant through the influence of a "narrative" and a "network." A clear and strong ideology focuses on the need and turns it into action, rather than aimlessness. It "frames" the issues,[98] and "connects the dots in a satisfying way, one which offers a simple but definitive explanation for their angst, offers a grand solution, targets a culprit, and prescribes a course of action. Most of all it sets the individuals' struggles in a transcendent frame of meaning that gives an ultimate and virtuous purpose to their existence. It places their personal troubles in solidarity with those of a whole people" – the *ummah*.[99]

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97 Dawson, "Sketch of the Social Ecology Model," 6.

98 Quintan Wiktorowicz, *Radical Islam Rising: Muslim Extremism in the West* (Lanham, MD: Rowman and Littlefield Publishers, 2005).

99 Dawson, "Sketch of a Social Ecology Model," 8.

The Jihadist ideology, with its clear and absolute conceptions of good and evil, and the imperative to actually live one's faith, provides cognitive closure and a course of action. It establishes a coherent identity, one welded to a world-transformative project of great significance.[100] Given the youthfulness of most of the members of the Toronto 18, the simplicity of the Jihadi narrative heightened its appeal. As the court records indicate, the group did not have a very good grasp of the geopolitics of the "war on terror," and the judges, in passing sentences, repeatedly cite their youthful naiveté as a mitigating factor in sentencing them. In the case of Khalid, for instance, Justice Durno quite typically states, he was "young and in an impressionable state, and lacking in life experience."[101]

In taking on the Jihadist role and ideology, Amara said on his Facebook page that he felt "worthy, righteous, and heroic." "You see yourself as a saviour of your people," he says: "Your mind is obsessed with injustices that they are suffering from and that's all you wish to talk about. You see the world in strictly black and white terms. Deep inside you suspect that there may be other colours, which subconsciously drives you to engage in constant re-enforcement of your beliefs."

In this regard, it is important to call attention to one particular aspect of the radicalization of the Toronto 18, the role of fantasy. In a letter Ahmad submitted to the court, in the sentencing process, he professes that he was naïve and sought to compensate for the inadequacies of his real life by indulging in a fantasy. The mosque, he says, "was where I could get the attention that I wasn't getting from those closest to me. It was where I could be larger than life and not hear a word of criticism. I would say things, often terrible things, that I felt would get me attention in that fantasy world."[102]

Certainly, in Shaikh's account of the group, as the key RCMP agent, fantasy emerges as a key interpretive theme (e.g., pages 152, 154, 167, 170–171, 184, 190, 191–192). Fahim, in particular, the inspirational leader, was prone to use exaggerated depictions of the group's plans and activities to make them seem far more significant than they were. At the December 2005 amateurish training camp that many participated in at Washago, for example, Shaikh quotes him as saying, with "reverence filling his voice": "look around you brothers... It's just like we're in Chechnya. The winter

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100 Kruglanski et al., "The Making of an Extremist," 111–12.

101 *Khalid* (ONSC), CarswellOnt at para 128.

102 R v. Ahmad, 2010 ONSC 5874 (Exhibit #3: Written Submissions of Fahim Ahmad (Re: Sentencing)).

snow, we are in the woods. We are living the life, brothers! We are living just like the mujahideen are!" We are told that this outburst caused Shaikh to realize that "Fahim wants to enter the pure fantasy of those he considers his life heroes – Chechens and Talibans."[103] Similarly, after checking out the safe house the group was thinking of buying in northern Ontario, Shaikh recounts the following conversation:

> Look, one of the reasons we are getting this place is because we will need to hide out after our big mission at the Parliament," Fahim said as he reentered his grand fantasy of terrorist destruction.
>
> "So what happens at Parliament?" Durrani asked.
>
> "We go and cut off some heads," Fahim answered matter-of-factly.
>
> "Then what?" Durrani asked.
>
> "Then we read about it," Fahim cackled as Mubin pulled the van into a roadside café to take a break.
>
> "We'll attack the Parliament buildings of Canada," Fahim continued as they got out of the van for coffees. "First we'll distract the police with car bombs going off all around the city. That will take all the security forces attention away from the Parliament," Fahim fantasied. "And then when they are responding to the car bombs, we will storm the Parliament buildings![104]

The degree to which fantasy played a significant role in the radicalization of the others in the group remains less clear. Fahim, however, was the "entrepreneur," to use Petter Nesser's label for the ideologically inspired and inspiring leaders of terrorist cells.[105] He created the group, and it would seem reasonable to conclude that part of his success lay in his inclination and ability to spin such fantasies. He stimulated the adolescent dreams of glory that many in the group may have craved, and their recruitment, in turn, legitimatized the fantasies – even though both remained rather embryonic.

Fantasizing, then, is a component of both the narrative and the network drivers of radicalization, but before addressing the latter, some further comment is in order. The complex functions of fantasy exceed what we can say here, but through fantasy, identities are discovered and forged by transcending the specifics of history and time and establishing imaginary

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103 Speckhard and Shaikh, *Undercover Jihadi*, 170–71.

104 Speckhard and Shaikh, *Undercover Jihadi*, 191–92.

105 Petter Nesser, "Joining Jihadi Terrorist Cells in Europe: Exploring Motivational Aspects of Recruitment and Radicalization," in *Understanding Violent Radicalisation*, ed. Magnus Ranstorp (New York: Routledge, 2009), 87–114.

solidarity with desirable others. In this case, the unity achieved is with the saintly warriors who defended Islam in the past and are doing so in the present, and through that heroic role, with the wider communal ideal of the past, present, and future *ummah*. In helping to articulate both individual and collective identities, fantasy "extracts coherence from confusion, reduces multiplicity to singularity, and reconciles illicit desire with the law."[106] Fantasy is characteristic of childhood, but it is not simply childish, and its role in fostering identity is one way of making sense of the overall Jihadi quest for significance.

The point is we are dealing with a process that goes well beyond mere accent to an ideology. Reflecting on his experience from prison, on his illicit Facebook page Amara says:

> I did not see my radical ideology as separate from my religion and this caused me to fear that abandoning it would lead to abandoning my faith. I also feared confronting the reality that I may have thrown my whole life away and brought so much suffering upon my family for no good cause.

The commitment to the Jihadist ideology seems to involve what sociologists call a role-person merger[107] and what social psychologists call a process of identity fusion, in which someone's personal identity is largely subsumed by the commitment to the needs of the group or cause.[108] The cause becomes an integral and pivotal part of the challenging "project of the self" that Anthony Giddens thinks confronts youth in the de-traditionalized context of late modernity.[109]

We have very little information from the other members of the Toronto 18, but in letters sent by Saad Khalid to CBC reporters,[110] he simply says, "There will probably always be someone who will be allured by the extremist narrative. It took me a long time to be convinced that I was wrong." Like so

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106 Joan W. Scott, "Fantasy Echo: History and the Construction of Identity," *Critical Inquiry* 27, no. 2 (2001): 284–304.

107 Ralph H. Turner, "The Role and the Person," *American Journal of Sociology* 84, no. 1 (1978): 1–23.

108 William B. Swann et al., "Identity Fusion: The Interplay of Personal and Social Identities in Extreme Group Behavior," *Journal of Personality and Social Psychology* 96, no. 5 (2009): 995–1011.

109 Anthony Giddens, *Modernity and Self-Identity* (Cambridge: Polity Press, 1991).

110 Davison and Thomson, "Homegrown terrorist"; Janet Thomson and Manmed Alhuwalia, "Toronto 18 bomb plotter Saad Khalid Tells His Story," *CBC*, April 16, 2014. A series of brief videos are available at: https://www.cbc.ca/news2/interactives/homegrown-terrorist.

many other young Jihadists throughout the Western world, Khalid traces his radicalization to the powerful online English-language lectures of Anwar al-Awlaki. As he writes, "He had a knack for telling a good story, so when I came across his lectures on Jihad, I was hooked... Here was someone I respected and he was connecting global grievances that Muslims share with what your responsibility is in terms of these issues." After listening to al-Awlaki, Khalid says he felt he would be committing a major sin if he did not fulfil his obligation to engage in Jihad, and somewhat more cryptically, he adds, he did not realize he was being radicalized, he just thought he had "found a solution to a problem that had always bothered me."

In our casual discussions with another member of the Toronto 18, who wishes to remain anonymous, there also was some reference to a "role-play element" in the process of radicalization. This person says they became politically aware at the time of the war in Iraq and radicalized by a growing sense of guilt over failing to come to the aid of their fellow Muslims. Unlike the others, he was first engaged in forms of "activism." Gradually, however, he felt a fantasy-like desire to emulate the great heroes of Muslim history. Person-to-person interactions at the mosque and with other people, most notably Amara, played a large role as well and in ways whose "significance," he says, he did not understand at the time.

Fantasy turns to reality and becomes the foundation for action when individuals participate in "the network" of like-minded people. Individuals access the narrative through their interaction with both informal networks of friends and family, as well as formal networks like al-Qaeda and countless other international Jihadist organizations. This happens both online and offline. It also is how the narrative and the call to violence is validated, since we are inherently social beings and the active support of others is influential,[111] especially for risky behaviour. As Dawson stipulates:

> Invariably it is the shared nature of the experience between close friends and family members that ratchets-up the enthusiasm, and eventually the courage to act. As many convicted homegrown [J]ihadists have acknowledged, long hours spent watching videos online and discussing [J]ihadists tracks with other angry young men, solidified their commitment to the cause.[112]

The turn to the narrative and the bonds with the deviant group co-evolve, and though Kruglanski et al. surprisingly do not discuss it, experimental social psychology exhaustively documents the many ways in

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111 Kruglanski et al., "The Making of an Extremist," 110.

112 Dawson, "Sketch of a Social Ecology Model," 8.

which groups exert powerful pressure on the behaviour of individuals.[113] Small-group dynamics, Dawson's last ecological niche, provides the affective closure that complements the cognitive closure provided by the narrative. Once thoroughly engaged, separation from the group can be tantamount to self-destruction for many members.

Operating from a psychological point of view, Kruglanski et al. prioritize the role of the need in the process of radicalization. "Without such a need, narratives and networks should not be able to evoke extreme actions unless they can induce a desire for significance."[114] Dawson, as a sociologist, places greater emphasis on the role of social processes: in this case, the co-evolution and interaction of the narrative and the network. These factors shape a rather too pervasive youthful need into the specific identification with the beleaguered *ummah* and the adoption of the Jihadi role. An underlying quest for significance is only one contributing factor that plays a strong role in many cases. Both agree, however, that all three factors – need, narrative, and network – must be present to create a violent extremist.

V. Conclusion

Researchers have been trying to ameliorate the specificity problem when it comes to radicalization leading to violence for decades. With the rise of ISIS (Islamic State in Iraq and Syria) in 2014, this research took on a new urgency. ISIS supporters were intensely active on a host of social media platforms, recruiting new Jihadists and inspiring attacks in the West and elsewhere. Much of the attention of researchers was fixated on understanding and assessing this newest, innovative, and perhaps most dangerous manifestation of the Jihadist threat. We were engaged in this research as well.[115] Along with the other contributors to this volume, however, we never lost sight of the value of more fully mining this historical case for fresh insights.

As we have argued here, the Toronto 18 represents one of the most paradigmatic cases of so-called homegrown terrorism, and its further study

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113 Clark McCauley and Sophia Moskalenko, *Friction: How Radicalization Happens to Them and Us* (New York: Oxford University Press, 2011).

114 Kruglanski et al., "The Making of an Extremist," 110.

115 Lorne L. Dawson and Amarnath Amarasingam, "Talking to Foreign Fighters: Insights into the Motivations for Hijrah to Syria and Iraq," *Studies in Conflict and Terrorism* 40, no. 3 (2017): 191–210.

can help to better understand how and why relatively well-integrated, reasonably well-off, and well-educated young men from suburbia would choose to become violent extremists, potentially sacrificing their lives in the process. Admittedly, only an inner core of perhaps six or seven individuals were fully committed to the cause and even then, it is questionable if they all fully understood what they were doing. It is important, all the same, to piece together a more satisfactory picture of their experiences and perceptions – a task we only begun in this chapter.

The members of the Toronto 18 were young (like most other homegrown Jihadists), but, somewhat atypically, they were even younger than other homegrown Jihadists. Like other Western Jihadists, they were from immigrant families, but relative to their European counterparts, they had not suffered as much, at least materially. Their socioeconomic status was higher, and they were better educated. Their prospects were relatively good, but most were too young to tell, and perceptions of relative deprivation may have played a role for some. At any rate, they did not display the prior criminality characteristic of European Jihadists born in circumstances where this may be one of the few pathways out of deprivation. Mental health issues, as with most Jihadists, played no significant role in their radicalization, and with one possible exception, they did not come from families with strong religious commitments or extremist views.

On every count, however, despite the exhaustive legal proceedings, what we actually know about the lives of these men is insufficient to account for their radicalization. The "need" driving their turn to political violence, to use Kruglanski et al.'s term, remains obscure, though there are grounds to speculate about their apparent desire to fulfil a heroic role. They felt a deep obligation to come to the defence of their fellow Muslims suffering in distant zones of conflict, and, in this respect, the role of the "narrative" seems more obvious. The courts, however, were content to establish that they possessed extremist literature and espoused extremist ideas. Little is known about what they read, how they interpreted it, and their understanding of why it mattered so much.[116] The "network" appears, characteristically, to have been a very important factor in their radicalization. In this pre-social media age, however, their own local network mattered most in exerting an influence on their behaviour. The social bonds

[116] Donald Holbrook, "The Terrorism Information Environment: Analysing Terrorists' Selection of Ideological and Facilitative Media," *Terrorism and Political Violence* (2019): 1–23, https://doi.org/10.1080/09546553.2019.1583216.

of the group were a significant motivational factor. The siren call of a larger global and historical significance, though, did inspire their willingness to take action. On all counts, however, we need to obtain more information from these men directly to identify the complex blend of social structural, group dynamic, and personal factors that led to their disturbing choices.

A Social Network Analysis of the Toronto 18

DAVID C. HOFMANN*

ABSTRACT

This chapter employs social network analysis in order to empirically explore the communication network established by the Toronto 18 in the three years before their arrest. It provides a basic conceptual overview of the extent, breadth, and nature of ideological and operational communiques between the disparate members within the Toronto 18 to further stimulate scholarly inquiry into similar relational dynamics within analogous terrorist groups. This chapter also provides readers with an understanding of certain group, social, and structural characteristics across three distinct periods: (1) the radicalization phase (January 2003 to October 2005); (2) the winter training camp (November 2005 to December 2005); and (3) the three-month period surrounding the Opasatika property buying trip (January 2006 to March 2006). Research results are then presented and discussed, along with a brief overview of areas for future research.

I. INTRODUCTION

While not unique in the history of North American homegrown terrorism, the Toronto 18 presents an opportunity to parse out and understand various social and structural dynamics that contribute to the scholarly knowledge of the composition, radicalization towards violence, strategic operation, and eventual dissolution of homegrown terrorist groups. The sensational nature of the events leading up to, surrounding, and unfolding during and after the legal proceedings

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related to the Toronto 18 has provided scholars with a treasure trove of highly detailed relational data across the lifespan of the terrorist plot spearheaded by Zakaria Amara and Fahim Ahmad. Riveted by the circumstances surrounding the allegations against the members of the Toronto 18, the media produced highly detailed biographies[1] and coverage of the trials of its key members.[2] Transcripts of court proceedings and exhibits for the core membership of the homegrown terrorist cell have also provided in-depth details and data on various stages of their plot.[3] In addition, one of the key RCMP informants that was embedded within the Toronto 18 (see Chapter 4 in this volume) wrote a tell-all book of his experiences infiltrating and acting within the group.[4] When properly vetted and refined, all of these data sources allow social network analysts to put together a reasonable approximation of the inter and intragroup dynamics, ties, and social-structural characteristics of the Toronto 18 terrorism plot.

While most of the other scholars in Part I of this volume examine the Toronto 18 through theoretic or substantive lenses, this chapter presents an empirical exploration of the Toronto 18 social communication network over their ideological and operational lifespan, beginning with the radicalization of core members beginning in 2003 and ending with their arrests in 2006. There have been a limited number of other social-scientific works that have examined the Toronto 18[5] and even fewer that have done so using social network analysis.[6] Keeping in mind the varied audience and overall goals of this volume, this chapter takes a broad and accessible approach to examining the Toronto 18's communication network. Its main

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1 Isabel Teotonio, "The Toronto 18," *Toronto Star*, accessed 2016, http://www3.thestar.com/static/toronto18/index.html.

2 Isabel Teotonio, "Publication ban lifted in Toronto 18 case," *Toronto Star*, September 10, 2009, https://www.thestar.com/news/crime/2009/09/10/publication_ban_lifted_in_toronto_18_case.html

3 For example, see R v. Khalid, 2009 CanLII 44274 (ON SC).

4 Anne Speckhard and Mubin Shaikh, *Undercover Jihadi: Inside the Toronto 18: Al Qaeda Inspired, Homegrown Terrorism in the West* (McLean, VA: Advances Press, 2014).

5 Lorne L. Dawson, "Trying to Make Sense of Homegrown Terrorist Radicalization: The Case of the Toronto 18," in *Religious Radicalization and Securitization in Canada*, eds. Paul Bramadat and Lorne Dawson (Toronto: University of Toronto Press, 2014); Jeremy Kowalski, *Domestic Extremism and the Case of the Toronto 18* (New York: Palgrave MacMillan, 2016).

6 Marie Ouellet and Martin Bouchard, "The 40 Members of the Toronto 18: Group Boundaries and the Analysis of Illicit Networks," *Deviant Behavior* 39, no. 11 (2018): 1467–482, https://doi.org/10.1080/01639625.2018.1481678.

purpose is to present a basic conceptual overview of the extent, breadth, and nature of the ideological and operational communication ties formed by members of the Toronto 18 prior to their arrest and to introduce and stimulate further inquiry into examining groups, like the Toronto 18, using social network analytical methodologies. An additional purpose of this chapter is to provide security practitioners, jurists, and academic scholars with an alternate way of understanding one aspect of the social and relational dynamics present within the Toronto 18 during the roughly three-year period before their arrests. As a result, the analysis is kept as descriptive and free of jargon as possible to make it accessible to a wider academic and practitioner audience.

This chapter begins with a brief description of social network analysis, which also highlights some of the challenges that researchers face when dealing with covert and illicit networks akin to the Toronto 18. This is followed by a primer on what the scholarly literature has identified as key characteristics of homegrown[7] terrorist groups that are relevant to social network analysis. Next, the methodology for this research is outlined, which describes the research design and data coding procedures. The research results are then presented, followed by a discussion of the findings and study limitations. Lastly, this chapter concludes with a brief overview that also includes a brief discussion of areas for future research.

II. What is Social Network Analysis?

Social network analysis is a collection of theoretical- and mathematical-informed techniques and approaches that allow social scientists to examine network structure, social dynamics, trends, and how individuals or clusters of individuals affect, and are a part of, their larger relational networks.[8] Rather than relying solely on quantitative (i.e., statistical) or qualitative (i.e., content analysis, interviews) data, social network analysis is primarily concerned with relational data: any sort of identifiable social interaction that connects, binds, or ties together two or more actors within a larger network (e.g., social ties, flows, transfers, connections, and so on). Once a set of actors (nodes) and their relational ties (edges) are identified and coded

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7 Homegrown terrorism refers to violent terrorist acts committed by individuals who are naturalized or born in the home country which they are targeting. See chapter 2 in this volume for more information.

8 John Scott, *Social Network Analysis*, 4th ed. (Los Angeles: Sage Publishing, 2017), 8.

by researchers, these can be used to compute a variety of sociometric measurements that provide an array of different tools with which to interpret social structural, group, and individual-level dynamics. These measurements can help illuminate network cohesion, nodal/actor importance, the identification of structurally and socially significant actors, and numerous other insights that are not typically available from other commonly used methodologies.[9]

A. The Problem of "Dark" Networks

Social network analysts from criminology, security studies, and any research involving clandestine groups are confronted with persistent problems concerning the reliability and validity of relational data for "dark" networks: groups of connected actors who actively try to dissuade or prevent outside scrutiny by occluding a portion or all of their ties and/or actions from individuals or organizations who are not tied to the group itself (e.g., drug trafficking organizations, secret societies, terrorist groups, and so on). Politically violent groups like the Toronto 18 have a vested interest in hiding the extent and breadth of their connections while operational, but also during subsequent legal proceedings and police investigations. This presents numerous problems regarding the accessibility, validity, and reliability of relational data. As a result, scholars of dark networks have identified several prominent considerations that need to be taken into account when using social network analysis to examine clandestine groups.[10] However, despite the potential of working with incomplete data and other methodological weaknesses, the consensus among scholars of dark networks is that there is merit and analytical utility in studying the known portions of criminal, terrorist, or secretive groups.[11]

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9 For more information on the basics of social network analysis, see Stephan P. Borgatti, Martin G. Everett, and Jeffrey C. Johnson, *Analyzing Social Networks*, 2nd ed. (Los Angeles: Sage Publishing, 2018); Scott, *Social Network Analysis*.

10 For example, see Daniel Cunningham, Sean Everton, and Philip Murphy, *Understanding Dark Networks: A Strategic Framework for the Use of Social Network Analysis* (Lanham, MD: Rowman & Littlefield, 2016), xvii–xix.

11 Luke M. Gerdes, ed., *Illuminating Dark Networks: The Study of Clandestine Groups and Organizations* (New York: Cambridge University Press, 2015); David Hofmann, "How 'Alone' are Lone-Actors? Exploring the Ideological, Signaling, and Support Networks of Lone-Actor Terrorists," *Studies in Conflict & Terrorism* 43, no. 7 (2020): 657–78, https://doi.org/10.1080/1057610X.2018.1493833.

III. What do we know about Homegrown Terrorist Networks?

The academic literature on terrorist networks is largely informed by the criminological social network literature, which has provided pivotal insights into the structure, operations, and connections formed by a variety of covert and illicit networks.[12] While not as developed as their criminological equivalents, the literature on terrorist networks has become much more robust since 2002, when Valdis Krebs published the first modern network study of the 9/11 bombing plot.[13] In order to better understand the dynamics of the Toronto 18 network, this section will briefly summarize some of the major findings from the more prominent studies on the networks that terrorist groups, cells, and organizations form in pursuit of their ideological or politically-motivated violent goals. It is not meant to be an exhaustive review of the literature on terrorist networks, nor is it a review of the most up-to-date literature on terrorist radicalization and social dynamics. Rather, it is meant to be a brief introductory primer on some of the larger takeaways from the scholarly literature, with a particular focus upon what insights social network analysis has to offer on homegrown terrorists and cells.

There are several network-level and structural characteristics of terrorist groups that a number of empirical studies have identified that provide a baseline comparison for the subsequent analysis of the Toronto 18's network. The first characteristic is that homegrown terrorist groups generally lack any formal operational ties with international and longstanding terrorist organizations.[14] Instead, they tend to be small, self-contained, and carefully selected groups of individuals who operate with

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12 For example, see Gisela Bichler and Aili E. Malm, eds., *Disrupting Criminal Networks: Network Analysis in Crime Prevention* (Boulder, CO: First Forum Press, 2015); Martin Bouchard, "On the Resilience of Illegal Drug Markets," *Global Crime* 8, no. 4 (2007): 325–44, https://doi.org/10.1080/17440570701739702; Carlo Morselli, "Assessing Vulnerable and Strategic Positions in a Criminal Network," *Journal of Contemporary Criminal Justice* 26, no. 4 (2010): 382–92, https://doi.org/10.1177/1043986210377105.

13 Valdis E. Krebs, "Uncloaking Terrorist Networks," *First Monday* 7, no. 4 (2002), https://firstmonday.org/ojs/index.php/fm/article/view/941/863.

14 Lorenzo Vidino, "The Hofstad Group: The New Face of Terrorist Networks in Europe," *Studies in Conflict & Terrorism* 30, no. 7 (2007): 579–92, https://doi.org/10.1080/10576100701385933.

limited formal terrorist training (although a number of homegrown terrorist groups, including the Toronto 18, attempted to send one or more of their members to overseas training camps). Marc Sageman's early work on Salafist Jihadist networks suggests that people join violent Islamist movements through pre-existing networks of friendship and kinship.[15] In other words, people are either brought in or leverage pre-existing social connections when joining terrorist networks.

Although Sageman's findings are somewhat dated due to the evolving nature of terrorist threats, and dwarfed by more recent research, his observations remain an important cornerstone in terrorist network analysis. Several subsequent studies emphasize Sageman's findings and highlight the importance of interpersonal contacts and networks in explaining who, how, and why people join terrorist movements.[16] Furthermore, the more recent radicalization research tends to support these aspects of earlier attempts to frame and understand how social ties and group dynamics play a role in terrorist group formation and operation but provides a more nuanced understanding of its social complexity.[17]

IV. METHODOLOGY

A. Research Design

The current research seeks to contribute to our understanding of homegrown terrorist group dynamics, and of the Toronto 18 in particular, by mapping out and comparing the changes in group dynamics and social structures of the communication ties formed by Toronto 18 as they progressed towards the culmination of their bomb plot and their eventual arrests in 2006. It takes a cross-sectional approach that examines and

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15 Marc Sageman, *Understanding Terror Networks* (Pennsylvania: University of Pennsylvania Press, 2004).

16 Peter R. Neumann, *Joining al-Qaeda: Jihadist Recruitment in Europe* (New York: Routledge, 2009); Quintan Wiktorowicz, *Radical Islam Rising: Muslim Extremism in the West* (London: Rowman & Littlefield Publishers, 2005).

17 For example, see Chapter 2 of this volume. See also Lorne L. Dawson, "Sketch of a Social Ecology Model for Explaining Homegrown Terrorist Radicalisation," *The International Centre for Counter-Terrorism: The Hague* 8, no. 1 (2017), https://dx.doi.org/10.19165/2017.1.01; Petter Nesser, "Joining Jihadi Terrorism Cells in Europe: Exploring Motivations, Aspects of Recruitment and Radicalization," in *Understanding Violent Radicalization: Terrorist and Jihadi Movements in Europe*, ed. Magnus Ranstorp (New York: Routledge: 2009), 87–114.

contrasts the group across four distinct operational time periods (see Key Events Timeline in Appendix B): (1) the radicalization phase (January 2003 to October 2005); (2) the winter training camp (November 2005 to December 2005); (3) the three-month period surrounding the Opasatika property buying trip (January 2006 to March 2006); and (4) the bomb plot (March 2006 to May 2006). These time periods were chosen based upon significant changes in the nature and operation of the group itself, such as progressing towards formal operational training (i.e., moving from "talk" to "action"), attempting to acquire material goods for the bomb plot, and the schism between the Mississauga and Scarborough cells.

B. Data and Coding

Relational data on the Toronto 18 were gathered from an extensive examination of court documents related to the Toronto 18 trial, coupled with defendant testimonies, psychiatric evaluations, and other related legal documents. These data were supplemented and triangulated with open sources from news media stories,[18] publicly available police documents, and the autobiographical account given by Mubin Shaikh in order to increase the validity and reliability of data.[19] Actors and their communication ties were only included in the dataset if they were present in at least two independent data sources (e.g., a court document and Mubin Shaikh's account, a legal testimony and a police report, and so on). Attribute data for a total of 34 individuals associated with or connected to the Toronto 18 were gathered and included in the network based upon evidence of multiple (i.e., more than once during a particular time period) communication events between actors whose content included at least one of the following themes: violent Jihadism, Islamist ideology, recruitment attempts, and/or information related to planning for or committing acts of Jihadist violence.[20] Binary undirected[21] relational matrices were then coded (zero for

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18 In particular, the excellent and detailed coverage by Isabel Teotonio. See, Isabel Teotonio, "The Toronto 18."

19 Speckhard and Shaikh, *Undercover Jihadi*.

20 The social network analysis of the Toronto 18 undertaken by Ouellet and Bouchard identified up to 40 individuals involved in the Toronto 18 bomb plot. The difference in actors is due to the network boundary chosen by the researcher in regard to inclusion and exclusion criteria. See Ouellet and Bouchard, "40 Members of the Toronto 18."

21 An undirected network is one where the relational tie being measured "flows" both ways. For example, a network that examines romantic ties is likely to be undirected, since it is impossible to be in a "one way" consenting romantic relationship. A network

the absence of a tie, one for the presence of a tie) for each of the four identified time periods based upon communication between actors within the network. Gephi, MS Excel, R, and UCInet software packages were used to code, manage, and interpret the relational data.

V. RESULTS

A. The Radicalization Period (January 1, 2003 – October 31, 2005)

There are several prominent features of the Toronto 18 network that are evident during the two-year radicalization period examined in this study, from January 2003 until October 2005.[22] The sociogram[23] displayed in the top left of Figure 1.0 shows that the overall structure of the network is known as a scale-free network. This type of network typically consists of a small number of well-connected hubs (in this case, centred around Ahmad (node 11) and Amara (node 34)) which support "the rapid diffusion of information and suggests that the network is more hierarchically organized with a few individuals having many ties relative to others".[24] As scale-free networks grow, mechanisms of preferential attachment cause the network to self-organize into distinct groups or sub-groups of actors. Such mechanisms are "common to a number of complex systems, including business networks, social networks (describing individuals or organizations), transportation networks," among others.[25] In other words, the most important actors, and social hubs, for the Toronto 18 during their radicalization period are quite unsurprisingly their two nominal leaders.

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that examines money lending is likely to be directed, since people who lend money may not always borrow from the people they lend to.

22 This is not to suggest that violent radicalization in the Toronto 18 ceased after October 2005. Rather, this is the period where the radicalization process began and solidified.

23 A sociogram is a visual representation of a social network. Each circle in the sociogram denotes an actor (node), and each line denotes the presence of a relational tie (edge).

24 Albert-Làszló Barabási and Réka Albert, "Emergence of Scaling in Random Networks," *Science* 286, no. 5439 (1999): 509–12. See also Aili Malm and Gisela Bichler, "Networks of Collaborating Criminals: Assessing the Structural Vulnerability of Drug Markets," *Journal of Research in Crime and Delinquency* 48, no. 2 (2011): 271–97; Mangai Natarajan, "Understanding the Structure of a Large Heroin Distribution Network: A Quantitative Analysis of Qualitative Data," *Journal of Quantitative Criminology* 22, no. 2 (2006): 171–92.

25 Barabási and Albert, "Random Networks," 511.

Although Jihadist-related communication was not exclusively centred on them at this point of the Toronto 18 plot, the group was semi-hierarchical (when compared to more formalized social groups and organizations with more clear positions and titles) and hinged largely on the efforts of Ahmad and Amara to communicate Jihadist content to potential recruits. The clustering coefficient[26] (0.492) for the Toronto 18 during the radicalization period indicates that there is a moderate tendency for members of the group to connect with one another in highly cohesive clusters (see table 1.0). The assortativity[27] score (-0.308) indicates a somewhat moderate disinclination of actors within the network to connect with others who have similar network positions as themselves.[28]

Table 1.0 – Network-level cohesion measurements for the Toronto 18

	Radicalization	Winter Camp	Opasatika	Bomb Plot
Number of Actors	24	23	24	30
Clustering Coefficient	0.492	0.758	0.684	0.612
Assortativity	-0.308	-0.164	-0.156	-0.197

When examining the nodal-level centrality scores for the Toronto 18 during this time period (see Table 1.1), Ahmad, who served as the nominal ideological leader of the group, also unsurprisingly emerges as the most important node in terms of bridging the various parts of the network

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26 The clustering coefficient is a network-level metric that measures the degree to which nodes tend to cluster together into small, highly connected groups. A score of 0 indicates there is no tendency of nodes to cluster together, while a score of 1 indicates that all nodes are clustered together.

27 Assortativity is a coefficient that indicates nodal preference to attach to others with similar network positions as themselves (e.g., highly central nodes attach to other highly central nodes). A score of 0 indicates there is no tendency of nodes to attach with those similar to themselves, while a score of 1 indicates that all nodes have a tendency to attach with those similar to themselves.

28 This makes sense given the clandestine nature of the Toronto 18.

together. His betweenness centrality[29] score (0.621) is the largest by far, indicating that he is the most important broker for bridging disparate parts of the Toronto 18 together during this time period. Amara emerges as the second most important broker within the network with a betweenness centrality score of 0.221. Closeness centrality[30] scores during the radicalization period indicate that Ahamad, Amara, Durrani (node number 8), James (node number 15), Ansari (node number 9), and Khalid (node number 25) are the most centrally located nodes. As shown in the sociogram in Figure 1.1, these individuals occupy a central clustered position and are the most important to the diffusion of communication related to Jihadist violence.

B. The Winter Camp Period (November 1, 2005 – December 31, 2005)

During the three-month period surrounding the planning, execution, and aftermath of the winter training camp (November 1, 2005, to December 31, 2005), at the network level (see, Table 1.0) we see a consolidation of communication ties within the network, with Ahmad emerging as the central hub in terms of the frequency of connections with other members of the Toronto 18. The clustering coefficient (0.758) indicates that there is a discernable positive shift in cohesiveness within the Toronto 18 during this time period when compared with the radicalization period, with a strong tendency for the network to cluster together into small but highly connected groups. We also see a slight improvement in the tendency of the Toronto 18 to attach to other actors within the network who have a similar network position to themselves (assortativity of -0.164), although the coefficient is still negative, indicating a weak aversion effect.

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29 Betweenness centrality is a sociometric measurement that indicates how important a node is for connecting disparate parts of the network together. It is synonymous with the concept of "brokerage," with actors with high betweenness centrality being those that occupy positions within the network that allow them to leverage that position to broker or connect individuals or subgroups in the network with others.

30 Closeness centrality measures how "far" a node is from other nodes within a network. In other words, nodes with high closeness centrality are those who exhibit the shortest distances from other nodes, which is an indicator of the importance, strength, or value of that particular node to the overall network.

Figure 1.0 – Sociograms for the Toronto 18 across four time periods

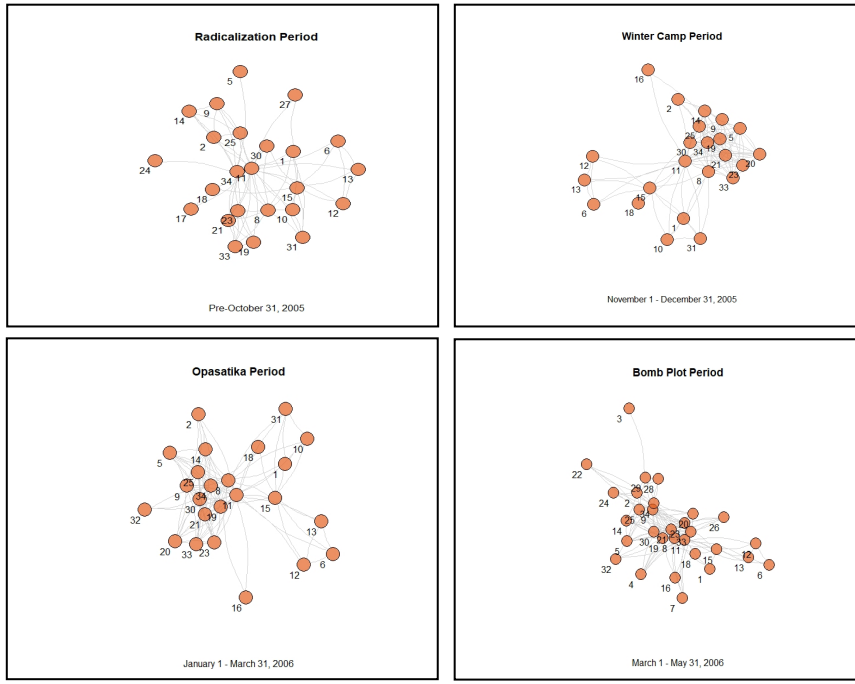

Table 1.1 – Nodal-level betweenness and closeness centrality for the six most central actors of the Toronto 18

Actor(s)	Radicalization		Winter Camp		Opasatika		Bomb Plot	
	Btwn	C	Btwn	C	Btwn	C	Btwn	C
Ahmad	0.621	0.920	0.500	1.000	0.526	1.000	0.433	0.829
Amara	0.221	0.697	0.011	0.710	0.029	0.742	0.223	0.725
Durrani	0.021	0.639	0.057	0.786	0.044	0.767	0.029	0.690
James	0.027	0.605	0.031	0.648	0.021	0.639	0.004	0.580
Ansari	0.000	0.561	0.004	0.710	0.005	0.697	0.392	0.725

Khalid	0.000	0.561	0.006	0.710	0.008	0.697	0.031	0.690
Remaining Actors	0-0.003	0-0.575	0-0.011	0-0.710	0-0.012	0-0.719	0-0.069	0-0.674

As shown in the top right of Figure 1.0, the sociogram displays a contraction of ties that radiates from a central node (Ahmad, node 11) when compared to the previous time period. In other words, the network exhibits more hierarchy than in other phases of the bomb plot, with Ahmad as the clear pillar of the Toronto 18's communication ties. Ahmad is also the only significant broker in the network during this three-month span, with by far the highest betweenness centrality score (0.500) and a closeness centrality score of 1.000. As a result, the network structure changed from a scale-free structure to what is known as a star or star-like structure: where a single, critically important node (or in some cases, a pair of nodes or more) is the most connected in terms of the number of ties and their ability to bridge disparate parts of the network together. Of other particular note is Amara's diminished centrality during the winter camp period: his importance as a broker is on par with some of the most peripheral members of the network (betweenness centrality of 0.011), and his closeness centrality score (0.710) is also on par with the vast majority of the other members of the Toronto 18. In fact, both Durrani (betweenness centrality of 0.057) and James (betweenness centrality of 0.031) are more important communication brokers during the winter camp than Amara.

C. The Opasatika Period (January 1, 2006 – March 31, 2006)

During the three-month period at the beginning of 2006, the Toronto 18 began to plan material acquisitions to aid with their plots, including a trip to the Opasatika area to purchase land to serve as a safe house (see Key Events Timeline in Appendix B). This demarcates a transition from "talking the talk" to "walking the walk" in terms of the operational aspects of the Toronto 18's plans to commit acts of violence. The network's clustering coefficient (0.684) indicates that there is a moderate-to-strong tendency among network members to cluster together into small, highly connected groups but exhibits a slight drop in network cohesion when compared to the winter camp period. There is a negligible change in assortativity (-0.156)

when compared to the winter camp period, with the network still exhibiting a weak aversion effect between nodes within the network that share similar network positions.

At the nodal level, there is also little change between the Opasatika period and the winter camp period: Ahmad remains the most central node in terms of his role as a broker for the network (betweenness centrality of 0.526), although Amara's betweenness centrality score (0.029) exhibits a slight increase. Closeness centrality scores for network members also remain largely the same when compared with both time periods, also indicating a somewhat hierarchical structure with Amara as the most centrally located actor within the network in regard to communication between members of the Toronto 18. Just like the winter camp period, the Toronto 18 communication network exhibits star-like properties, with a single, highly central node at the centre of the network, as shown in the bottom left of the sociogram in Figure 1.0.

D. The Bomb Plot Period (March 1, 2006 – May 31, 2006)

As the Toronto 18 progressed towards the terminal stages of their bomb plot, a schism occurred between the group, causing a division into the Mississauga (led by Amara) and Scarborough (led by Ahmad) cells. As a result, the Toronto 18's network structure breaks into a mixture of star-like and scale-free structures, with Ahmad's cell maintaining a star-like configuration and Amara/Ansari's cell taking on more of a scale-free configuration. Due to the length of this time period, and the nature of the ties being examined (communication), this division is not readily evident in the sociogram at the bottom right of Figure 1.0 since communication still occurred between the two cells that fit this analysis' coding criteria. If a different type of tie (e.g., operational communications, transfer of material or non-material forms of support related to the bomb plot) was examined, the schism would perhaps be more visible. Regardless, there are a number of interesting sociometric trends that emerge from the final stage of the analyzed time periods. The clustering coefficient (0.612) indicates a moderate-to-strong level of cohesion and is slightly less than during the Opasatika period, likely due to the schism between Amara and Ahmad. Much like the preceding three time periods, the Toronto 18's assortativity (-0.197) displays a weak aversion effect, but it is slightly stronger than during the preceding three-month period.

Quite logically, Amara becomes much more significant during this period when compared to the previous three when it comes to his position as a network broker (betweenness centrality of 0.223) due to the schism between the Mississauga and Scarborough cells. Remarkably, Ansari also becomes a prominent broker (betweenness centrality of 0.392), second only to Ahmad (betweenness centrality of 0.433). These three actors also emerge as the three most central individuals, with Ahmad (closeness centrality of 0.829) as the most important, followed by Amara and Ansari (both with closeness centrality scores of 0.725).

VI. DISCUSSION

While generalizing the results of the above analyses is impossible with a single case study, there are several notable trends, changes in nodal characteristics and network structures, and social dynamics that provide interesting insights into how the Toronto 18 communicated their ideologies and operational plans over the four time periods examined. Below, observations taken from the results section are discussed, followed by an outline of the study limitations. While there is a multitude of nuances that can be drawn from the research findings, space constraints limit the discussions to those that are deemed most important and informative for the themes discussed in this volume and the eventual creation of policy-relevant practical approaches to interdicting homegrown terrorist groups, once additional research of a similar nature is conducted.

There is a robust and growing criminological scholarly literature that analyzes how the structure and composition of networks present various vulnerabilities and points of interdictions for police and government agencies tasked with disrupting and destroying covert networks.[31] As a result, there is an established body of knowledge on some of the key structural vulnerabilities (such as the targeted removal of brokers)[32] that can be exploited within covert and dark networks akin to the Toronto 18.[33] The

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31 See e.g., Bichler and Malm, *Disrupting Criminal Networks*; David C. Hofmann and Owen Gallupe, "Leadership Protection in Drug-Trafficking Networks," *Global Crime* 16, no. 2 (2015): 123–38, https://doi.org/10.1080/17440572.2015.1008627; George Wood, "The Structure and Vulnerability of a Drug Trafficking Collaboration Network," *Social Networks* 48 (2017): 1–9, https://doi.org/10.1016/j.socnet.2016.07.001.

32 Morselli, "Criminal Network."

33 However, it is important to note that the ultimate goal of criminal networks (profit) differs from that of terrorist networks (ideological or politically inspired violence).

results described above offer some interesting insights into some of the structural vulnerabilities present within the Toronto 18's communication network.

During the Toronto 18's radicalization period, the communication network exhibited a scale-free network structure, with Ahmad and Amara as the most important brokers or hubs. During the early stages of feeling out potential recruits, sharing ideological material, and communicating future operational plans, it makes sense for a homegrown terrorist group like the Toronto 18 to adopt a scale-free structure, with the most trusted members (or nominal leaders) occupying the most central positions. In other terms, the sociometric results suggest that during the Toronto 18's early radicalization stage, the group employed strong ideological and inspirational figureheads in order to catalyze the radicalization of potential recruits. If this is a generalizable finding found in future research that employs similar case studies of homegrown terrorist networks, it suggests a semi-hierarchical network structure (with ideological leaders serving as hubs) might be efficacious or efficient when trying to attract potential recruits. It also suggests a certain amount of structural vulnerability.

Although the existing criminological literature on covert and illicit networks points to the fact that the nominal leader is not always the most central figure within a network,[34] in this particular case, and at this particular juncture in the Toronto 18's overall progression towards their bomb plot, both Amara and Ahmad were central. Therefore, during the Toronto 18's radicalization period, both Ahmad and Amara are the lynchpins of communication, and, therefore, they are the most strategically vulnerable nodes whose removal would disrupt the efficacy of the network.

The Toronto 18's network structure changed during the winter camp period, shifting towards a star-like configuration with Ahmad as the most

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Therefore, each type of illicit network tends to structure themselves differently: criminal networks tend to prioritize efficiency over security, and terrorist networks tend to prioritize security over efficiency. This influences how they structure themselves. For more information, see Carlo Morselli, Cynthia Giguére and Katia Petit, "The Efficiency/Security Trade-off in Criminal Networks," *Social Networks* 29, no. 1 (2007): 143–53.

34 Gisela Bichler, Aili Malm and Tristen Cooper, "Drug Supply Networks: A Systematic Review of the Organizational Structure of the Illicit Drug Trade," *Crime Science* 6, no. 2 (2017): 1–23, https://doi.org/10.1186/s40163-017-0063-3; Carlo Morselli and Julie Roy, "Brokerage Qualification in Ringing Operations," *Criminology* 46, no.1 (2008): 71–98, https://doi.org/10.1111/j.1745-9125.2008.00103.x.

central node and broker. This star-like structure persisted into the Opasatika period as well, with a slight increase in Ahmad's importance as a broker. This, rather unsurprisingly, suggests that the structure of the Toronto 18's communication network shifted and adapted based upon their progression towards an act of violence. As the need for recruitment and radicalization dwindled, there is a contraction of communication activity, centralized around a single actor rather than diffusing it among multiple actors.

The relevant network analysis literature highlights that hierarchical organizations and groups with clear chains-of-command tend to be more efficacious, although with the trade-off that they are less resilient to sudden changes or removals of upper-level leaders.[35] Star-like networks are perhaps the most structurally vulnerable configurations that dark networks may adopt since they rely heavily on a single central actor whom the majority of network activity flows through. Star-like networks also tend to be the most hierarchical (when compared to other configurations of dark networks) since the most central node is typically someone with both formal and informal authority and power. Therefore, it is during these two time periods where the Toronto 18 is the most structurally vulnerable since the communication within the network revolves almost exclusively around Ahmad (with Durrani and James occupying secondary diminished roles as communication brokers). Last, the schism between the Mississauga and Scarborough cells during the bomb plot period created two distinct configurations within the network, with Ahmad's cell maintaining a star-like structure and Amara/Ansari's network shifting back towards a scale-free configuration that was exhibited during the radicalization period. With this type of bifurcated, cell-like structure, the most structurally weak portions of the network tend to be the pivotal nodes who bridge and coordinate communication between both cells (in this case, Amara, Ahmad, and Ansari).

The assortativity metric across the Toronto 18's four time periods remains relatively the same, all indicating a weak tendency for network actors to avoid nodes within similar network positions as themselves. This finding is consistent with the star-like and scale-free structures exhibited by the Toronto 18 throughout their lifespan (i.e., only a very few highly central

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35 Chris Dishman, "The Leaderless Nexus: When Crime and Terror Converge," *Studies in Conflict & Terrorism* 28, no. 3 (2005): 237–52; Natarajan, "Understanding the Structure."

nodes). It also suggests that communication was "cell-like" (as in an operational terrorist cell) in nature, with a more central actor controlling the flow of information for all of, or a portion of, the network. This makes sense in the high-security environment of a terrorist group, where network actors are wary of outside scrutiny and interdiction efforts by law enforcement and government agencies.

The changes in actor-level sociometric measurements across the four observed time periods also offer some interesting insights into the communication dynamics within the Toronto 18. Although the number of actors remains relatively the same over the group's lifespan, the most important actors within the network stay relatively the same, with some exceptions. Unsurprisingly, the two nominal leaders of the Toronto 18, Ahmad and Amara, generally emerge as the most central nodes across the four time periods, with Ahmad emerging as the more connected of the two actors. What is also notable is the importance of Durrani and James to the Toronto 18's communication network, particularly during the radicalization and winter camp periods. In fact, Durrani is more central and a more important broker than Amara in the winter camp period, which is similar to other criminological research that suggests the nominal leaders of illicit networks are not always the most central actors.[36] This provides additional empirical support that researchers and security practitioners should not always assume that the nominal leaders are the most connected or "important" (in network terms) actors within their organizations.[37]

Informed by the wider scholarly literature on homegrown terrorist networks, the Toronto 18 generally fits the scholarly literature's operational and ideological definitions of "homegrown" terrorists. They are a relatively small group who, for the most part (aside from their connection to the Atlanta terrorist cell and Aabid Khan), were disconnected from other, larger terrorist organizations. While this research did not include a thorough discussion on the types of social ties network actors had with one another (e.g., friendship, kinship, and so on), there is sufficient evidence to suggest that pre-existing relationships played a role in who communicated with whom (e.g., Amara and Ahmad brought in their former friends/school mates and branched out from there). However, the Toronto 18 differs somewhat from previous conceptions of "terrorist cells,"[38] which generally

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36 Hofmann and Gallupe, "Leadership Protection."

37 For e.g., see Morselli and Roy "Brokerage Qualifications."

38 See Morselli, Giguere, and Petit, "The Security/Efficiency Trade-off."

assume a flattened, non-hierarchical structure in order to mitigate risk. Although the current findings are not completely analogous with other similar research due to the difference in measuring communication ties, the evidence suggests that the Toronto 18 adopted a hybrid-leadership model more akin to certain types of for-profit criminal networks.[39] Flattened "cell-like" networks tend to be, by design, less cohesive and decentralized, with very few highly-central individuals. This allows for these types of networks to be resilient to outside interdiction and to maintain certain levels of operational security.[40] While the Toronto 18 does share some of these characteristics, the fact that Ahmad, Amara, and several other network actors occupy extremely central positions across some or all four time periods suggests that the group operated with some form of explicit hierarchy – with communication originating from, or filtering through, network leaders. Whether this was done purposefully or was due to the relative inexperience of the Toronto 18's leaders is debatable.

A. Study Limitations

Perhaps the most obvious study limitation is the lack of generalizability of any findings. A single case study does not allow for any of the conclusions in this chapter to be applied to any other case of homegrown terrorism. It is, however, a first step towards creating generalizable results and contributes to future studies that examine homegrown terrorist groups using social network analysis. However, much more research of a similar nature to this study needs to be conducted before any solid insights into the structure and nature of homegrown terrorist communication networks can be codified.

Another study limitation was the minimal amount of primary data available when coding the communication networks for the Toronto 18. The golden standard in social science is quality primary data, and while there were several data sources (i.e., transcripts of interviews with health professionals and police, Mubin Shaikh's memoir) used in this study that can be considered as "primary" sources, there was undoubtedly an overreliance on secondary source material (i.e., court documents, police reports, media stories). This overreliance on secondary source data is a

[39] For e.g., see Hofmann and Gallupe, "Leadership Protection," 133–34.
[40] Bouchard, "On the Resilience of Illegal Drug Markets."

common problem in terrorism studies,[41] where a variety of factors such as access to primary data, danger to researchers and subjects, and the secretive nature of terrorist investigations create significant hurdles for researchers seeking to obtain and use primary data.

Last, the current research provides a cross-sectional approach to examining the Toronto 18's communication ties by reducing the four examined time periods into multi-month "snapshots" of communication ties. There are longitudinal and dynamic social network methodologies that, if there is sufficient quality relational data, can offer a much more nuanced understanding of how certain social ties form and break within smaller timeframes (over days or weeks rather than months) that can offer additional insight into how the Toronto 18 communicated with one another.

VII. Conclusion

The purpose of this chapter was twofold. The first was to provide readers with a general concept of the overall communication structure of the Toronto 18 during four significant time periods as they progressed towards the culmination of their bomb plot. The second was to contribute to the nascent empirical literature on homegrown terrorist groups that employ social network analysis as a primary methodology. It is important to note that social networks are extremely complex and multiplex constructs, where actors can have dozens upon dozens of simultaneous ties with other network actors (i.e., communication ties, friendship ties, business ties, romantic ties, and so on) that can manifest in different network- and nodal-level dynamics. This chapter offers a glimpse into just one of those types of ties; it is a first step to better understand some of the operational and ideological ties that homegrown terrorist groups form, break, and change as they progress towards violence. While space constraints prevented an exhaustive overview of all the various sociometric dynamics that could have been discussed, this chapter provides a fairly accessible discussion of some of the more important communication ties and changes in the overall network structure that the Toronto 18 adopted during the three-year period prior to their arrests.

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41 Bart Willem Schuurman and Quirine A.M. Eijkman, "Moving Terrorism Research Forward: The Crucial Role of Primary Sources," *The International Centre for Counter-Terrorism: The Hague* 4, no. 2 (2013), http://dx.doi.org/10.19165/2013.2.02.

As a final consideration, there are a number of areas for future research that can build upon the findings in this chapter. As discussed in the study limitations section, the development of a body of case studies of homegrown terrorist groups akin to the Toronto 18 would allow for the generalization of study findings and may provide practical policy advice for security agencies and police who are tasked with detecting and interdicting terrorist plots. There is also a great deal of room for more nuanced social network analyses of the Toronto 18 that examine the interplay between different types of social ties (e.g., recruitment, exchange of material goods for the purpose of completing the terrorist plot, kinship/friendship ties, and so on) that existed between the members of the Toronto 18. Each of these approaches has the potential to offer additional insight into the operations and structure of Toronto 18. Finally, the available relational and attribute data on the Toronto 18 may provide some interesting insights into how and why individuals radicalize towards political violence. These and many other research avenues that employ social network analysis have much to offer academics, jurists, and security practitioners interested in better understanding a variety of social, relational, and transactional dynamics within terrorist groups.

Criminological Perspectives on the Toronto 18

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ABSTRACT

Historically, research in terrorism studies has drawn from a variety of disciplines including, but not limited to, political science, psychology, and security studies. More recently, however, researchers have argued that

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criminological approaches can and should inform terrorism studies as well. In this chapter, we apply four criminological perspectives to the case of the Toronto 18: the general strain theory of terrorism, social learning theory, situational crime prevention, and situational action theory. Drawing from news media accounts and court documents as well as extensive personal and background details about the offenders, we examine what inspired members of the Toronto 18 to join the cell, as well as the internal dynamics of the cell and why they selected certain targets, all through a criminological lens. The complexities of the Toronto 18 cases clearly demonstrate why it would be unrealistic at best, and foolhardy at worst, to expect any single orientation to "explain" terrorism. But used in concert, criminological theories and perspectives clearly have a role to play in advancing our understanding of the dynamics of terrorism.

I. INTRODUCTION

In the summer of 2006, 18 individuals, inspired by al-Qaeda, were arrested for planning large-scale terrorist attacks on Canadian soil. More specifically, the individuals, known collectively as the "Toronto 18," were arrested for two plots: one against a number of prominent buildings in southern Ontario, including Parliament Hill, the headquarters of the Canadian Security Intelligence Service (CSIS), the Toronto Stock Exchange (TSE), and the Canadian Broadcasting Centre (CBC). The group also targeted political leaders, including then-Prime Minister of Canada Stephen Harper, whom they planned to behead.[1] Although these attacks were pre-empted, the case of the Toronto 18 sparked significant national and international media attention. This notoriety, in turn, prompted a number of questions, ranging from how and why such a terrorist cell could form in Canada, to questions about where these individuals came from and how they became inspired by al-Qaeda, to questions about the internal dynamics of the cell and why they selected certain targets. The goal of this chapter is to address questions such as these through the application of criminological theories and perspectives. Space limitations preclude a thorough examination of each theories' application to radicalization. Rather, the

1 Ian Austen, "Man Guilty in Canada Terror Plot," *New York Times*, September 26, 2008, https://www.nytimes.com/2008/09/26/world/americas/26canada.html.

objective is to identify the facets of particular theories that may be useful in understanding the Toronto 18.

Historically, research in terrorism studies has drawn from various disciplines including, but not limited to, political science, psychology, and security studies. More recently, however, researchers have convincingly argued that terrorism and political violence also fall within the realm of criminology and that criminological approaches, therefore, can and should inform terrorism studies.[2] Perspectives that have been extended to account for various aspects of terrorism include general strain theory,[3] social learning theory,[4] the situational crime prevention framework,[5] and situational action theory.[6] Thus far, these perspectives have addressed terrorism in a predominantly generalized manner. In this chapter, each of these criminological perspectives (i.e., general strain theory of terrorism, social learning theory, situational crime prevention, and situational action theory) will, first, be briefly summarized and, second, be applied specifically to the Toronto 18 case. This was accomplished by drawing from news media accounts and court documents of the case, which included trial decisions, trial transcripts, expert witness reports, and sentencing reports, amongst other records. Extensive personal and background details for whom information was available were collected for each individual, with the exception of the youth offenders because of their ages. The information

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2 See Gary Lafree and Joshua D. Freilich, "Bringing Criminology into the Study of Terrorism," in *The Handbook of the Criminology of Terrorism,* eds. Gary LaFree and Joshua D. Freilich (Chichester, U.K.: Wiley Blackwell, 2017), 3–14. See also Joshua D. Freilich and Gary Lafree, "Criminological Theory and Terrorism: An Introduction to the Special Issue," *Terrorism and Political Violence* 27 (2015): 1–8.

3 Robert Agnew, "A General Strain Theory of Terrorism," *Theoretical Criminology*, 14 (2010): 131–53; Robert Agnew, "General Strain Theory and Terrorism," in *The Handbook of the Criminology of Terrorism,* eds. Gary LaFree and Joshua D. Freilich (Chichester, U.K.: Wiley Blackwell, 2017), 121–32.

4 J. Keith Akins and L. Thomas Winfree, "Social Learning Theory and Becoming a Terrorist: New Challenges for a General Theory," in *The Handbook of the Criminology of Terrorism,* eds. Gary LaFree and Joshua D. Freilich (Chichester, U.K.: Wiley Blackwell, 2017), 133–49.

5 Henda Y. Hsu and Gary R. Newman, "The Situational Approach to Terrorism," in *The Handbook of the Criminology of Terrorism,* eds. Gary LaFree and Joshua D. Freilich (Chichester, U.K.: Wiley Blackwell, 2017), 150–61.

6 Per-Olof H. Wilkström and Noémie Bouhana, "Analyzing Radicalization and Terrorism: A Situational Action Theory," in *The Handbook of the Criminology of Terrorism,* eds. Gary LaFree and Joshua D. Freilich (Chichester, U.K.: Wiley Blackwell, 2017), 175–86.

collected included offenders' upbringing, family life, and psychiatric evaluations. In addition, extensive information was gathered on numerous aspects related to the terrorist cell. The purpose of this approach was to try to understand what inspired the members of the Toronto 18 to join the cell, as well as why the group functioned the way it did, through a criminological lens.

II. GENERAL STRAIN THEORY

A. Overview of General Strain Theory

Robert Agnew's[7] general strain theory (GST) posits that a wide range of strains – or "stressors" – contribute to crime and delinquency. According to Agnew's GST[8], strain may be experienced as a result of the introduction of negative stimuli (e.g., neglect or abuse), the removal of positive stimuli (e.g., the death of a loved one), or the failure to achieve positively valued goals (e.g., financial or status-related). Put simply, a strain is an unfavourable condition or event experienced by an individual; as such, GST is situated at the "social-psychological" level, which focuses on an individual's interactions with their immediate surrounding environment.[9] When confronted with one or more strains, individuals feel a range of negative emotions, including frustration, anger, and desperation. As a result, individuals may resort to crime and delinquency to alleviate the negative emotions they experience due to strain (e.g., drug or alcohol abuse) or to escape the source(s) of strain (e.g., monetary theft).[10] In particular, GST maintains that strains that are higher in magnitude, more recently encountered, longer in duration, and more clustered in time have greater influence in producing a criminal coping strategy.[11]

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7 Robert Agnew, *Pressured into Crime: An Overview of General Strain Theory* (New York: Oxford University Press, 2006).

8 Agnew, *Pressured into Crime*.

9 See Robert Agnew, "Foundation for a General Strain Theory of Crime and Delinquency," *Criminology* 30 (1992): 47–88; Agnew, *Pressured into Crime*.

10 Agnew, *Pressured into Crime*.

11 Agnew, "Foundation for a General Strain Theory of Crime and Delinquency," 64–66.

B. General Strain Theory in Terrorism Studies

Agnew[12] has elaborated upon GST to provide an explanation for (1) the strains that are most likely to result in terrorism; (2) why these strains are likely to result in terrorism; and (3) why so few who experience these strains use terrorism as a coping strategy. Referred to as the general strain theory of terrorism (GSTT), this approach posits that "collective strains," or strains that are experienced by an identifiable group based on racial, ethnic, classist, or political grounds, increase the likelihood of terrorism.[13] The collective strains that are most likely to result in terrorism include those that are "(a) high in magnitude, with civilians affected; (b) unjust; and (c) inflicted by significantly more powerful others, including 'complicit' civilians, with whom members of the strained collectivity have weak ties."[14] Collective strains, according to the GSTT, contribute to terrorism because they increase negative emotions, as well as reduce social and self-controls and the ability to cope through both legal and military channels, thus fostering the social learning of terrorism by strengthening group ties and the formation of terrorist groups.[15] Additionally, potential terrorists do not need to personally experience collective strains. Rather, they may be vicariously experienced through membership in a group with which they closely identify.[16] Although Agnew (2010) acknowledges that collective strains do not lead to terrorism in every case, the GSTT does, however, provide a number of subjective factors that "condition" the effect of collective strains and, resultantly, influence an individual's likelihood of engaging in terrorism.[17] These factors include the extent to which they identify with the strained collectivity, personally-experienced strains associated with that collectivity, possess attitudes favourable to terrorism, or associate with those who either support or engage in terrorism themselves.[18]

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12 Agnew, "A General Strain Theory of Terrorism."

13 See Agnew, "A General Strain Theory of Terrorism." See also Agnew, "General Strain Theory and Terrorism."

14 Agnew, "A General Strain Theory of Terrorism," 132.

15 See Agnew, "A General Strain Theory of Terrorism."

16 Agnew, "A General Strain Theory of Terrorism."

17 Agnew, "A General Strain Theory of Terrorism."

18 Agnew, "A General Strain Theory of Terrorism."

III. GENERAL STRAIN THEORY AND THE TORONTO 18

The members of the Toronto 18 strongly identified themselves with the global Muslim community (the "ummah"). The wars in Afghanistan and Iraq triggered many of the youth, producing feelings of a "collective strain" for the Muslims across the globe. They perceived that Muslims were being mistreated and/or oppressed at the hands of the American military and the West more generally. To illustrate, Fahim Ahmad, for example, believed that the West was in a "global fight" with Islam and identified Canada, with its military presence in Afghanistan, as part of the problem.[19] The 2004 invasion of Iraq was apparently "the straw that broke the camel's back," as all of Ahmad's resentment towards the West and United States (US) for having invaded Afghanistan became manifest in intense anger with the invasion of Iraq.[20]

Zakaria Amara was similarly affected by the wars in Afghanistan and Iraq, which seemed to precipitate within him "a roller coaster ride of conflicting emotions... including confusion, shock, sorrow, helplessness and outrage of images of conflict and barbarous stories of slaughter of Muslims."[21] It was further noted that Amara's "self-concept seemed to have hyper-identified with the cause of defending the aimless Muslims against oppression."[22] Saad Khalid also was primarily concerned with Canada's involvement in Afghanistan, particularly its combat role after 9/11. As a result, he "felt there were hypocritical and unfair policies towards Muslims in Afghanistan. He emphasized that he was not angry at and did not hate Americans. However, he was angry about the policies."[23] As with other members, it was noted at trial that Saad Gaya's actions were not attributable to any sort of cognitive or personality conditions, such as anti-sociality, impulsivity, or psychopathy. Instead, he was motivated by "his religious beliefs, his sympathy towards the suffering 'limbs' of the Muslim Nation, and his perceived sense of duty to stand up to the Canadian Government toward change in foreign policy."[24]

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19 See Isabel Teotonio, "Toronto 18," *Toronto Star*, July 3, 2010, http://www3.thestar.com/static/toronto18/index.1.html.

20 Julian Gojer, "Psychiatric Report for Sentencing," (2010): 2.

21 R v. Amara, 2010 ONSC 441 at para 62 [*Amara*].

22 Arif Syed, "Psychiatric Report Regarding Amenability to Treatment," (2009): 7–8.

23 R v. Khalid, 2009 O.J. No. 6414 at para 22 [*Khalid*].

24 R v. Gaya, 2010 ONSC 434 at para 43 [*Gaya*].

A common topic of discussion among members of the terrorist cell, and their larger Ontario Muslim community, related to the collective strains they experienced through their Muslim brothers and sisters around the world. Notably, these strains were experienced vicariously, since most members themselves spent portions of their childhood in Canada and did not directly experience the strains associated with military occupation. Still, these strains became central to the members. For instance, within "their gatherings and conversations, the group would 'just want to talk about grievances.'"[25] Ahmad spoke often about Muslims whose countries were being attacked by the U.S. and its allies, as well as how "Muslims everywhere needed to stand up for their faith."[26] As noted earlier, the GSTT proposes that a collective strain, such as that experienced by members of the Toronto 18, is most likely to result in terrorist acts. In the case of Gaya, for example, religiously motivated moral outrage superseded his perceived need to abide by secular laws.[27] In a similar vein, Amara's "need to attempt terrorist acts may have included his determined need to follow through on commitments of Muslim loyalty."[28]

IV. Social Learning Theory

A. Overview of Social Learning Theory

At its core, social learning theory (SLT) posits that certain processes govern the learning of both pro-social and anti-social (criminal) behaviour.[29] In particular, SLT has four key theoretical elements. First, differential association refers to the direct social contact between an individual and members of their peer group, which provides the context for social learning. Second, SLT considers imitation to be the most basic form of learning, which occurs when an individual observes, and models, the behaviour of their peers. Third, the definitions element of SLT refers to an individual's own attitudes, values, and orientations about what are and are not acceptable forms of behaviour. And fourth, differential reinforcement refers to the experienced, expected, or perceived rewards and punishments that

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25 Arif Syed, "Psychiatric Report Regarding Amenability to Treatment," (2009): 7.

26 R v. Ahmad, 2010 ONSC 5874 at para 28 [*Ahmad*].

27 *Gaya*, ONSC at para 43.

28 *Amara*, ONSC at para 52.

29 Edwin H. Sutherland, *Principles of Criminology*, 4th ed. (Philadelphia: J.B. Lippincott, 1947).

follow the performance of a particular behaviour and functions to push an individual toward or pull them away from criminal behaviour.[30] Akers[31] later elaborated upon traditional SLT by adding a structural component called social structural learning theory (SSSL). SSSL adds four structural dimensions to SLT: (1) differential social organization; (2) differential location in the social structure; (3) theoretically defined structural causes; and (4) differential social location in groups.

B. Social Learning Theory in Terrorism Studies

SLT maintains that all behaviour, including terrorism, is learned behaviour. Understandably, then, SLT has been applied to explain how individuals learn to be terrorists and understand the process by which they engage in terrorist actions, from recruitment and building kinships to suicide attacks.[32] According to Akers and Silverman,[33] the "extremist subculture provides identity, ideational and physical resources, and a more or less coherent perspective on the disputes and grievances that are so important to the person in which violent struggle is an integral part of his life." In particular, through differential association "terrorists learn an ideology that the ends justify the means; violence for political ends is accepted and rewarded."[34] In Western nations, individuals or even "groups of friends" may be socialized into terrorism through friends or relatives who are "connected" to terrorist groups.[35] In addition, online social media platforms play a role in radicalized learning; empirical research on applying social learning theory to the radicalization of violent and non-violent

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30 See Ronald L. Akers, *Deviant Behavior: A Social Learning Approach* (Belmont, CA: Wadsworth, 1973).

31 Ronald L. Akers, *Social Learning and Social Structure: A General Theory of Crime and Deviance* (Boston: Northeastern University Press, 1998).

32 See Akins and Winfree, "Social Learning Theory and Becoming a Terrorist."

33 Ronald L. Akers and Adam L. Silverman, "Toward a Social Learning Model of Violence and Terrorism," in *Violence: From Theory to Research*, eds. Margaret A. Zahn, Henry H. Brownstein, and Shelly L. Jackson (Cincinnati: LexisNexis and Andersen Publishing, 2004), 26.

34 Akers and Silverman, "Toward a Social Learning Model of Violence and Terrorism," 27.

35 Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (Philadelphia: University of Pennsylvania Press, 2008).

extremists has concluded that the Internet offers "a source of social connections and messaging that enabled acceptance of radical ideas."[36]

C. Social Learning Theory and the Toronto 18

1. Evidence of Differential Association

There appear to have been multiple pathways through which differential association influenced members of the Toronto 18. One important avenue was provided by local mosques. To illustrate, the psychiatrist who performed a psychiatric evaluation of Fahim Ahmad ahead of his trial found that Ahmad's interest in more radical Islam was, at least to some extent, initiated and supported by senior members of the Meadowvale Mosque.[37] Moreover, some of those sermons propagated aggression in response to Muslim persecution.[38] Ahmad also sought out information from other mosque attendees, but the information they offered him was oftentimes incorrect. For example, when Ahmad discussed his political grievances with other mosque attendees, some would offer him religious advice in the form of misinterpreted Koran verses such as "fight wherever you find them, wait for them at every place of ambush."[39] Both Ahmad and Zakaria Amara were drawn to the mosque because they enjoyed the company and preachings of the centre's janitor, Qayyum Abdul Jamal, who was 20 years their senior. Jamal has been characterized as a social tie that provided access to radical messaging. For instance, Jamal's views were known to sometimes be extreme and, at one public event, he railed against Canadian soldiers raping Muslim women.[40] In addition, as Amara became "increasingly disconnected from his overworked and unhappy parents, the enigmatic Jamal became a sort of father-figure."[41]

Another important trajectory of differential association was the online milieu. One member of the Toronto 18 for whom online connections

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36 Thomas J. Holt et al., "Examining the Utility of Social Control and Social Learning in the Radicalization of Violent and Non-Violent Extremists," *Dynamics of Asymmetric Conflict* 11 (2018): 142. See also Akins and Winfree, "Social Learning Theory and Becoming a Terrorist."

37 Julian Gojer, "Psychiatric Report for Sentencing," (2010), 3.

38 Gojer, "Psychiatric Report for Sentencing," 3.

39 Gojer, "Psychiatric Report for Sentencing," 4.

40 Isabel Teotonio, "Toronto 18: The Brothers of Meadowvale," *Toronto Star*, July 3, 2010, http://www3.thestar.com/static/toronto18/index.1.html.

41 Teotonio, "Toronto 18: The Brothers of Meadowvale."

would prove crucial was Jahmaal James. Within James' "cyber-circle", for example, was "Aabid Khan, known as a Mr. Fix-It because he was a facilitator for the Pakistan-based terrorist organizations Lashkar-e-Tayyiba and Jaish-e-Mohammed."[42] Like Jamal, Khan operated as a social tie that increased radicalization.[43] Khan claimed to have contacts in paramilitary training camps in Pakistan and began speaking with James and others about overseas training. After some time, "they decided to meet in Toronto for about a week in March 2005 to plan."[44] In November 2005, James travelled to Pakistan to meet with Khan and join a training camp that provided him training in both firearms use and making explosives – knowledge that James planned to share with the rest of the terrorist cell back in Canada.[45] In this way, Khan provided James with training that Holt and colleagues[46] may characterize as a "resource to offend."

2. Social Bonds

According to Sageman,[47] friendship and kinship ties are significant factors that drive individuals to join the global Islamist terrorist movement. As a result of the informal self-organization of "bunches of guys," according to Sageman,[48] the movement is formed from the bottom-up. Some members of the Toronto 18 described turning to their extremist peers for a sense of identity and belonging. For Saad Khalid, as an example, it was suggested that "[i]n his quest for meaning he developed a need to belong to a group, which led to his eventual involvement in a terrorist organization, culminated with the behaviour leading to his arrest."[49] It was similarly noted that Amara "turned to his practicing Muslim peer group for his source of intimacy, consistency, and loyalty."[50] For members of the Toronto 18, membership in the group served to provide them with a "more or less"

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42 Isabel Teotonio, "Toronto 18: Soldier of Allah," *Toronto Star*, July 3, 2010, http://www3.thestar.com/static/toronto18/index.1.html.

43 Holt et al., "Examining the Utility of Social Control and Social Learning in the Radicalization of Violent and Non-Violent Extremists," *Dynamics of Asymmetric Conflict*, 11 (2018).

44 Teotonio, "Toronto 18: Soldier of Allah."

45 Teotonio, "Toronto 18: Soldier of Allah."

46 Holt et al., "Examining the Utility of Social Control."

47 Sageman, *Leaderless Jihad*.

48 Sageman, *Leaderless Jihad*.

49 *Khalid*, O.J. at para 31.

50 Arif Syed, "Psychiatric Report Regarding Amenability to Treatment," (2009): 3.

coherent perspective on their grievances or the Afghanistan/Iraq wars. Amara, for example, stated that:

> Ahmad began to recruit the agent by indoctrinating him with emotional arguments about the oppression of Muslims. Ahmad defined "the enemy" as the Americans, and because of the "close local connection between Canada and the United States, Canada was also the enemy."[51]

Sageman[52] has further suggested that joining a homegrown terrorist group is largely a "bottom-up" process, where groups of friends, or "bunches of guys," informally organize to join the global terrorist movement. This was certainly the case with the Toronto 18, as members were not recruited by formal organizations. Ahmad himself declared "we're not officially Al Qaeda but share their principles and methods."[53] Instead, members came to know about the group and its objectives through friendship ties with local boys in their community. Interestingly, the foundation of the group was the bond formed between Amara and Ahmad at school, where they joined the Muslim Student Association and were drawn to other troubled or disaffected Muslim youth. This context "proved fertile for the seeds of extremism and militancy."[54] Through joining the terrorist cell, members came to believe that violence for political ends could be rewarded.[55] Khalid declared that "Ahmad and Amara intended to show the tape to "higher up Mujahadeen people who would be impressed with us" if they could be convinced the group was "the real deal."[56] Shareef Abdelaheem commented that the intended bombings could both prompt Parliament to reconsider its (then) recent decision to extend the military mission in Afghanistan[57] and produce a financial gain, noting that "there's money to be made here."[58]

3. The Role of the Internet

It is increasingly understood that the Internet has played a role in the radicalization of violent extremists, functioning as what Holt et al.[59] describe as "a source of social connections and messaging that enabled acceptance of

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51 Zakaria Amara, "R. v. Zakaria Amara Agreed Statement of Facts," (2009): 1.
52 Sageman, *Leaderless Jihad*.
53 Isabel Teotonio, "Toronto 18: The Camp," *Toronto Star*, July 3, 2010.
54 Teotonio, "Toronto 18: The Brothers of Meadowvale."
55 Akers and Silverman, "Toward a Social Learning Model of Violence and Terrorism."
56 Saad Khalid, "Statement of Uncontested Facts: R. v. Saad Khalid," (2009): 1.
57 Khalid, "Statement of Uncontested Facts," 17.
58 Hy Bloom, "Independent Psychiatric Evaluation: Sentencing Issues," (2010): 38.
59 Holt et al., "Examining the Utility of Social Control," 142.

radical ideas." It is clear that some of the members of the Toronto 18 were also exposed to Jihadist ideology via the Internet. Ahmad, for example, spent increasing time online, including on sites dedicated to highlighting "atrocities" being committed against Muslims by Western forces overseas. He was also influenced by online lectures from the US-born Yemeni preacher Anwar al-Awlaki.[60] Ahmad "became convinced it was his duty to assist the Afghani people and his faith by becoming involved in the conflict."[61] At the same time, Toronto 18 members explored Islamic-based forums (i.e., Clear Guidance) as well as other Internet forums (i.e., Paltalk) where they were able to actively engage with like-minded peers and exchange (and come to further embrace) radical ideas.[62] Although online interactions do not replace the importance of face-to-face social dynamics in the radicalization process,[63] their discussions amongst like-minded peers within these forums further entrenched members into their extremist belief system. For instance, when Ahmad was feeling lonely, he would "go on Islamic sites and forums as a means of gaining further religious knowledge and also meeting other Muslims feeling similar alienation from school and society."[64] Ahmad met his wife on the Islamic forum Clear Guidance, which she later characterized as inciting young Muslims to hate "non-believers" and promoted violence against them.[65]

V. SITUATIONAL ACTION THEORY

A. Overview of Situational Action Theory

Situational Action Theory (SAT) is often referred to as a "general," "dynamic," and "mechanism-based" theory of crime because it may be used to explain all forms of crime: it focuses on the "person-environment interaction," and it identifies the basic explanatory processes behind crime causation.[66] To explain the mechanisms behind criminal acts, SAT

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60 See Michelle Shepherd, "What Happened to the Toronto 18 Plotters?," *Toronto Star*, May 29, 2016.

61 *Ahmad*, ONSC at para 29.

62 Jeremy Kowalski, *Domestic Extremism and the Case of the Toronto 18* (New York: Palgrave MacMillan, 2016), 139.

63 See Paul Gill et al., "Terrorist Use of the Internet by the Numbers: Quantifying Behaviors, Patterns, and Processes," *Criminology & Public Policy* 16 (2017): 99–117.

64 Fahim Ahmad, "Fahim Ahmad's Letter to Justice Dawson," (2010): 2.

65 *Ahmad*, ONSC at para 30.

66 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism," 178.

incorporates four key theoretical elements: (1) the "person" and their propensity for crime; (2) the "setting" or environmental inducements; (3) the "situation" or the "perception-choice process" that is sparked when the "person" meets the "setting"; and (4) the "action" or, more specifically, bodily movements.[67] A key underlying premise of SAT is that crime cannot be understood by solely examining the "person" and the extent to which their personal morals and lack of self-control allow them to see crime as an "action alternative," or the "setting," which has its own set of moral norms that may encourage an individual to break a rule of law.[68] Rather, according to SAT, it is the "situation" – i.e., the bridge between the "person" and the "setting"– that explains the "action."[69] Simply put, SAT proposes that "[a]cts of crime are most likely to happen when crime-prone people take part in criminogenic settings (environments)."[70]

B. Situational Action Theory in Terrorism Studies

According to Wilkström and Bouhana, SAT can shed light on "why some people see acts of terrorism as acceptable" or even why some people become "externally pressurized to carry out acts of terrorism."[71] To illustrate, SAT considers radicalization to terrorism as a process of moral education, where a person comes to understand what right or wrong conduct is, in a given scenario, through the sub-mechanisms of instruction, observation, and trial and error.[72] To explain what causes a radicalized individual to participate in terrorist attacks more specifically, SAT proposes that "the direct causes of a person's involvement in acts of terrorism have to do with their morality and the moral context in which they operate."[73] At the most basic level, then, a person who has the propensity to engage in terrorism may commit a terrorist act if they perceived that act to be a viable "action

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67 See Per-Olof H. Wilkström, "Why Crime Happens: A Situational Action Theory," in *Analytical Sociology: Actions and Networks, ed.* Gianluca Manzo (Chichester: John Wiley & Sons, 2014), 74–94.

68 Wilkström, "Why Crime Happens: A Situational Action Theory," 74–79.

69 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism."

70 Wilkström, "Why Crime Happens," 76.

71 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism," 178.

72 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism," 178.

73 Noémie Bouhana and Per-Olof H. Wilkström, "Theorizing Terrorism: Terrorism as Moral Action: A Scoping Study," *Contemporary Readings in Law and Social Justice* 2 (2010): 60.

alternative," and if they also make the (moral) choice to commit the act.[74] Bouhana and Wilkström further argue that whether a person believes that terrorist acts are an acceptable "action alternative" is dependent upon "their moral education (their history of moral learning and moral experiences), and these experiences depend, in turn, on the individual's history of exposure to moral contexts promoting engagement in acts of terrorism."[75]

Few empirical studies, however, have tested SAT's general theory of crime to explain terrorism. One study that examined SAT's notion of the "moral context" in relation to acts of eco- and animal-rights terrorism found that, following only some high-profile attacks by such groups, moral rules and their enforcement were significantly altered to produce a reduction in subsequent terrorist events.[76] Another study found empirical support for SAT's "person-setting interaction" and violent extremism, concluding that "[a]dolescents that rank high on individual violent extremist propensity are by and large far more susceptible to exposure to violent extremist moral settings than their counterparts with low individual violent extremist propensity."[77]

C. Situational Action Theory and the Toronto 18

1. Motivation for the Planned Terrorist Attacks

Members of the Toronto 18 appear to have had their action processes initiated by a number of external, precipitant events.[78] First, the motivation for the attack emerged, in part, in the period following the 9/11 terrorist attacks. Following this event, members of the cell generally became more sensitive to how "Muslim people were being perceived and treated" in Canada.[79] Fahim Ahmad, in particular, perceived a climate of hatred developing in Canada against Muslims. In this post-9/11 setting, Ahmad observed how Muslims were increasingly being perceived as terrorists and,

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74 See Wilkström and Bouhana, "Analyzing Radicalization and Terrorism." See also Nele Schils and Lieven Pauwels, "Explaining Violent Extremism for Subgroups by Gender and Immigrant Background, using SAT as a Framework," *Journal of Strategic Security* 7 (2014): 27–47.

75 Bouhana and Wilkström, "Theorizing Terrorism," 60.

76 See Jennifer V. Carson and Brad Bartholomew, "Terrorism Outside the Proverbial Vacuum: Implications for the Moral Context," *Deviant Behavior* 37 (2016): 557–72.

77 Schils and Pauwels, "Explaining Violent Extremism for Subgroups," 45.

78 Martha Crenshaw, "The Causes of Terrorism," *Comparative Politics* 13 (1981): 379.

79 Julian Gojer, "Psychiatric Report for Sentencing," (2010): 1–2.

as a result of this climate, Muslim men and women were physically assaulted and harassed.[80] As an example, Muslims' religious attire was being targeted, where Muslim women had their headscarves pulled and forcibly removed.[81] Ahmad himself was once stopped and questioned by the police while dressed in traditional robes.[82] The setting in which the targeted harassment and bullying of Muslims in Canada was observed provided a grievance that drove some members of the Toronto 18 to become further affiliated with their faith.

Second, members of the terrorist cell were motivated by U.S. and Canadian foreign policy decisions. Here, members were provoked by Canada's perceived involvement in the wars in Iraq and Afghanistan.[83] For members of the group, the wars against Iraq and Afghanistan had the effect of bringing about an awareness of the state of the global Muslim community. For instance, the 2003 invasion of Iraq was the "straw that broke that camel's back" for Ahmad.[84] The U.S. and Canada's role in these wars, then, may have provided some degree of environmental inducement for members to be willing to prepare an attack.

However, not all those who experience such provocations will be driven to perceive terrorism as an acceptable "action alternative."[85] What drove members of the Toronto 18 to perceive terrorism as an acceptable action alternative in response to their grievances, then, was due in part to their criminal propensities. Members' criminal propensities in favour of terrorism appear to have developed, to some extent, through processes of self and social selection. These processes "are crucial to our understanding of how people come into contact with particular moral contexts... that, through their moral education, promote 'radicalization'."[86] To illustrate, members of the Toronto 18 situated themselves within radicalizing moral contexts among peers who helped to develop their propensity for terrorism.

2. Radicalization as a Process of Moral Education

The leaders of the Toronto 18 developed their "propensities" for terrorism in a variety of settings. One radicalizing environment in which

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80 Gojer, "Psychiatric Report for Sentencing," 10.
81 Gojer, "Psychiatric Report for Sentencing," 10.
82 Gojer, "Psychiatric Report for Sentencing," 10.
83 Gojer, "Psychiatric Report for Sentencing," 2.
84 Gojer, "Psychiatric Report for Sentencing," 2.
85 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism."
86 Wilkström and Bouhana, "Analyzing Radicalization and Terrorism,"181.

Ahmad, for example, received instruction was from radical high-level members at the local mosque. Ahmad frequently interacted with these individuals who "believed Islam was under attack" by the U.S. and its allies.[87] As a result of Islam being under attack, they argued, Muslims everywhere were instructed to stand up for their faith.[88] This form of instruction by high-level members appeared to be one of many factors that effectively influenced Ahmad's moral education. An additional influential factor at play was the online realm. To illustrate, virtual interactions with extremists in web forums (like Clear Guidance) served as influential forms of instruction for Ahmad. There, Ahmad was frequently exposed to and influenced by Muslims imparting extremist ideology.[89]

Although these on- and offline sources of instruction were effective methods of instruction for the leaders of the Toronto 18, other methods of instruction were given to the recruits that may have also been effective. For instance, the winter training camp, held by the terrorist cell, provided its members with instruction that was meant to influence attendees' propensities to gradually favour terrorism as a morally acceptable "action alternative." Various methods of instruction were given to attendees at the training camp, the most notable of which included both lectures (*halaqaat*) and Jihadi videos imparting extremist ideology. One video, for example, at the training camp featured the former leader of al-Qaeda in Iraq as well as "masked and armed mujahideen fighters and firing weapons" to instruct attendees on the importance of fighting for their religion.[90] Together, the lectures and videos generally sought to "encourage them [attendees] to fight for Islam."[91] As a result, those who attended the training camp (or at least those who were aware of the "true" purpose of the camp) may have come to believe that terrorism was an acceptable "action alternative" in response to the atrocities committed against Muslims. In other words, the training camp was an opportunity for the leaders of the Toronto 18 to influence attendees' moral education by instructing them on the appropriate moral response to the perceived oppression of Muslims.

Finally, the life histories of group members also situated them in settings where their criminal propensities may have been reinforced.

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87 *Ahmad*, ONSC at para 28.
88 *Ahmad*, ONSC at para 28.
89 *Ahmad*, ONSC at para 29.
90 Zakaria Amara, "R. v. Zakaria Amara Agreed Statement of Facts," (2009): p. 13.
91 Amara, "R. v. Zakaria Amara Agreed Statement of Facts," 2.

Ahmad's religious background, for example, discouraged him from questioning religious authorities and prevented him from thinking critically about the nature of what was being taught to him. The elders at his mosque "challenged his loyalty to the faith and said everything just short of 'you are not going to Heaven' if he did not believe them wholly."[92] Similarly, Amara isolated himself in a "very tight circle" of like-minded Muslim peers, where they were "sequestered from the refreshing currents of the broader Muslim and non-Muslim community."[93] As a result of being isolated in these radicalizing environments, Ahmad and Amara's morality was continuously pushed toward accepting violence as an acceptable "action alternative."

VI. Situational Crime Prevention

A. Overview of Situational Crime Prevention

Situational Crime Prevention (SCP) is a primary prevention orientation that is comprised of three main elements: (1) a theoretical framework, (2) a methodology, and (3) a set of "opportunity-reducing" techniques.[94] First, the theoretical frameworks associated with SCP include routine activities and rational choice approaches.[95] Second, SCP methodology is characterized by the "action research" paradigm, which provides a framework to collect and analyze data, and to implement the findings from the analysis.[96] Third, SCP seeks to inform prevention measures for specific crimes using opportunity-reducing techniques that would reduce the rewards or increase the risk and difficulties for offenders.[97]

SCP techniques were later expanded upon by Cornish and Clarke who developed 25 unique techniques, each of which falls under one of five prevention themes: (1) increasing the effort; (2) increasing the risks; (3)

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92 R v. Ahmad, 2010 ONSC 5874 (Evidence, Dr. Julian Gojer's psychiatric evaluation of Mr. Ahmad for sentencing), 2, Terrorismcases.ca.

93 R v. Amara, 2010 ONSC 441 (Evidence, Dr. Arif Syed's psychiatric report regarding amenability to treatment for Zakaria Amara), 6–7, Terrorismcases.ca.

94 See Ronald V. Clarke, "Situational Crime Prevention," *Crime and Justice* 19 (1995): 91–150.

95 Hsu and Newman, "The Situational Approach to Terrorism."

96 Clarke, "Situational Crime Prevention."

97 Clarke, "Situational Crime Prevention."

reducing the rewards; (4) reducing provocations; and (5) removing excuses.[98] Each technique aims to prevent an offender from reaching their target. Here, one of the most common techniques to increase the effort expended by an offender is to use "target hardening," such as tamper-proof packaging on products.[99]

B. Situational Crime Prevention in Terrorism Studies

SCP is adaptable to all forms of crime, including terrorism. In fact, terrorism, according to SCP, is not necessarily distinct from other forms of crime in that an explanation of it does not necessarily rely on an understanding of a terrorist's political, religious, or ideological motivation.[100] Rather, SCP states that a more significant factor is understanding a terrorist offender's immediate motivations or the most effective and efficient way to "reach and destroy the target."[101] According to Clarke and Newman, the most attractive targets to terrorists are those that lie in close proximity to their base of operations.[102] Apart from this, however, Clarke and Newman argue that terrorists commonly seek out targets that are exposed, vital, iconic, legitimate, destructible, occupied, and easy. Not only can SCP help to explain the targets of terrorism, but theorists have also applied this framework to explain how terrorists choose their weapons, using the acronym MURDEROUS (multipurpose, undetectable, removable, destructive, enjoyable, reliable, obtainable, uncomplicated, and safe).[103]

SCP measures have generally been supported by empirical research on terrorist attacks. Gruenewald, Allison-Gruenewald, and Klein, for example, applied Clarke and Newman's targets framework to eco-terrorism targets, finding support for exposed, easy, and legitimate measures.[104] Gruenwald

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98 Derek B. Cornish and Ronald V. Clarke, "Opportunities, Precipitators and Criminal Decisions: A Reply to Wortley's Critique of Situational Crime Prevention," *Crime Prevention Studies* 16 (2003): 41–96.

99 See Cornish and Clarke, "Opportunities, Precipitators and Criminal Decisions."

100 Hsu and Newman, "The Situational Approach to Terrorism."

101 Hsu and Newman, "The Situational Approach to Terrorism," 151.

102 Ronald V. G. Clarke and Graeme R. Newman, *Outsmarting the Terrorists* (Westport: Greenwood Publishing Group, 2006).

103 See Clarke and Newman, *Outsmarting the Terrorists*.

104 Jeff Gruenewald, Kayla Allison-Gruenewald, and Brent R. Klein, "Assessing the Attractiveness and Vulnerability of Eco-Terrorism Targets: A Situational Crime Prevention Approach," *Studies in Conflict & Terrorism* 38 (2015): 433–55.

and colleagues also found that eco-terrorists often chose non-vital, indestructible, and unoccupied targets.[105] A second study, which explored successful and unsuccessful assassination incidents by terrorists, found support for SCP measures in successful terrorist assassinations, including the number of fatalities, weapon type, and proximity between terrorists and their targets.[106] Another study explored the impact of "target hardening" techniques on airplanes and U.S. embassies, finding that such measures did not increase either the frequency or proportion of casualty attacks.[107] Lastly, researchers studying the situational prevention of terrorism found that the construction of the West Bank Barrier on the Palestinian-Israeli border, alongside related security activities, was effective in preventing terrorist attacks and fatalities.[108]

C. Situational Crime and the Toronto 18

1. Target Selection

Members of the Toronto 18 placed significant value on one of the most important features of a target according to Newman and Clarke's SCP framework: nearness. Proximity is crucial because it allows terrorists to gather detailed information on the target to aid in their attack.[109] To illustrate, despite naming Americans "the enemy," members of the Toronto 18 instead chose Canadian targets located near Mississauga and Scarborough – the group's "separate suburban Toronto satellite communities."[110] Here, the terrorist cell was attracted to two nearby high-profile Canadian targets: the TSE and the CSIS headquarters on Front Street.[111] Additionally, members' less concrete plan was to target Parliament

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105 Gruenewald, Allison-Gruenewald, and Klein "Assessing the Attractiveness and Vulnerability."

106 See Marissa Mandala and Joshua D. Freilich, "Disrupting Terrorist Assassinations through Situational Crime Prevention," *Crime & Delinquency* 64 (2018): 1515–537.

107 See Henda Y. Hsu and David McDowall, "Does Target-Hardening Result in Deadlier Terrorist Attacks against Protected Targets? An Examination of Unintended Harmful Consequences," *Journal of Research in Crime and Delinquency* 54 (2017): 930–57.

108 See Simon Perry et al., "The Situational Prevention of Terrorism: An Evaluation of the Israeli West Bank Barrier," *Journal of Quantitative Criminology* 33 (2017): 727–51.

109 Hsu and Newman, "The Situational Approach to Terrorism."

110 John McCoy and W. Andy Knight, "Homegrown Terrorism in Canada: Local Patterns, Global Trends," *Studies in Conflict & Terrorism* 38 (2015): 263.

111 R v. Amara, 2010 ONSC 441 (Agreed Statement of Facts, R. v. Zakaria Amara), 6, Terrorismcases.ca.

Hill in the close-by national capital of Ottawa. Members of the group carefully chose these targets because each were located "near" their groups' base of operations, despite naming Americans as "the enemy."

In deciding on specific targets located near their base of operations, members of the Toronto 18 selected the TSE and the CSIS headquarters on Front Street because they were believed to be destructible – which is another important component of target selection. For instance, during the planned attack that members referred to as the "Battle for Toronto," they envisioned that a significant amount of destruction would occur against their intended target. There would be "blood, glass, and debris everywhere" from the buildings following the attack, according to members of the terrorist cell.[112]

The destruction of these buildings and the surrounding area would have inevitably led to the death and injury of civilians. A high number of casualties was an important objective of the group's planned attack to demonstrate their commitment to violence and their cause. As a result, members chose targets that they knew to be "occupied" with civilians. For instance, members chose buildings in downtown Toronto because they were likely to be occupied with civilians and lead to mass casualties.[113] Armed with information gathered from their "near" target, members of the Toronto 18 decided to strategically detonate the bombs during a period when the city was most likely to be densely populated with civilians. To cause as many casualties as possible, the bombs would have been detonated in the city centre at 9 a.m.[114] Yet another site, Parliament Hill, was targeted so members could "go and kill everybody"[115] because it would be "occupied" with government officials and politicians whom Ahmad would behead "one by one."[116]

Although the "occupied" characteristic of downtown Toronto proved to be an attractive feature of the targets, members of the Toronto 18 also selected these targets based on their perception that they were "iconic" and "vital" to Canada. First, the intended targets in downtown Toronto hold symbolic value to Canada. The CSIS building on Front Street, for instance,

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112 *Amara*, Agreed Statement of Facts, 20.

113 McCoy and Knight, "Homegrown Terrorism in Canada."

114 McCoy and Knight, "Homegrown Terrorism in Canada."

115 Isabel Teotonio, "Toronto 18: In Search of a Safe House," *Toronto Star*, July 3, 2010, http://www3.thestar.com/static/toronto18/index.1.html.

116 Isabel Teotonio, "Toronto 18: Fahim Ahmad 'The Ideologue'," *Toronto Star*, July 3, 2010, http://www3.thestar.com/static/toronto18/index.1.html.

is an iconic representation of the security of the nation. Second, not only were the targets attractive because they were iconic, but they could also be considered to be "vital." Although the SCP framework normally refers to transportation grids and electricity networks as "vital," members of the Toronto 18 envisioned that the attack would have an impact on what they thought to be vital to Canada: its economy. For example, when the city of Toronto would be "shut down" following the attack, Shareef Abdelhaleem believed that the attack against the TSE would "close the stock exchange for days."[117] Abdelhaleem estimated the Canadian economy would, as a result, "lose half a trillion dollars."[118] Clearly, choosing destructible targets that are vital to functioning society would help to clearly send the Toronto 18's message to Canadian and American governments while instilling fear among civilians.

2. Weapon Selection

Members of the Toronto 18 chose certain weapons to effectively reach and destroy their selected targets. First, members of the terrorist cell chose a "destructive" weapon to effectively destroy their targets in downtown Toronto. To illustrate, the powerful blast from the bombs located inside rented U-Haul vans would not only cause significant damage to the targeted buildings but also injury and death to the civilians inside the buildings – or even those simply on their way to work.[119] Further, there is evidence that members of the Toronto 18 wanted to exploit the destructive capabilities of the bomb and maximize the destruction of "the whole building and the surrounding three blocks" of downtown Toronto.[120] Here, Abdelhaleem suggested using a two tonne, rather than one tonne, bomb outside of the TSE.[121] Explosive tests from the Royal Canadian Mounted Police (RCMP) that replicated the effects of the bomb blast only served to confirm the terrorists' cells' potential to cause considerable damage to their intended targets. In fact, the RCMP Explosives Disposal Unit determined that the blast would "have caused catastrophic damage to a multi-storey glass and

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117 R v. Gaya, 2010 ONSC 434 (Agreed Statement of Facts, R. v. Saad Gaya), 9, Terrorismcases.ca.

118 *Gaya*, Agreed Statement of Facts, 9

119 Isabel Teotonio, "Toronto 18 Attack was to Mimic 9/11," *Toronto Star*, June 23, 2009 https://www.thestar.com/news/gta/2009/06/23/toronto_18_attack_was_to_mimic_911.html.

120 *Amara*, Agreed Statement of Facts, 20.

121 *Amara*, Agreed Statement of Facts, 20.

steel frame building 35 metres from the bomb site, as well as killing or causing serious injuries to people in the path of the blast waves and force."[122]

According to Clarke and Newman's[123] MURDEROUS framework, the Toronto 18's choice of weapon was not necessarily easy, uncomplicated, or obtainable. Although a bomb is a relatively destructive weapon, members of the group required skills to create a bomb and a detonator, rendering it relatively complicated. Since Amara wanted to create the bomb "with his own hands," it would require certain skills and materials to manufacture.[124]

Having said that, the members of the group had to make sure the final product was reliable.[125] As Abdelhaleem explained, "it would be terrible if it doesn't explode because they got the concentration wrong."[126] Although there is little evidence that members of the Toronto 18 tested the actual bomb's reliability or explosivity, the bomb's detonator was tested multiple times to ensure it would be functional on the day of the attack.[127] On one occasion, Amara demonstrated the detonators functionality to Abdelhaleem by dialing his cell phone, which caused "a spark from the end of the wires that ignited matches, and burned the carpet."[128] Eventually, Amara configured the detonator so that members wouldn't have had to be so close to the bomb in order to detonate it. Amara claimed that "you could call from anywhere and it will just explode."[129]

In addition, the chemicals needed to create such a powerful bomb were not easily obtainable. Amara initially wanted to create the bombs out of the more powerful material, "RDX^2", but since it was more difficult to obtain, "he ruled it out and decided to use ammonium nitrate."[130] In effect, Amara had to sacrifice destructiveness for the sake of finding more easily obtainable materials. There was also the question of how to store the quantity of chemicals required to make the bombs. Members of the group identified a nearby storage unit to house the material; however, the potential for security cameras located near the storage unit increased the risk and difficulty of storing the illegal material in this location. Here, although "Amara had

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122 *Gaya*, Agreed Statement of Facts, 34.
123 Clarke and Newman, "Outsmarting the Terrorists."
124 *Amara*, Agreed Statement of Facts, 6.
125 Clarke and Newman, "Outsmarting the Terrorists."
126 *Gaya*, Agreed Statement of Facts, 10.
127 *Amara*, Agreed Statement of Facts, 6.
128 *Gaya*, Agreed Statement of Facts, 11.
129 *Gaya*, Agreed Statement of Facts, 6.
130 *Amara*, Agreed Statement of Facts, 6.

wanted to rent a storage unit for the chemicals... Abdelhaleem had told him that was a stupid idea because storage units have security cameras."[131] The security cameras, then, produced a deterrent effect on members of the group.

The Parliament Hill attack was to have taken a different approach than the Battle of Toronto. Rather than engaging their target from a safe distance like the Toronto plot, members of the group would need to be present to reach their target at Parliament Hill. To take over Parliament Hill and reach the politicians, Ahmad opted for the use of handguns. The handguns selected by Ahmad offered a number of advantages to the group. For example, they would have been relatively undetectable during the Parliament Hill attack, capable of being concealed under clothing or in bags. To obtain the handguns and ammunition required for the attack, then, Ahmad instructed Dirie to travel to the U.S. "with the intention of bringing them back to Canada illegally."[132] Additionally, members would need to receive weapons training and undergo military training exercises.[133] At a training camp, members of the group were taught how to use guns. The camp included "activities included firearms training and target practise with a black 9mm handgun... shooting with an air rifle at various targets, mock war games that involved paintball guns, marching and running through various obstacle courses."[134] As a result of this training, the use of guns during the Parliament Hill attack was made "safer" and "uncomplicated."

VII. Conclusion

The comparatively recent application of criminological perspectives has provided useful insights into terrorism. Each of the frameworks identified in this chapter advances our understanding of key aspects of this phenomenon. General Strain Theory of Terrorism (GSTT), an extension of general strain theory, highlights the effect that "collective strain" often plays in the process of radicalization toward terrorism. Simply put, violent extremism is predominantly a group-based phenomenon. Even so-called "lone wolves" are usually connected to some broader, often online, network

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131 *Amara*, Agreed Statement of Facts, 28.

132 R v. Dirie, [2009] O.J. No. 6526 (Agreed Statement of Facts, Ali Dirie), 1, Terrorismcases.ca.

133 *Ahmad*, ONSC.

134 *Ahmad*, ONSC at para 5.

or community.[135] As Agnew[136] has posited, the collective strains experienced by the members of the Toronto 18, in relation to their Muslim identities and their identification with what they perceived to be oppressed Muslims around the world, increased the likelihood of terrorism by increasing negative emotions and reduced social and self-controls and their ability to cope through both legal channels. Social learning theory illustrates the importance of understanding the social context of radicalization to violence. Terrorism, like any other social behaviour, is learned behaviour.[137] The case of the Toronto 18 illustrates how the processes requisite to acts of terrorism – including recruitment, the strengthening of group ties and kinship bonds, and the learning of various terrorist techniques – led to the formation of fledgling terrorist groups. Situational action theory (SAT) further adds to the puzzle by focusing on radicalization to violence as a process of moral education. Through training camps and both offline and online discussion, group member propensities gradually came to favour terrorism as a morally acceptable "action alternative."[138] Finally, situation crime prevention (SCP) alerts us to key facets of the commission of terrorist acts. Targets of terrorism, and the weapons used in those attacks, are chosen with a particular logic in mind,[139] and uncovering that logic would go a substantial way toward assisting with the prevention of terrorism.

Given its complexity, to expect any single orientation to "explain" terrorism would be unrealistic at best, foolhardy at worst. While this exploration of the Toronto 18 clearly demonstrates that criminology has much to offer in the way of theorizing about terrorism, much work remains. First, other criminological approaches could fruitfully be applied to terrorism. To give but one example, the life course perspective is potentially relevant in this context. Second, the Toronto 18 case also points to the need to establish broader connections between various criminological perspectives. Just as theoretical integration continues to be a challenge for criminology generally, so too will it prove difficult in the realm of terrorism studies. Finally, more studies are needed to extend the application of

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135 See Bart Schuurman et al., "End of the Lone Wolf: The Typology that Should Not Have Been," *Studies in Conflict & Terrorism* 42 (2019): 771–78.

136 Agnew, "A General Strain Theory of Terrorism."

137 See Akins and Winfree, "Social Learning Theory and Becoming a Terrorist."

138 See Wilkström and Bouhana, "Analyzing Radicalization and Terrorism."

139 See Hsu and Newman, "The Situational Approach to Terrorism."

criminology perspectives and to continue building the criminology of terrorism.

The Infiltration of the Toronto 18: A Conversation with Mubin Shaikh

AMARNATH AMARASINGAM AND MUBIN SHAIKH [*]

ABSTRACT

This chapter is an edited version of a conversation that occurred in December 2019 between Amarnath Amarasingam and Mubin Shaikh, a confidential human source for Canadian law enforcement related to the Toronto 18 case. Shaikh, having spent an inordinate amount of time with the suspects, has important insights on the group, their friendship dynamics, and their differing levels of radicalization. The chapter also delves into the challenges of infiltration, trust-building with suspects, as well as the risks experienced by those who go undercover. The conversation concludes with Shaikh reflecting on ongoing struggles related to convincing some in the Muslim community in Canada that it was not entrapment and the social and psychological fallout of the whole experience, even after a decade.

I. INTRODUCTION

To fully understand the twists and turns of the so-called Toronto 18 case, it is important to talk to religious scholars, legal experts, and terrorism researchers. But it is also important to talk to people who spent an inordinate amount of time with the suspects, listening to their

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views and watching the evolution of this network of individuals over time. One of these individuals is Mubin Shaikh.

Shaikh had been a confidential human source for the Canadian Security Intelligence Service (CSIS) since 2004 and is a former police agent for the Royal Canadian Mounted Police's (RCMP) Integrated National Security Enforcement Team. Because details of his work before the Toronto 18 case remain protected, this interview deals largely with how he was brought into the Toronto 18 investigation, how he infiltrated the group, and the impact his involvement had on his family and his standing in the Muslim community.

Shaikh initially infiltrated the group while with CSIS and traversed to the RCMP as a police agent on December 5, 2005, shortly after the initial meet with suspect group members in Toronto. After a seven-month investigation, during which key evidence was collected, charges were finally laid in June 2006. Shaikh then became the primary Fact Witness in five subsequent legal proceedings spanning four years. During this time, he refused to go into witness protection for the sake of his family and has since been involved in combating extremism both online and offline.

This conversation took place in Toronto on December 13, 2019 and has been edited for quality and consistency.

II. RECRUITMENT BY CSIS AND THE INFILTRATION

Amarasingam: What is the natural starting point in the story of how you got involved with the Toronto 18 case?

Shaikh: I was with CSIS undercover for two years, almost two years starting in 2004. After I returned from Syria. I was what they call "under development" by the service. My duties were to infiltrate organizations that I had been introduced to. I would be told "here is a target, this is who the target is." They would identify who that person was, and they said, "just tell us what they're doing." I was never told what information the service had on them. It was left to me to either confirm or deny the information they had. I did multiple infiltration operations online and on the ground. One day, in November, they said to me, "these are the guys that we're looking at."

Amarasingam: This is November 2005.

Shaikh: Correct, November 25, to be precise. That evening, I went to the banquet hall where they were gathered. While it is true that the Service did send me to them, I was also independently invited by the person who was running the event. It was a presentation on the men held under the security certificates and it was being used as a grievance – look, these people, they haven't even been charged with a crime, and yet they can't even touch their children when they go to visit. You have murderers, drug dealers, and rapists who have done those things and yet they are able to see their families. So that was a grievance. It was in this context that those individuals from the Toronto 18 came to that banquet hall. I was there already, by myself at a table. Somebody walks across the room; he's got an Arabic-style scarf covering his face. He comes right next to me, opens the scarf, and it is Zakaria Amara. I thought to myself, oh, how convenient.

Amarasingam: Why do you think he came to you?

Shaikh: No idea. The hand of God, fate. There were other tables where there were single individuals sitting and even two or three individuals. I have no idea why he would come to my table specifically. He then said the rest of his friends were coming, so I waited for them. They entered; I recognized them from the photos that I had been given. They came over to us; he got up. I took that as an opportunity. I also got up. They moved to a larger table adjacent to us. I joined them at the table, and so began the infiltration of the Toronto 18.

Amarasingam: Starting in 2004, why did you feel the need to give yourself to CSIS as a potential resource?

Shaikh: I returned from Syria after studying there for two years. After my time there, I came back to Toronto, and what prompted me to contact CSIS was the day that the media ran with the story of some legal proceedings related to Momin Khawaja. He had been implicated in the 2004 London fertilizer bomb plot, and what prompted me to contact them is that I went to Qur'an school with him as a kid. I knew him for years as a child. We played together, him and his brothers. That is what prompted me to get in touch, to potentially be a character reference for him. I said the family is a good family and so on, and they said, "well look, you don't know what people do after you've known them from your childhood. We have this tendency to want to remember people the way we remembered them back

then, not realizing that they have changed." Then they said, "somebody's going to come and see you and talk about some things with you." And that's how I got recruited by the Service.

Amarasingam: Why do you think that kind of transition was so easy for you? You said yes right away?

Shaikh: If you really want to track it back, and if I can even self-psychoanalyze here for a moment, I've grown up in that environment. I was in the Cadets for five years; I went on training exercises with reserve and regular forces who were our instructors. Maybe a little state sympathetic if you will. If you really want to go way back to high school, I was a co-op student with the Intercommunity Relations Unit of the Toronto Police Service. My own father was a Police Chaplain, and his father was a police officer in India. I would say this was easy for me because I was somewhat conditioned to this line of work.

Amarasingam: Did you ever feel guilty as a Muslim?

Shaikh: I definitely went through these feelings of what am I doing? What am I doing? I specifically remember being in my local mosque, the one I grew up in and that I would always go to, standing in prayer, in ranks, and thinking to myself, in prayer, my God, "what am I doing?" I had feelings of doubt and whatever else, but the feeling that kept coming over me while I was questioning myself in those moments was the understanding that what the targets were up to is far worse, and stopping them is a necessary thing. I don't necessarily have to like it because of having to be duplicitous and stealing their trust, but it had to be done because [of] what they were planning. So, I got over it.

Amarasingam: Fast-forwarding to the banquet hall, what happens next after you move to the table?

Shaikh: So, I've now moved from my independent table to the one with everybody else. I remember telling Amin Durrani, "Hey, I know you from Madinah Masjid." I would just drop that in as a line, but it turned out that he had seen me at Madinah Masjid. He responded affirmatively, basically signalling to Fahim, who was at the table, that I was a guy who they knew from their circles. That I was safe and so, I could confidently pursue the

infiltration of the group. As the event went on, there were some comments that were made – Jihadi comments if you will, just bravado, youthful bravado. One of the speakers would say, "Islam is a religion of peace", and Fahim would say, "yeh, we got a piece." After the presentation was done and we went outside, we socialized more, and my infiltration started to escalate. I was becoming more direct in some of my points, my questions, and they were starting to realize that we were all on the same page. They started to say, "look, brother, what the US has done in Iraq warrants a response. The Canadians are partners of the Americans, so, therefore, the Canadians are a fair target." Things like that. Fahim claimed he had gone to Iraq – which we later learned was completely false. He said he had been overseas, and the fighters over there told him that "over here, you're nothing, but back in your home country you're a lion because you know their ways, you can travel freely." There were several arguments that he put forward about why Canada was a fair target. I played along. At the end of it, they basically showed me a map and said they were going to have a training camp – and said they would like for me to come and train their people.

This was November 25, 2005 – my first meeting with them. I got enough information that I needed at the time, and I left it to Fahim to get in touch later to discuss these things at length. I played it off that first time by saying that we needed to be careful – we don't know who's around, who's listening. But, I knew I had what I needed at that moment. They had confirmed that they were going to hold a training camp, they confirmed that they had already selected the individuals for the camp, and they had already gone up and seen the camp. All before I was involved. It was already in play. So, that's how I found the group, that's what stage they were at in their plotting and planning. They had already decided that they were going to commit criminal acts, they had selected their candidates and even visited the training site, all prior to me being tasked to uncover the plot overall.

Amarasingam: Did you feel scared?

Shaikh: I wasn't fearful *per se* because I think I had a good background growing up. I think the Cadet program went a long way. I think my own experiences with just being a regular teenager and getting into a few fights helped. I did start to feel that I wasn't sure what I was getting myself involved in. Realizing that as I walked down this path, the path is continuing to a place that I can't see into. There's uncertainty about the future. What kind

of people am I going to run into? All of that. And knowing that they are armed, albeit with a single .9mm pistol. I'm not armed. I'm not authorized to be armed. The worst-case scenario concern was of course that they would find out who I was and kill me right then and there.

Amarasingam: What do you think tipped CSIS off in the beginning to what was happening, what these guys were doing? I mean, even before you showed up?

Shaikh: The only way I could speak to that is on the basis of what was disclosed to me in a CSIS disclosure in 2008. During the trial of one of the young offenders, I learned that around two weeks before the event at the banquet hall, CSIS came to know that these individuals – Fahim, Zakaria, etc. – were planning a training camp and that a bunch of people were going somewhere up north. The disclosure doesn't reveal where they learned that from, but they knew that almost two weeks before that event. I was not told this. I only discovered this two years later in the disclosure.

Amarasingam: Can you describe what happened next with the infiltration process? What kind of strategies did you use? What were you asked to do? What are you asked to look into?

Shaikh: So, remember I'm given very general instructions: "just tell us what they're about and what they're up to." And I understood that their mandate and my task was to see if there was anybody up to no good. That's pretty much the general framework. I was not given any specific directions, no training, no publications to read, or anything of the sort. I was just left to my own devices. As far as I was concerned, I would offer myself up as somebody who had utility in the group. So that was my strategy. For example, when I met Fahim and Ahmed the second day, I picked him up at his apartment building and then went off to Sunnybrook Park to have this conversation about what we were going to do. What's interesting is that this is also when several surveillance vehicles were following us. I had some training from back in the late 90s when I took a surveillance course by a former Toronto Police staff sergeant. We spent a couple of days learning about surveillance. That's all I knew. So, on the day that Fahim, Ahmed, and I were being followed, I exposed all these surveillance cars. I exposed the cars for two reasons. First, to try to dissuade him from continuing. I told him that there's a lot of heat on him, with the hope that he would just take

things easy and just chill and slow down. Instead, he just responded that the "kuffar this and that." He dismissed it. The other reason was utility – that I have these skills, and that I have some use in the group.

Amarasingam: How did Fahim and CSIS respond to you doing that?

Shaikh: Fahim did seem surprised. I was basically walking him through the process. We would be stopped at a traffic light and I would say, look at that white van in the gas station at nine o'clock. Notice nobody's gotten out to get gas? They're waiting for our light to change. When the light changed, sure enough, that white van started following. So, I started to expose the cars. We created a list of the licence plates of the cars. Later that day, when I met with CSIS for a debrief at a safe house location, I gave the handler the list of the cars and their plates. And I said I'm sorry, but there you go. His face went red, and I knew something had happened. I did not know at that time, but it was not CSIS. It was the RCMP. The RCMP were running a parallel investigation. In court, the defence lawyers took me to task for this, for doing this, suggesting I put the cops at risk. I responded that I don't think I put trained, armed law enforcement officers at risk because we are dealing with two brown guys in a car with barely winter boots to their name.

Amarasingam: Can you describe Amara and Ahmad as people? What were they like, their personalities, leadership styles?

Shaikh: Ahmad was the introvert, spending most of his time online, radicalizing in the echo chamber of other young Muslims navigating a post 9/11 landscape. He was born in the 80s during the Jihad in Afghanistan but found himself displaced along with his family when he was very young. He arrived in Canada as a refugee, settled in Mississauga, and would end up going to the same high school in which he would find a like-minded friend, Zakaria Amara. Ahmad was soft in one sense, was not prone to speaking as much as others, and reflected more than he plotted.

Amara was an extrovert, known for being a joker in class, quoting the rapper 50 Cent before he would end up quoting Osama Bin Laden. He was less abstract in his thinking, like Fahim was, and was firmly the "doer" of the group, having accelerated the bomb plot aspect of the case by making a detonator from scratch. It is largely for this reason that he remains behind bars while Fahim has been released. Both Ahmad and Amara grew up

alienated from their fathers, but Amara had the added trigger of the father leaving his mother in divorce and he would grow up in this destabilizing context.

III. THE PLAN AND THE ARRESTS

Amarasingam: Why do you think knowing that he was under surveillance didn't shock Fahim enough to put a halt to plans?

Shaikh: Because he was committed, as far as he was concerned. This was the second day I met him. Day two. You can imagine how many other incidents occurred after that. He knew that the police were on them. They pulled a surveillance camera out of the exit sign of the apartment hallway. It was in a bag. I came to meet them during Friday prayers, and they said to me, "look what we found. Now, who would put a surveillance camera there, in the apartment building? You don't know who did that? It's the fucking cops. Who else?" And what did they do? They said, "Mubin, try to recover the information that was recorded on this and sent to whatever receiver."

I would turn over the device eventually to the authorities who gathered what information they could and returned it back to me to give to Fahim. It was eventually discarded because of the obvious security compromise it represented to them.

Another time, when I was with Amin Durrani, his car seat had been adjusted different than where he usually leaves it. Durrani tells me in Urdu, "there's dirt in my car," meaning his car is dirty. He's being watched. So, there were multiple indicators over that eight-month period that the police were involved and watching, and that these guys knew they were being watched.

Amarasingam: What would you say are some key events or turning points for your involvement in the group? Obviously, the first day at the banquet hall, the second day when you burned the surveillance cars.

Shaikh: We burned the surveillance and then went to Sunnybrook Park. It was here that I started to get more details of what Fahim had planned for the group. That's where I started to get details about targets that they wanted to hit and what else they wanted to do. The next important date was

December 5, 2005. This is when I officially become the police agent for the RCMP, and I'm done with CSIS. I traverse over to the RCMP. I met with CSIS in our safe house, and they told me that the RCMP wants to talk to me. "Here's a guy, here's his number, I want you to call him and talk to him." So that's where the handover occurred.

Amarasingam: In early 2006, you had the group split into two – the Mississauga group and the Scarborough group. What led to the split?

Shaikh: What I understood was that after the training camp in December, Zakaria felt that Fahim was a bullshitter. He told me that Fahim was a bullshitter, he wasn't committed, and he was mismanaging money, and so on – money that they had donated, or they were stealing through faulty or fraudulent bank transactions or whatever. I was privy to these conversations about how they would procure these funds through fraudulent means – making a fake business, going to apply for a loan, emptying out the account, and doing that again, and again, and again with fake IDs. So Zakaria felt Fahim was a bullshitter, that he was mismanaging money, and just wasn't moving on the schedule that he wanted to see. Also, and this is important, Zakaria wanted everyone to look to him as the leader of the group and not Fahim. Zakaria was more committed, he had done more of the research, he wanted it to move quickly, and Fahim was a little more just playing the role if you will.

Amarasingam: So, the split happens in April 2006, people decide to stay in kind of geographical locations. Who did you stay with, and who did you think was the more dangerous group?

Shaikh: I was told to stay with the Scarborough group, Fahim and company. They had another source in the Mississauga group. I believed the Scarborough group was the less dangerous group. By May or so, the split is complete. And on Fahim's part, there was definitely a little bit of "who does Zakaria think he is?," and "I'm the one who started the group," and so on. There was a bit of a turf war. He was upset by it and didn't like it, but it is what it is. It was clear by May that the two were irreconcilably split because there was no more communication between them, they were shit-talking each other, and delegitimizing each other's leadership. So it was clearly separate by May 2006.

Amarasingam: Where were you when the arrests happened?

Shaikh: So, I was at a safe house location called Great Wolf Lodge in Niagara Falls [laughs] where a bearded, turban-wearing, thobe wearing Muslim guy with his niqabi wife was sent. And then they told us, "don't leave your rooms, just stay in the room." I have children. I could not coop them up in a hotel room, so finally, the RCMP decided to move us to a cottage nearby.

I was in the Great Wolf Lodge hotel room when the news of the arrests went public. They told us the arrest was happening today, and they were getting us out of town. As I watched it unfold, I was asking myself, what case is this? Because there was a lot of over-the-top rhetoric – snipers on the roof, stopping four lanes of traffic on the highway. We caught some major terrorists. Who is this, what case is this? And then when I realized, I'm like "oh shit!" And that's when it hit me like a ton of bricks. And I felt like I wanted to cry. Everything just came rushing to my face, and I suddenly realized: this is going to be a huge deal for me and my future and possibly my life.

Amarasingam: Why?

Shaikh: Now there's no way out of this. I mean, I agreed that I would testify and all of that, but when you see it, the way that it was presented as this major thing. Al Qaeda is here! I've always maintained this, much to the chagrin of the RCMP and the prosecution. The RCMP wanted me to say that there's 18 hardcore al Qaeda terrorists waiting to be suicide bombers in our midst, and the Muslim community wanted me to say, "oh no, no, no there's nothing here, nothing to see here." I didn't parrot either of these lines. I maintained this throughout all my testimony. I've always maintained I told the truth, the whole truth, and nothing but the truth, so help me, Allah. I will say, I don't think the RCMP needed to stop traffic on the highway to arrest one person who was peripherally involved. I was also well aware of how this was beneficial for the RCMP on the international stage. Their members were getting promoted; they were patting themselves on the back for a job well done in Parliament.

Amarasingam: So how did your wife respond?

Shaikh: My wife is cool, man. She is so cool. It was in that hotel room that the RCMP first came talking about witness protection. The first thing the guy says to me is, "you're going to have to change this" – pointing to the religious clothes we were wearing – "this outfit, you're going to have to change. You're going to have to change your outfit, change your clothes." One RCMP guy looks at my wife in a niqab and says, "how can I do a close protection for her, and I don't know what she looks like?" Zero cultural awareness. Disrespectful, in fact. And that's when I realized why witness protection could not work for me.

Amarasingam: So, you were in Great Wolf Lodge for a couple of days?

Shaikh: For a few days and then to a short-term rental cottage while things calmed down a bit.

IV. The Fallout

Amarasingam: So, what did you do after the two weeks?

Shaikh: Every single day, and I mean every single day, I went to the RCMP to ask why they were not saying in their public statements that we thank the community for assisting us. They suggested it was up to senior RCMP leadership, but I felt in not saying so, it was reinforcing the notion that the Muslim community is the bad guy. They could have put out this simple statement, "we thank the community for assisting," so it tells people that, in fact, the Muslim community helped. Alas, no such acknowledgements came. I decided I needed to come forward; that was the only solution to this whole problem. So that's why I ended up going public.

Up to that point, they were trying to get us to go into witness protection. They said, "We assess that there is a significant threat to your life." Witness protection means cutting off all of your friends, your family, and this and that and starting a new life. And you're going to have to change this outfit of yours and your appearance. My wife and I looked at each other and we laughed, we chuckled out loud, like what kind of a deal is that? Nobody told me, obviously, what was coming down the road. Nobody said, "by the way, this is going to take years of your life, it will change your life forever, you'll never be the same again, your employability is going to suffer from it, your

place in the community is burned to the ground." Nobody told me any of this.

Amarasingam: So, you declined witness protection because you wanted to tell Canadians that there was someone from the Muslim community involved in the case?

Shaikh: That was part of it. The main reason I didn't go into witness protection was because I'm born and raised in Toronto; this is my city. I'm not going to leave under the impression that I did something wrong or that I need to start my life over because of these people. All of my friends are here, my family. There was a doctor from CAMH who is talking to me about why I don't go into witness protection, and I say to him, "I don't think you understand who my father is in this community and how difficult it would be for us, coming from the family we come from, to do this." You know what he says? "Oh, this guy's narcissistic, he has narcissistic tendencies, self-aggrandizement as to what he thinks of his family and who his family is and who he is." He obviously had not done any research. My father has been doing this work in the community since the 70s in Canada when there was one Muslim organization in Toronto on Parliament Street. My father's been one of the pioneers of this community, a pillar in this community. This is not an exaggeration at all.

So, that's why I rejected witness protection. Because of my ties to Toronto and my father's deep ties to the community. How am I going to go to him and tell him you need to leave your masjid, walk away from your work, all of that because of what I did? My dad has had the same job for 40 years, and he's going to just leave because of me?

Amarasingam: How would you describe your experience in court? Were you prepared for it?

Shaikh: So, the arrests happened in 2006. I realized that I needed to come forward with this information to the media. I wanted to go public to show the Canadian public that there was a Muslim who assisted the cops in this case. I asked the RCMP multiple times, why aren't you saying anything? Why aren't you saying anything? And I've said this on the record, under oath, that every single day I was with them, I asked them why they weren't doing it. Then I got fed up when I realized they weren't going to do it.

Number two, I realized that the media was on the hunt for me and they were starting to go to my parents' house and find out where I was and start harassing them. So, I said rather than that happening, let me just step out and just admit my involvement. I phoned one of the Muslim scholars in the area. This person was somebody that I met in Syria when I had gone there to study, and he was coming back to Canada. And because he was a traditionally trained, legitimate Islamic scholar, I called him and told him that I was in over my head. I told him: "the case that you heard about, I'm the undercover on that case." He said, "oh boy, let me put you in touch with somebody who I trust." And this was Nazim Baksh at the CBC. I called Nazim and he said, "oh boy, come on down, let's talk about it." You know, I'll never forget what Nazim said to me: after we were done talking, he said, "Man oh man, I'm looking at a guy whose life is about to change in ways that he can't even imagine, and it's going to happen real fast."

So, obviously, I was not prepared for court. I had an idea, but it was still very abstract. I knew there was going to be trouble in the community once my identity was revealed, but I totally underestimated it. I give the analogy of when you can see that a car accident is about to happen, and you have a general idea of what happens in an accident, but you're never really ready for how severe it can be. I'll never forget walking into court. I was isolated from everyone and then coming into the court and the courtroom is full and everybody is there, and I'm like holy shit. This is major. So, what can I say, it turned my life upside down for several years. I had never been put through that kind of scrutiny before. And I thought to myself, what the hell did I get myself involved in?

I enrolled in a master's degree in policing, intelligence, and counterterrorism to study it from outside even though I was on the inside. I wanted to understand everything that was happening from the outside, and that's when a lot of these things started to make sense to me. While the trial was going on – there were four legal hearings over five years – and after each one of them, I realized what was required of me, what kind of scrutiny I was going to be put under. I got better and better with every hearing that took place because I realized that it was almost a battle for survival for me. Because if I screwed up and the case was gone, it would be my fault. And it's ironic and funny to me that I tried to go out of my way to do things so that I would not be accused of such and such, and yet I was accused of such and such anyway.

Amarasingam: What do you mean?

Shaikh: Well, for example, taking a ridiculously low amount of money for my involvement so that people would not say that I did it for the money. But guess what, they said I did it for the money anyway. One of the defence lawyers was saying, "Oh, you were a courier driver with only a high school education" – calling me a bum basically, that I joined CSIS because I needed a job. And I remember saying, "well, you're talking about that like it's a bad thing. Is it wrong to want a job with the government?" So, court was just me trying to fight back as these people were denigrating me and belittling me and my experiences. It was a challenge to me personally, professionally, spiritually, and I was hit in all those areas.

The fallout from the Muslim community was the biggest hit to me, with everyone thinking that it was my fault. The myth that I entrapped the youth, which many in the community still believe to this day – despite all of the evidence, all of the guilty pleas – is still hurtful. Me being at the centre of it, and everything being focused on me. So, it was a completely life-altering experience. At the end of it, I should say, it was a positive experience. What I gained in that time – not just from being the witness in such a case, but also studying the topic – those four years I gained so much knowledge that I'm very grateful for it, very grateful. It started off as a very overwhelming experience, with everybody waiting for me to fail, but I think it was all for the best.

Amarasingam: Who did you go to for support?

Shaikh: There was nobody I could go to for support. I'm bitter over this whole experience with the Muslim community. They really dropped the ball. I'm profoundly disappointed in the Muslim community's response – profoundly disappointed that they were in such denial, they remained in denial, and even after the whole ISIS thing has come and gone, a small few remain in denial.

Amarasingam: How did your parents respond to the fact that you were the undercover in the case?

Shaikh: In the beginning, my father was very happy. He actually said, you know, "Oh, great, tell them to give you a job!" He watched the Fifth Estate

religiously, so I had to call him and warn him: "that big terrorism case – well, I'm the undercover." But he also had to deal with fallout from the community, but luckily for him, his credibility is so stellar in the community that people just dismissed the actions of his wayward son and didn't really let it reflect on him. While he claimed to me that most people were positive in what they said to him, there were some people who said what your son did was no good. And I did have close relatives who said the same thing, that I shouldn't have done that. And when I asked them what I should have done, they have no answer.

Many Muslims still believe that if a Muslim is doing something wrong, you should not tell on them. It's Muslim first, right or wrong. And I've asked them many times, "is that your version of Shariah? That if somebody you know rapes a girl, you would not tell the police because you can't rat out your Muslims to the *kuffar* [unbelievers], but they're allowed to rape people? But you're not allowed to stop them from committing the rape?" It was ridiculous, ridiculous arguments. I'm a kaffir [unbeliever] or a murtad [apostate] because you helped the *kuffar* against the Muslims. But I said, "yeah, but if I stopped a terrorist plot, and that's me stopping Muslims, you're basically saying terrorism is Islam." But I learned very quickly that logic is not what this is based on. People just didn't want to hear it.

The Canadian Security Intelligence Service and the Toronto 18 Case

STEPHANIE CARVIN [*]

ABSTRACT

While it is well known that the Canadian Security Intelligence Service (CSIS) played a key role in the investigation of the Toronto 18 cases, these activities have been left out of the public record. To provide some context for the other contributions in this study, this chapter proceeds by describing the process by which CSIS conducts counter-terrorism investigations – from initial notification of the threat through to cooperating with the RCMP. Although there have been some changes since the mid-2000s, these processes largely remain in place today.

Importantly, while the case of the Toronto 18 was seen as a huge success for Canada's counter-terrorism capabilities at the time, it also shaped expectations regarding how future threats would be treated. Canadian national security would spend much of the five to seven years after the Toronto 18 arrests looking for the next such group, a threat that never really manifested. In this way, the Toronto 18 may have contributed to bias in understanding an evolving national security threat that was manifesting in the form of lone actors and extremist travel.

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I. INTRODUCTION

Although the Toronto 18 case was not the first terrorism investigation the Canadian Security Intelligence Service (CSIS or "the Service") managed in the post-9/11 era, it is certainly the most high-profile. And yet, little is publicly known about CSIS's role in the case, relative to that of law enforcement agencies. To fill this gap, this chapter provides the first scholarly description of CSIS's counterterrorism (CT) investigation process, the context in which it took place, and it assesses the impact of the case on the Service and the understanding of national security threats in Canada, generally. It argues that while the Toronto 18 case was a success for the Service, it represents something of a relic rather than being indicative of current CT threats. Moreover, it may have created certain biases within the organization, where the most pressing task was believed to be finding the next Al Qaida (AQ)-influenced terrorism "cell", rather than how the threat itself was evolving or how new threats were emerging.

After a description of the Service's role and its experience with CT prior to the Toronto 18, this chapter provides a broad outline of the Service's CT investigative process that gives context in how it would have investigated the case. It then evaluates the legacy of the Toronto 18 case, as described above.

II. CSIS 101

The issue of terrorism (or violent extremism[1]) has been extremely prominent in Canada since 9/11, but most Canadians remain unfamiliar with CSIS. A survey conducted by Ekos in 2018 found that only 30% of Canadians could name the government agency "that is responsible for investigating threats to Canada such as terrorism, espionage, and the proliferation of weapons of mass destruction."[2]

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1 This chapter uses "terrorism" and "violent extremism" in an interchangeable way. The author's preference is the latter term to cover acts of political violence which, for a variety of reasons, fall short of our legal definition of terrorism that nonetheless may meet the threshold for being a national security concern.

2 Canadian Security Intelligence Service, *Attitudes to the Canadian Security Intelligence Services (CSIS): Base Line Study* (Report), by EKOS Research Associates, Catalogue No PS74-8/1-2018E-PDF (Ottawa: CSIS, 2018), <https://epe.lacbac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/canadian_security_intelligence_service/2018/report.pdf>.

Perhaps this should not be surprising for a security intelligence service that is often described as operating (as the cliché has it) "in the shadows." Moreover, Canada has lagged behind other countries in terms of the review, oversight, and transparency of its national security services. Even those who have an interest in learning more about CSIS's role in national security do not have many resources to work with. In this way, it is useful to begin this chapter with a brief outline of the Service's role, not just for this chapter's subsequent discussion of CSIS, but to place the organization and its role in context for the forthcoming chapters in Part II of this collection, which discuss CSIS and its relationship to the RCMP, its role in providing (or not providing) evidence at trial, and so on.

CSIS is Canada's domestic national security intelligence service. It is mandated to collect information "within or relating to" threats to the security of Canada. These are defined in section 2 of the *CSIS Act* as espionage, foreign-influenced activities, terrorism (described as "activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state") and subversion.[3]

As the Service is sometimes confused or conflated with similar organizations in allied countries, it is worth taking a moment to differentiate CSIS from its domestic and international counterparts. First, while the Service does operate overseas, it does so in relation to its mandate to collect information on threats to the security of Canada outlined in section 12 of the *CSIS Act*: "[i]f there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat." However, unlike most of its allies, Canada does not have a human foreign intelligence agency like the American Central Intelligence Agency (CIA) or British Secret Intelligence Service (SIS or MI6). Under section 16 of the *CSIS Act*, the Service may collect information on foreign states, groups of states, or individuals other than Canadian citizens or permanent residents, at the

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[3] Although "sabotage" remains in the *CSIS Act*, the Service ended its subversion investigations in 1986 due to the end of the Cold War and concerns over the surveillance of Canadians engaged in lawful activities, mostly by the RCMP. See Reg Whitaker, Gregory S. Kealey, and Andrew Parnaby, *Secret Service: Political Policing in Canada From the Fenians to Fortress America* (Toronto: University of Toronto Press, 2012), 395–96.

request of the Minister of National Defence or Foreign Affairs. However, this collection must take place within Canada.

Second, CSIS is primarily a human intelligence organization. That is, it employs and trains a cadre of intelligence officers (IOs) who engage with sources with whom they work in order to obtain information to support authorized investigations into threats to Canadian national security. This differentiates CSIS from Canada's signals intelligence agency, the Communications Security Establishment (CSE), which collects foreign intelligence through the global information infrastructure and defends Government of Canada systems and critical infrastructure designated by the Minister of National Defence under subsection 21(1) of the *CSE Act*. Importantly, the CSE is not permitted to collect information on Canadians, permanent residents, or anyone on Canadian territory. It may only do so under its mandate to assist federal law enforcement and security agencies (including CSIS), the Canadian Forces, and the Department of National Defence.

Third, the Service is a relatively small organization within the Canadian government. There are approximately 3,330 CSIS employees overall as of 2020, most of whom are located at the CSIS Headquarters in Ottawa, Ontario; there are also several regional offices throughout Canada. The Service has an annual budget of approximately $570 million. By contrast, the Department of National Defence employs almost 95,000 (full-time) people and has an annual budget of approximately $21.9 billion, while the RCMP employs over 30,000 people with an annual budget of approximately $3.5 billion. Even the Toronto Police Service has approximately 7,900 employees and an almost $1.1 billion annual budget. While all of these departments and agencies have roles beyond that of national security (making this an imperfect comparison), CSIS's relatively small budget is indicative of its narrow mandate relative to the other defence and law enforcement organizations listed above.

Fourth, unlike the above organizations, CSIS does not have the ability to arrest or detain individuals. While it may gather, store, and search information – and its IO have certain legislated powers to do so – it is a strictly civilian organization and may not cross into law-enforcement territory. Unless it is in extraordinary circumstances (such as engaging in its

lawfully mandated activities in a zone of conflict overseas[4]), its officers do not carry guns. However, as will be further discussed below, the Service does have some very strong powers it can wield, including the ability to engage in surveillance, run human-sources, and with the appropriate warrants, wiretap, and intercept communications of individuals the Service is targeting.

III. CSIS AND VIOLENT EXTREMISM BEFORE THE TORONTO 18

Prior to the creation of CSIS in 1984, CT operations in Canada were conducted by the Royal Canadian Mounted Police (RCMP). In the aftermath of the 1970 October Crisis, when the violent, nationalist *Front de libération du Québec* (FLQ) kidnapped a British diplomat and Quebec cabinet minister, the Mounties came under considerable pressure to ensure that such an incident was prevented from happening again. This pressure, combined with a lack of clearly defined procedures and regulations governing national security investigations, created a climate where RCMP officers engaged in a very aggressive series of tactics against targets perceived as being subversive or supportive of violent extremist movements.[5] Once these tactics were exposed, they became known as the "dirty tricks campaign," leading the (Pierre) Trudeau government to call for an inquiry into how the RCMP engaged in national security. The Royal Commission of Inquiry into Certain Activities of the RCMP (aka "The McDonald Commission") would go on to make several recommendations, including the idea that the collection of national security information should be civilianized and separated from policing and criminal investigations. Heeding this advice, the Trudeau government established CSIS.

In the years after its creation, CSIS focused on a range of violent extremist activities, particularly "transnational" terrorism from conflict areas overseas that manifested into threat activity in Canada. This included Armenian terrorist attacks against Turkish targets in Canada, the Liberation Tigers of Tamil Eelam, and Sikh separatism (particularly the attack on Air India Flight 182 that killed 329 people). The failure to prevent this latter

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4 This issue was controversial in relation to CSIS's support to Canada's mission in Afghanistan. See Colin Freeze, "Undercover CSIS Agents Carry Guns in Foreign Flashpoints," *Globe and Mail*, May 25, 2010, https://www.theglobeandmail.com/news/national/undercover-csis-agents-carry-guns-in-foreign-flashpoints/article4320423/.

5 Whitaker, Kealey, and Parnaby, *Secret Service,* 271–364.

attack was, in part, due to a lack of proper cooperation between the Service (albeit in its first year of existence) and the RCMP and was a serious blight on the new organization.[6] It also stood as a tragic reminder of what was at stake if Canada's national security agencies could not figure out how to work with each other on threats to the country.

By the 1990s, the Service had begun to monitor the rise of extremist networks motivated by religious extremism and their links to individuals in Canada. This included Shi'ite groups such as Hizballah, as well as Sunni groups like the Algerian Armed Islamic Group (GIA). The case of the "Millennium Bomber", Ahmed Ressam, was indicative of the threats that preoccupied national security departments and agencies after 2001. Ressam arrived in Canada on a false identity, travelled to the United States from Victoria, British Columbia, and planned to carry out a bomb attack against Los Angeles Airport on the eve of the Millennium. Ressam was caught by a U.S. border guard who noticed his nervousness as he attempted to enter from Canada.[7]

Therefore, although the Service had been aware of violent-extremist threats in Canada prior to 9/11, the aftermath of al-Qaeda's attacks on America still represented a dramatic change in how the Canadian government prioritized national security and intelligence. Being seen as a reliable CT partner for the United States and our allies became an issue of importance to the Jean Chrétien government, and they made a $7.2 billion investment in the Canadian national security and intelligence community.[8] They also created, for the first time, specific terrorism charges in the *Anti-Terrorism Act* (2001) and the first national security policy, *Securing An Open Society*, in 2004.[9]

For an agency like CSIS, which was used to low-levels of interest from

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6 There is no room in this chapter to discuss the impact of Air India 182 on CSIS or Canadian national security, generally. See Kim Bolan, *Loss of Faith: How the Air-India Bombers Got Away with Murder* (Toronto: McClelland & Stewart, 2005). See also Whitaker, Kealey, and Parnaby, *Secret Service*, 374–85.

7 Stewart Bell, *Cold Terror: How Canada Nurtures and Exports Terrorism Around the World* (Mississauga, ON: J. Wiley & Sons Canada, 2007) 161–70.

8 Greg Fyffe, "The Privy Council Office and the Canadian Intelligence Community," in *Top Secret Canada: Understanding the Canadian Intelligence and National Security Community*, eds. Stephanie Carvin, Thomas Juneau, and Craig Forcese (Toronto: University of Toronto Press, 2021).

9 Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy*, Catalogue No CP22-77/2004E-PDF (Ottawa: Privy Council Office, 2004), <http://publications.gc.ca/collections/Collection/CP22-77-2004E.pdf>.

other branches of government and previously avoided day-to-day policymaking in downtown Ottawa, the heightened attention on its activities and expectations to deliver in this new era meant added pressure on the organization.

Indeed, the demands to effectively combat terrorism and stay within a narrowly defined mandate consistently challenged the Service in the 2000s. For example, in 2007, CSIS was publicly reprimanded after its then-review agency – the Security Intelligence Review Committee (SIRC) – found that it likely overstepped its mandate, crossing over into law-enforcement activities by facilitating the handing over of Mohammed Mansour Jabarah, a Canadian and an admitted al-Qaeda member, to U.S. authorities. In addition, SIRC found that although Jabarah was a violent extremist, several of his *Charter* rights were violated and he was arbitrarily detained. SIRC made several recommendations regarding the handling of future cases.[10]

The Service also was criticized by courts and SIRC for destroying records. Previous Service practice (owing to its interpretation of the *CSIS Act* provisions that it can collect, analyze, and retain only that which is "strictly necessary") was to destroy information after a period of time, so as to not keep files on Canadians forever. It was also criticized for endangering Canadians when discussing them with foreign officials and contributing to their mistreatment.[11] In this way, early terrorism cases proved to be something of a field of landmines for the Service as it tried to figure out where the (ill-defined) lines were while working at an unprecedented operational tempo. The main difficulty was that the Service had been given more capacity to carry out its tasks, but it had not created up-to-date policies

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10 Canada, Security and Intelligence Review Committee, *SIRC Annual Report 2006-2007: An Operational Review of the Canadian Security Intelligence Service*, Catalogue No PS105-2007E-PDF (Ottawa: SIRC, 2007), 18–22, <http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf>. For an overview of the Jabarah case, see Stewart Bell, *The Martyr's Oath: The Apprenticeship of a Homegrown Terrorist* (Mississauga, ON: J. Wiley & Sons Canada, 2005).

11 On destroying records, see Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38. On the mistreatment of Canadians due to the actions of national security officials, see Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar*, 3 vols (Kanata, ON: Gilmore Printing Services, 2006), http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-FB1.pdf; *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Kanata, ON: Gilmore Printing Services, 2008) (The Honourable Frank Iacobucci, Q.C.), <http://publications.gc.ca/collections/collection_2014/bcp-pco/CP32-902008-1-eng.pdf>.

and guidelines for the new world it was now operating in, including an increased presence abroad.[12]

Of course, there were accomplishments too. The first successful terrorism charge in Canada was brought against Mohammed Momin Khawaja in 2004, and he was convicted in 2008 (later upheld by the Supreme Court).[13] Khawaja had been part of a London-based cell and sought to facilitate bombmakers by designing a weapon, transferring funds, and recruiting individuals to assist in these efforts. The case proved to be a successful test of the new *Anti-Terrorism Act*, as well as the national security community's efforts to successfully prosecute a terrorism charge.

A. What CSIS Investigates

While the most pressing concern for CSIS employees working in CT is the threat of an armed attack within Canada (or a Canadian conducting an armed attack overseas), the Service monitors for other sorts of threat-related activity as well. This includes travel for extremist purposes (foreign fighters, called Canadian extremist travellers or CETs), financing and facilitating threat-related activity, and radicalization. In this sense, while CT investigations have at their core the goal of preventing extremist attacks, doing so requires monitoring a broad range of activities.

Indeed, it is likely that the majority of violent extremist activity in Canada is that which supports violent extremism, rather than direct attack planning. This is why statistics that highlight the fact that there are more people killed by moose or bathtubs than violent extremism are misleading. Non-violent activities that nevertheless support extremism cause disruption in communities, whether by furthering mistrust, siphoning funds from worthy charitable causes to extremist ones, and sowing division through the targeting of youths through radicalization and/or the intimidation of community members from speaking out.[14] Worse, they may contribute to the killing and wounding of others overseas in attacks made possible by individuals providing support in Canada.

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12 Whitaker, Kealey, and Parnaby, *Secret Service*, 458.

13 R v. Khawaja, 2012 SCC 69.

14 Canada Centre for Community Engagement and the Prevention of Violence, *National Strategy on Countering Radicalization to Violence*, Catalogue No. PS4-248/2018E-PDF (Ottawa: Government of Canada, 2018), 13–14, <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-strtg-cntrng/ntnl-strtg-cntrng-rdclztn-vlnc-en.pdf>.

B. How CSIS Investigates Violent Extremism

Whatever the form of violent extremism, the Service's investigations typically begin through a "tip," either from the public or through a foreign government that has information to suggest that someone within Canada may be engaging in threat-related activity. In addition, it is common that the Service may find out about an individual through their connections to other individuals who are under investigation. This section provides a general description of how CT investigations proceed, with a view to providing some insight into how the Toronto 18 investigation likely took place.

The Service has a considerable range of authorities it can use when it becomes aware of a potential threat to national security. The most important of these is the ability to "target" an individual, person, organization, or event suspected of constituting a threat to the security of Canada. Targeting activities are governed by the rules and procedures set out in the *CSIS Act*, ministerial directives, Service policy, and other related procedures.[15] In using them, the Service must follow the rule of law, the means employed must be proportional to the gravity and the imminence of the threat, they must use the least intrusive techniques first (except for emergency situations), and the level of authority required must "be commensurate with their intrusiveness and risks associated with using them."[16] All targeting decisions are provided to senior CSIS personnel (typically an assistant director or assistant deputy minister-level managers) within a five-day period from the date of approval.[17] CSIS procedures state that regional director generals (RDGs) are to consult with the director generals of the appropriate headquarters branch on all targeting decisions to ensure consistency and coordination.[18]

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15 CSIS, *Internal Audit of Operational Compliance: Targeting*, (880-144), March 2013. Documents available through ATIP by the Globe and Mail. See Colin Freeze, "CSIS Documents Reveal how Agency Designates Terrorism Targets," *Globe and Mail*, February 11, 2015, https://www.theglobeandmail.com/news/politics/csis-documents-reveal-how-agency-designates-terrorism-targets/article22905797/.

16 CSIS, *Internal Audit*, 1.

17 CSIS, *Internal Audit*, 1.

18 Who is in charge of this investigation depends on its location. As noted above, the Service is represented across Canada in several regional offices. In the case of the Toronto 18, the suspects were located in the Greater Toronto Area (GTA), and the Toronto Regional Branch (TR) was given the lead responsibility. However, regions will stay in touch with headquarters, normally through the "desk" assigned to a particular threat or region.

Targeting authorities themselves are broken up into two main categories: those for when investigators have reason to suspect an individual may be engaged in threat-related activity and those for when the Service believes it can demonstrate to a federal judge that it believes an individual is engaged in threat-related activity, and more powerful investigative tools are required.

The former set of authorities are governed within the Service and typically require the support of a director general (DG) to authorize. The authorities are divided up into different investigative levels. During the Toronto 18 investigations, there were three levels: Level 1, which allowed for basic information gathering, moving up through to Level 3, which allowed for more intrusive means, including physical surveillance. (Today, CSIS has simplified this into two levels 1 and 2.) According to CSIS documents released under the Access to Information and Privacy (ATIP) policy, several factors are taken into account when selecting the appropriate targeting level, including the nature, imminence, and significance of the threat, the collection techniques allowed, and the availability of resources to conduct the investigation.[19]

Once the Service moves from "suspecting" individuals might be engaged in threat-related activities to the point where they "believe" that they are doing so, and they feel the need to use more intrusive means to gather information, they can appeal to the Federal Court for a warrant under section 21 of the *CSIS Act*. The warrant is necessary under the *Canadian Charter of Rights and Freedoms* to protect individuals from unreasonable search and seizure. Court documents indicate that, during the Toronto 18 investigation, CSIS was engaging in electronic surveillance during its investigation.[20]

The process to obtain a warrant is far from a rubber stamp process; applications may often run more than 50 pages, and every line must be supported (typically described as "facted" within Service jargon) with evidence. Government of Canada lawyers vet the applications rigorously, and they are subject to several layers of management approval. In addition, Service personnel are often required to testify to the information in the warrant and answer any questions federal judges may apply. In this sense, drafting warrants may take several months.

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19 CSIS, *Internal Audit*, 4.

20 See the decision in R v. Ahmad, 2009 CanLII 84779 at para 11 (ON SC) [*Ahmad* ONSC].

The reason for this diligence is clear: judges can be very demanding of the Service if they feel any information provided in the warrant application is missing, misleading, or unsupported. If judges feel that the Service has not met its "duty of candor," they will deny or even revoke warrants that have been issued.[21] Nevertheless, the system can move quickly if needed. In the wake of a serious incident, the Service can apply for warrants to conduct investigations in order to ensure the safety of Canadians. But for a relatively slow investigation such as the Toronto 18, the full warrant process was required.[22]

As noted above, CSIS is a human intelligence agency where IOs collect information in support of national security investigations. This can be done in a variety of ways. IOs may begin by simply performing a basic internet search and speaking to friends and relatives or even the targets themselves. IOs have been known to show up to the workplaces of the individuals they wish to speak with – a practice that has been controversial and the subject of several complaints of harassment and intimidation.[23] However, IOs do not have the freedom to speak with whomever they please. Investigations normally follow a plan, requiring layers of approval. Further, additional and

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21 In X(Re), 2014 FCA 249, the Federal Court of Appeal found that the Service had violated its duty of candour to the Court in seeking a warrant for surveillance. See Maciej Lipinski, "X(Re): A Check on CSIS Powers or a Roadmap for Expanding Them?," *theCourt.ca*, November 6, 2014, http://www.thecourt.ca/xre-a-check-on-csis-powers-or-a-roadmap-for-expanding-them/. This issue came into the public eye once more in July 2020, when a Federal Court ruling that CSIS had repeatedly violated its duty of candour up until 2019 – the third time such a ruling had been made since 2013. For more on this issue, see Leah West, "Secret law used by security establishment threatens public trust," Policy Options, July 22, 2020, https://policyoptions.irpp.org/magazines/july-2020/secret-law-used-by-security-establishment-threatens-public-trust/. The Service appealed this decision in October 2020.

22 Alternatively, in threat to life scenarios (such as the knowledge that an individual under investigation has access to a weapon and the intent to use it), the Service may inform the RCMP or other police service of an incident in order to prevent serious harm from occurring. While such an intervention may harm an investigation, the serious risk of a loss of life will trump operational concerns.

23 See Shanifa Nasser, "When CSIS Comes Knocking: Amid Reports of Muslim Students Contacted by Spy Agency, Hotline Aims to Help," *CBC News*, August 7, 2019, https://www.cbc.ca/news/canada/toronto/csis-students-university-muslim-campus-1.5229670. Of note, most of the complaints date to 2012–2013. CSIS continues to speak with individuals in communities as a part of their lawful investigations and says it has changed some of its practices in this regard. Still, it is clear that there are those who believe that these visits damage community relations and that it continues to create mistrust with marginalized communities.

specific permissions and authorities are required from regional DGs for "sensitive sectors," such as educational and religious institutions. All of this is done to ensure that investigations keep within the letter and the spirit of the law but also to anticipate and manage blowback from individuals and the community who may feel unduly targeted. More will be said on this below in relation to the Toronto 18 investigation.

IOs are also trained to recruit sources that can provide information to investigators to support the investigation. While most interactions IOs will engage in during an investigation are casual, in some cases the relationship may become formalized over time. In these cases, individuals who may be motivated by patriotism, a sense of adventure, money, or all of the above, are tasked with gathering information to assist the investigation.

Supporting the work of the IOs is a network of individuals within the regional branches as well as headquarters. Each region has a Physical Surveillance Unit (PSU) that sends out teams of individuals who help to establish the patterns of life and observe the behaviours of individuals under investigation. This information assists IOs in learning, for example, who a target is in regular contact with and to identify if they are deviating from their regular habits in such a way that may identify they are engaged in threat-related activity.

Within the Service, there are also a number of analysts assisting the investigation in several ways. Helping IOs make sense of a case are tactical analysts that are often embedded in regional desks. These analysts take disparate pieces of information and clarify networks, establish timelines, and assist in identifying key individuals within a larger target set. Additionally, whereas IOs are typically rotated to different desks every two to five years, these analysts tend to stay in their roles, becoming "institutional memory", particularly on longer-term investigations. Communications analysts translate and interpret information gathered (usually under warrant) but are also able to get to know and understand targets from listening, observing, and reading their interactions. Finally, strategic analysts help to contextualize the investigation within a bigger picture. For example, with CT investigations, strategic analysts can provide insight on the kinds of materials a target is consuming and how observed behaviour fits known patterns of mobilization to violence, generally.

Finally, there are units within the Service that provide technical expertise (such as providing scientific analyses of the kinds of bomb-making materials a target may be trying to acquire), open-source information (using

research librarians at the Service's Information Centre), and legal support from Government of Canada lawyers through the duration of the investigation. All of these can play key roles in ensuring that an unpredictable investigation runs as smoothly as possible.

Once an investigation is up and running, it may go in a number of ways. Individuals who appear to be mobilizing to violence may gradually (or even suddenly) change course with their plans. It is not unusual for individuals that appear to be highly motivated to engage in threat-related activity to suddenly disengage from it. For example, individuals who had been struggling to find work may find employment. Other individuals may become distracted by the mundane activities of everyday life, such as trying to raise and support a family. In other cases, loved ones may successfully intervene, or the individual may grow disillusioned with extremist messaging. While not necessarily a Service success specifically, disengagement is undoubtedly a positive outcome.

However, a challenge for IOs is that Service targets often go through different phases in their willingness or capacity to mobilize to violence; the path a target takes is often anything but linear. In this way, periods of disengagement may be followed by a sudden return to supporting violent extremism or even mobilization, and this may be followed by a gradual withdrawal once again. Following this cycle may take months or even years. If, in the course of the investigation, the Service comes to the point where it believes that the targets are engaging or about to engage in criminal activity, they alert the RCMP who then proceed to begin a criminal investigation based on a "disclosure letter" from the Service. How this works in practice will be discussed below with reference to the Toronto 18 case.

IV. CSIS AND THE TORONTO 18 INVESTIGATION

As noted above, there is not much in the way of publicly available information on CSIS's role in the Toronto 18 case. Nevertheless, the available but fragmentary information about its activities in this case paints a picture that is consistent with the account described above.

CSIS's involvement in the Toronto 18 case may date back as far as 2002 when the Service began to watch eventual ringleader Fahim Ahmad's activities on the internet as he chatted with like-minded individuals on

extremist forums.[24] However, the investigation into what became known as the Toronto 18 cell appears to have picked up steam sometime around 2004–2005, when a group of individuals, including Ahmad, appeared to be engaged in radicalization activities.[25]

Interestingly, it appears that the Service tried to stop the group before it went too far down the path of mobilization. According to the journalist Stewart Bell, "CSIS initially tried to break the group with a disruption campaign" that involved CSIS officers approaching cell members and their parents, informing them they were on the Service's radar. However, this appears to have had very little effect on the plotters, who continued their plans.[26] In 2010, not long after the Toronto 18 investigation concluded, SIRC raised concerns that these disruptions potentially went beyond the Service's mandate and that the government should monitor them closely.[27]

In the wake of the failed disruptions, CSIS continued to monitor Ahmad. It was soon discovered that he rented a car for two individuals, Yasin Mohammed and Ali Dirie, in August 2005. Mohammed and Dirie subsequently drove to the United States in a two-week effort to procure guns. Upon their return, the two were arrested for gun smuggling at the Peace Bridge as they attempted to return to Canada – their arrests due to the fact that they were on the authority's radar.[28]

As it became apparent that these individuals may be mobilizing to violence, the Service was able to recruit a source to infiltrate the cell in an investigation that soon became known as "Operation Claymore." It also

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24 Michelle Shephard, *Decade of Fear: Reporting from Terrorism's Grey Zone* (Vancouver: Douglas & McIntyre, 2011), 115.

25 Bell, *Cold Terror*, 252.

26 Bell, *Cold Terror*, 254. See also Shephard, *Decade of Fear,* 116. Of note, civil liberties groups such as the National Council of Canadian Muslims, have expressed concerns about the use of CSIS's threat disruption measures. Ihsaan Gardee, "Government Must Rebuild Trust with Canadian Muslims on National Security," *The Hill Times*, June 11, 2018, https://www.nccm.ca/government-must-rebuild-trust-with-canadian-muslims-on-national-security/.

27 Canada, Security Intelligence Review Committee, *Annual Report 2009-2010*, Catalogue No. PS105- 2010E-PDF (Ottawa: SIRC, 2010), 16, <http://www.sirccsars.gc.ca/pdfs/ar_2009-2010-eng.pdf>. After being granted sweeping "threat reduction" powers in 2015 under the Harper Government's Bill C-59, the Trudeau government kept "disruption" as a national security tool for the Service but defined it within narrow parameters in Section 21 of the *CSIS Act*. A critique of disruption powers (as they existed in Bill C-51) can be found in Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015), 225–70.

28 Bell, *Cold Terror*, 255; Shephard, *Decade of Fear*, 107.

played a role in securing the recruitment of a second individual who convinced the cell that he could procure explosives for them.[29] Open source and court reporting suggest that this second source was already "under development" as an informant for the Service between February and April 2006.[30]

A decision to alert the RCMP, who could engage in a criminal investigation of the case, was made, and the official handover was in November 2005. This was done with the exchange of a "disclosure letter" from CSIS which indicated that Fahim Ahmad was believed to be engaging in activities that pose a threat to the security of Canada.

However, this was not the end of CSIS's investigation into the Toronto 18 case. Following the handover, CSIS established a parallel investigation, not for the purpose of obtaining evidence or contributing to the RCMP investigation, but, in the words of the Ontario Superior Court, "in order to fulfill its mandate under s. 12 of the *Canadian Security Intelligence Service Act*."[31] As such, CSIS members worked with the RCMP but for the purpose of ensuring that information flowed back to the Service rather than helping inform the federal police force.[32] During the RCMP investigation, CSIS handed over further information in several "disclosure" and "advisory" letters (carefully crafted and vetted letters from CSIS to the RCMP containing intelligence and permitting its use in legal proceedings). The basic information in these letters was used by the RCMP to obtain warrants that were then used in the investigation.[33]

V. Significance and Legacy

The Toronto 18 investigation was, and remains, significant for CSIS for a number of reasons. One of the reasons may be the fact that, according to media coverage, CSIS's regional office in Toronto was a target of the cell – making it the first time CSIS employees were themselves at the centre of a plot.

However, the high-profile case had an impact on Service investigations

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29 Bell, *Cold Terror*, 254; Shephard, *Decade of Fear*, 115.

30 Michael Friscolanti, "The Four-Million Dollar Rat," *Macleans*, February 7, 2007, https://archive.macleans.ca; *Ahmad* ONSC, CanLII at para 63.

31 *Ahmad* ONSC, CanLII at para 7.

32 *Ahmad* ONSC, CanLII at para 44.

33 *Ahmad* ONSC, CanLII at para 39.

for the next decade and a half in at least four ways. First, the Toronto 18 case was the largest and most important post-2001 counterterrorism operation in Canada, and it was a success. It was proof that the Service could handle a major investigation of a threat to Canadian national security in a new era of violent extremism. In addition, the courts upheld CSIS's practices in relation to "intelligence-to-evidence" with the RCMP, even if problems in that area remain. This meant that the amount of CSIS information that was brought to trial was minimized, protecting the Service's sources and methods.

A second significance is in what the Toronto 18 represented in the mid-2000s: the threat of terrorism was shifting from threats coming to Canada from abroad to "homegrown" violent extremism. In other words, terrorist threats to Canada were coming from individuals who had been born in Canada or who had spent the vast majority of their lives within its borders. While there would still be plots that originated overseas (such as the 2006 Transatlantic Airline Plot), most Service investigations largely focused on Canada-based extremists.

A third significance is the legacy of the Toronto 18 case in terms of the biases it may have created. The nature of the Toronto 18 case is a classic "left-of-bang" scenario – over several months, a number of individuals are observed engaging in threat-related activity, a Service investigation is mounted which then becomes an RCMP investigation that leads to an arrest disrupting a plot before an attack is carried out. Therefore, in the same way that armies often prepare to fight the last war, a question could be raised as to whether or not the Canadian national security community, including CSIS, spent its time and resources looking for the next "Toronto 18" rather than thinking about how violent extremism in Canada would evolve over the next decade.

While there were other domestic cells that were disrupted in Ottawa (2009) and Toronto (2013), within six years of the Toronto 18 case, violent extremists in Canada began to mobilize to violence by travelling overseas to war zones, especially Syria, rather than plotting attacks at home. Indeed, there were signs this was taking place as early as 2009 when six Canadians from Toronto left to travel to join Al Shabaab in Somalia.[34] Eventually, more would follow them in travelling to East Africa as well as South Asia

[34] Stewart Bell, "Canadian Appears in Terror Group's Propaganda Video Two Years after Being Killed in Somalia," *National Post*, January 8, 2015, https://nationalpost.com/news/canadian-appears-in-terror-groups-propaganda-video-killed-in-somolia.

over the next several years, but this general trend appears to have gone generally unnoticed until 2014.[35]

Of course, it goes without saying that prediction is difficult, and anticipating how threat of violent extremism will evolve is extremely challenging. How could an analyst working on the Toronto 18 case have reasonably anticipated that a mass uprising in the Arab world in late 2011 would unleash a massive civil war that would revitalize al-Qaeda in Iraq (now Daesh) and draw in tens of thousands of extremist travellers? Moreover, Canada was not alone in failing to anticipate the rise of extremist travellers as a major national security threat of the 2010s. Still, a bias towards looking for the next domestic "cell" may have prevented the Service (institutionally) from seeing this shift earlier as it was looking for more of what had already happened rather than trying to figure out what may happen next.

A final significance of the Toronto 18 case is more of a reflection as to how much has changed since 2006. Today, while Al Qaida/Daesh-inspired extremism remains a concern, the Service now actively investigates a broader range of violent extremism, including religiously-, ideologically-, and politically motivated causes. Indeed, the deadliest attacks to occur in Canada since 9/11 have been carried out by individuals with racist/xenophobic/anti-immigrant or misogynist views. Moreover, rather than violent extremist "cells", successful attacks have been perpetrated by lone actors who appear to have mobilized to violence quickly. This includes the 2014 attacks in Saint-Jean-sur-Richelieu and Ottawa, as well as the 2017 Quebec City mosque shooting and the 2018 Toronto van attack.

Moreover, it is clear that CSIS is now re-evaluating the emphasis that has been placed on violent extremism generally in the last two decades. In its 2019 Public Report, the director described geo-economic threats (such as economic espionage) as "the greatest danger to Canada's national security" – a significant change from prior reports.[36] This suggests a recognition that long-term campaigns aimed at either strategically undermining or skewing

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35 By 2011 it was estimated that up to 20 Canadian youths had travelled to Somalia to join Al Shabaab. See "Somali Militant Group Recruiting Canadian Youth," *CBC News*, January 26, 2011, https://www.cbc.ca/news/canada/somali-militant-group-recruiting-canadian-youth-1.1052143; "Terror Charges Laid Against Former Winnipeggers," *CBC News*, March 15, 2011, https://www.cbc.ca/news/canada/manitoba/terror-charges-laid-against-former-winnipeggers-1.1015496.

36 Canadian Security Intelligence Service, *CSIS Public Report 2019* (Ottawa: Public Works and Government Services Canada, 2020), 4, <https://www.canada.ca/content/dam/csis-scrs/documents/publications/PubRep-2019-E.pdf>.

the landscape of the Canadian economy pose a greater threat to the well-being of Canada than the threat of violent extremism.

In this sense, while the Toronto 18 case can be considered a success for the Service, it is also something of a historical artifact. The nature of the threat of violent extremism and national security threats in Canada have evolved in a decade and a half. CSIS has had to adjust along with other national security agencies. The best lesson to take from this case is to use it as a benchmark to observe the shifts and changing threats the Service has had to face and will face in the future.

This, however, has not been easy. A decade and a half's worth of focusing on CT at the expense of counterintelligence (CI) means that there is much work to do. Indeed, the neglect of CI issues means that key Canadian institutions – including the national security and intelligence community, the courts, political bodies, and the public – arguably lack knowledge and/or experience with these issues. The result is that Canada is arguably less prepared for what will likely be the main security challenges for the next decades of the 21st Century. In this sense, the Toronto 18 case should be considered a past success for CSIS but also a warning about the myopias that can be generated in the national security space.

Navigating National Security: The Prosecution of the Toronto 18

CROFT MICHAELSON*

ABSTRACT

Prosecutions of terrorism cases pose unique challenges because they typically raise complex issues engaging the right of an accused person to disclosure of relevant material and the public interest in protecting national security. This chapter provides the lead prosecutor's perspective on the Toronto 18 prosecution, some of the disclosure issues that arose in that case, and how similar issues might be handled in the future. Part II provides an overview of the Toronto 18 investigation. Part III reviews the Canadian disclosure regime in the context of terrorism prosecutions, contrasts it with disclosure regimes in the U.K. and the U.S.A., and highlights some problems associated with the current bifurcated approach when the defence seeks to compel disclosure of sensitive information. Part IV discusses how the prosecution in the Toronto 18 approached the disclosure of information in CSIS holdings. Part V concludes with a discussion of how the prosecution managed its disclosure obligations in the context of the *Garofoli* review of the wiretap authorizations, and how similar issues might be handled in the future given subsequent developments in the law.

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I. INTRODUCTION

The prosecution of the group that is commonly, and somewhat erroneously,[1] referred to as the Toronto 18 was a complex prosecution involving many difficult and unprecedented legal issues. The police investigation had its genesis in intelligence information provided by the Canadian Security Intelligence Service (CSIS), which was conducting a national security investigation against some of the individuals who became the subjects of the police investigation.

To give the reader some sense of the scope of the prosecution, the police investigation spanned approximately six months and involved two civilian agents, many investigators, authorizations to intercept communications, and search warrants, both covert and overt, which resulted in the generation of a voluminous amount of investigative material that was subject to disclosure and needed to be carefully reviewed to redact privileged information. The trial against the ten remaining adult offenders itself began with the assignment of the trial judge, Justice Fletcher Dawson, in late May 2008, who then promptly heard the first of approximately 30 pre-trial applications. Many of those applications were complex and involved novel legal questions relating to CSIS and its involvement in the investigation. By January 2010, four adult accused were left, the rest having pleaded guilty. Two trials then ensued – a judge-alone trial against one accused and a jury trial against three others. The judge-alone trial ended with a conviction in February 2010, and the jury returned guilty verdicts in late June 2010, more than two years after the trial had commenced.

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[1] The case is, perhaps, more accurately denoted the "Toronto 11", because although 18 individuals – 14 adults and four young persons – were initially charged, that number was ultimately reduced to 11 (ten adults and one young person). See the Introduction to this book for more details. Prosecutions may only be advanced by federal prosecutors if the evidence meets the test set out in the PPSC Deskbook; that is, the evidence must be sufficient to establish a reasonable prospect of conviction, and it must be in the public interest to proceed. The evidence is typically reassessed by prosecutors as the evidentiary landscape changes, such as after witnesses have testified at a preliminary hearing. Here, the Crown withdrew the charges against one adult accused and one young person was discharged after preliminary hearings. The Crown also stayed charges against three adults and two young persons, but those individuals consented to enter into judicial recognizances for one year under the predecessor provision to what is now s. 810.011 of the *Criminal Code*, R.S.C. 1985, c. C-46.

Any prosecution involving a lengthy police investigation and a large number of accused will inevitably be challenging for the prosecutors. Lengthy police investigations, particularly where the police have obtained authorizations to intercept communications and search warrants, typically generate large amounts of investigative material that can be difficult to manage and disclose in accordance with the Crown's duty to disclose the fruits of the investigation to the accused. Large numbers of accused persons also raise significant practical difficulties – few courtrooms are equipped for trials of more than a few individuals at a time; a jury may find it challenging to follow the evidence against more than seven or eight accused persons; in some cases, it may be almost impossible to craft intelligible jury instructions when a large number of individuals are prosecuted together and are facing complex charges.[2] The Toronto 18 prosecution was no different than many other cases in this respect. But what was unique about the Toronto 18 case was that, in addition to these commonplace challenges, the prosecution needed to also navigate its way through the national security interests that arose in the case. That is the basic theme of this chapter – a prosecutor's perspective on how we navigated our way through the national security issues that arose in the case and how those issues might be successfully navigated in the future. I also hope to show that although national security is uncommon and a rather esoteric subject matter in the context of criminal prosecutions, the issues that arise can be managed fairly in a manner that protects both national security and the right of an accused person to make full answer and defence. But in order to give context to what follows, I first begin with an overview of the investigation of the Toronto 18 and the national security issues that confronted the prosecution.

II. The Investigation of the Toronto 18

The police investigation of the Toronto 18 first began in November 2005 when CSIS sent the RCMP Integrated National Security Enforcement Team (INSET) in Toronto an "advisory letter"[3] detailing information that

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2 For example, in R v. Pangman, 2000 MBQB 71, the court ordered severance where 15 accused were jointly charged on conspiracy and criminal organization charges, and the jury would have been required to return 84 discrete verdicts.

3 When intelligence information is shared between agencies, it is commonly subject to caveats restricting the use to which the information may be put, absent express approval from the agency providing the information. In this manner, agencies are able to control

CSIS had collected during its investigation of Fahim Ahmad, a young male who lived in the Toronto area. Although CSIS conducts investigations, it is not a law enforcement agency and has no mandate to investigate violations of the criminal law. CSIS is an intelligence service, the mandate of which was, in 2005, to collect information and intelligence relating to suspected threats to the security of Canada, and to provide reports and advice to the Government of Canada in respect of such threats.[4] The ability of CSIS to disclose information that it gathers during its intelligence investigations is governed by statute. When CSIS, in the course of a national security investigation, learns of criminal activity, CSIS may share that information with the police.[5] The police, in turn, can then initiate a criminal investigation and, ideally, arrest the offender(s). The extent to which intelligence information may be shared by CSIS will typically engage a balancing of the risks of compromising national security against the degree of the threat to public safety arising from the apparent criminal activity.[6] If

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the use and dissemination of their information and thus mitigate risks that might arise from further disclosures of the information. CSIS provides both "advisory letters" and "disclosure letters" to the police; the terms used do not accurately describe – at least from the perspective of criminal practitioners – the nature of the documents. An "advisory letter", in the lexicon of CSIS, includes information that may be provided to an issuing justice for the purpose of obtaining judicial authorization to conduct a search or intercept communications, but it may not be further disclosed without the permission of CSIS. In contrast, a "disclosure letter" sets out information that the police may only use as an investigative lead – they cannot rely on any of the information as grounds for issuance of judicial process. In other words, none of the information in a "disclosure letter" may be disclosed beyond the recipient police force, but information in an "advisory letter" may be disclosed to an issuing justice.

4 Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, s. 12. The mandate of CSIS was extended in 2015 to permit the Service to take measures to reduce threats to the security of Canada. See Canadian Security Intelligence Service Act, s. 12.1.

5 Generally speaking, CSIS is prohibited from disclosing any information that it collects, except in accordance with s 19 of the *Act*. Disclosure for the purpose of domestic law enforcement is one of the prescribed purposes; the Service may share information with peace officers and Attorneys General for the purpose of investigating and prosecuting contraventions of Canadian and provincial law. See Canadian Security Intelligence Service Act, s. 19(2)(a).

6 There are many ways that disclosing information may impact adversely on national security. For example, disclosure of the fact that information came from a human source may narrow the pool sufficiently to allow others to determine the identity of that source, endangering the source's safety – if source identities are not assiduously protected, persons will be reluctant to act as sources of intelligence in the future. Revealing sensitive information may reveal enough about the operations and capabilities of

death or serious bodily harm is likely to ensue from the criminal activity, there is a strong likelihood that CSIS will disclose the information to the police.

Fahim Ahmad had been on the radar screen of CSIS for some time when the first advisory letter was sent to INSET. He had been interviewed by CSIS in the spring of 2005. On one occasion in late June 2005, Ahmad and three of his associates were followed to a park by CSIS surveillance personnel. While Ahmad waited on the street, his associates went into a wooded area, a loud bang was heard, and the associates then rejoined Ahmad. In August 2005, two individuals connected to Ahmad – Ali Dirie and Yasin Mohamed – were stopped entering Canada from the United States by border security officers, as a result of a lookout that had been placed by CSIS with the Canadian Border Services Agency. When Dirie and Mohamed were searched, they were found in possession of handguns and ammunition that they were trying to smuggle into Canada; the vehicle they were driving had been rented with Ahmad's credit card.[7] INSET officers were informed of the arrests of Dirie and Mohamed but concluded, based on the information they then had, that there was no evidence that the smuggled firearms were intended for terrorist activity. Finally, in November

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intelligence agencies to allow terrorist groups to frustrate or evade the interception of communications, hampering the ability of agencies to collect intelligence. Canada is also a net consumer of intelligence information obtained from its allies, meaning that we obtain more intelligence from our allies than we provide. Our relationships with our allies will likely suffer and they will be less likely to share sensitive intelligence information if Canada is not able to adequately safeguard that information. The balancing of the risk to national security posed by disclosure against the threat to public safety, therefore, will often dictate the degree of detail provided to the police and how the police may use that information.

7 Dirie and Mohamed both pleaded guilty to smuggling firearms and were sentenced to penitentiary terms of imprisonment. After the training camp, Ahmad sent extremist materials to Dirie in the penitentiary and had conversations with him concerning both the training camp and the acquisition of firearms. Dirie later pleaded guilty to participating in the activities of a terrorist group. When he was later released from prison, he entered into a judicial recognizance under s 810.011 of the *Criminal Code* (which is sometimes referred to colloquially as a "terrorism peace bond"). In any event, Dirie subsequently left the country in breach of the terms of his recognizance and travelled to Syria where he was reportedly killed in battle. See "'Toronto 18' member Ali Mohamed Dirie reportedly died in Syria," *CBC News*, September 25, 2013, https://www.cbc.ca/news/world/toronto-18-member-ali-mohamed-dirie-reportedlydied-in-syria-1.1868119.

2005, CSIS intercepted Ahmad's telephone conversations with another associate, in which they engaged in secretive discussions about meeting a contact in Pakistan.

By mid-November, the information collected by CSIS through its surveillance activities raised concerns within the Service that Ahmad and his associates posed a risk to public safety. Thus, on November 17, 2005, CSIS provided INSET investigators with an advisory letter summarizing some of the information that they had gathered relating to Ahmad and his activities.[8] The police then commenced their own criminal investigation on a parallel track.

The parallel nature of the CSIS and INSET investigations is illustrated by the events of November 27, 2005. By this date, INSET investigators were conducting surveillance on Ahmad and followed him to the Taj Banquet Hall, where Ahmad attended a public presentation on security certificates.[9] At the same time, CSIS asked one of their confidential human sources, Mubin Shaikh, to go to the banquet hall and see if he could manage to ingratiate himself with Fahim Ahmad, Zakaria Amara, and Amin Durrani.[10]

When Shaikh arrived at the banquet hall, he was able to join a table where Ahmad, Amara, and Durrani all sat. As the evening progressed, Shaikh was able to establish a rapport[11] with Ahmad and Amara, and they

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8 Not all of the information collected by CSIS was shared; indeed, much was not. For example, CSIS held back the fact that they were aware that Ahmad had reacted with panic when he learned that Dirie and Mohamed had been arrested.

9 Under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, a security certificate may be issued by the government stating that an individual is inadmissible to Canada for reasons of national security, violation of human or international rights, or involvement in organized or serious crimes. Once signed, the certificate is referred to the Federal Court. If the Federal Court finds that the security certificate is reasonable, it becomes an enforceable removal order. A warrant may issue for the arrest and detention of a person named in a security certificate.

10 CSIS had obviously identified Amara and Durrani as associates of Ahmad by this point.

11 See Chapter 4 of this book for Shaikh's perspective on this dinner. Shaikh managed to present himself in a manner that made him an attractive target for recruitment: he was familiar with firearms through his past involvement with the army cadets, he had a firearms acquisition licence, and perhaps most importantly, he said that he believed that Jihad is an individual obligation (*fard al-ayn*), rather than a communal obligation (*fard al-kifayah*). Jihadist terrorist groups all invariably state that jihad is *fard al-ayn*. Although the term Jihad is subject to various interpretations within Islam, for the purposes of this chapter I adopt the meaning used by Islamist terrorist groups – fighting in the cause of Allah or, in other words, violent acts committed for a religious objective or purpose. This interpretation of the term Jihad is not restricted to terrorist groups;

tried to recruit Shaikh to join a group they were forming to carry out terrorist acts. Ahmad explained that he wanted to launch attacks on critical infrastructure targets in Canada and invited Shaikh to attend a training camp in December in a rural area north of Toronto. At one point during the evening, Amara reached inside his jacket, disengaged the magazine for a handgun, and showed it to Shaikh. Referring to the bullets inside the magazine, Amara said, "these are cop killers." When the evening wrapped up, police surveillance officers followed Ahmad but did not follow Amara because they had not yet identified him as a person of interest. CSIS surveillance personnel, therefore, picked up the surveillance of Amara once he left Ahmad's presence.

In a subsequent meeting that occurred a couple of days later, Ahmad told Shaikh his intended targets – Parliament, power grids, the nuclear power station in Pickering, and military sites. Ahmad said that he had a cache of weapons that he had buried in a park. He also told Shaikh that he had sent a couple of guys to the United States to bring back some weapons, but they had been caught and arrested at the border. Ahmad asked Shaikh, who Ahmad knew to have once been an army cadet rifle instructor, to help him train the recruits who attended the training camp.

The information gathered by Shaikh, which now indicated that Ahmad had identified specific targets, resulted in CSIS providing another advisory letter to the police. When the police received this letter, they decided that they would need to rely on the contents of the advisory letters as grounds to obtain authorization to intercept Ahmad's communications, but before doing so, they sought further detail from CSIS about the source(s) of the information.[12] CSIS then decided to see if Shaikh was willing to become a

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one widely distributed English translation of the Holy Quran, published by the Saudi Arabian government, adopts the same interpretation. See Taqi Ud Din Hilali and Muhammad Muhsin Khan, *Translation of the Meanings of The Noble Qur'an in the English Language* (Saudi Arabia: King Fahd Complex for the Printing of the Holy Qur'an, 2006), Glossary, definition of *Jihad*.

12 It is well established that the determination of whether informer information is reliable requires an assessment of the following factors: the compelling nature of the information, the credibility of the source, and the extent to which the information has been corroborated. Weaknesses in one area may be compensated by strengths in the other. See R v. Debot, [1989] 2 S.C.R. 1140, 37 O.A.C. 1, per Justice Wilson. The INSET investigators, therefore, sought additional information relating to the source or sources of the CSIS information so that the investigators (and any issuing justice) could determine whether that information was reliable.

police informer; when Shaikh indicated that he was, he was handed over to the police. Shaikh then became a confidential police informant entitled to the traditional common law protection afforded to police informers, whose identities may only be disclosed if it is necessary to prove the factual innocence of an accused person.[13] When Shaikh was debriefed by a source handler for the police, Shaikh essentially repeated the information that he had previously provided to CSIS about Ahmad and his plans. The information gathered by the source handler from Shaikh, along with the information provided in the CSIS advisory letters, became the foundational grounds for an application under Part VI of the *Criminal Code* to intercept the communications of Fahim Ahmad, Zakaria Amara, and their associates.[14]

Shaikh subsequently agreed to attend Ahmad's training camp, which was held at a remote location north of Orillia, Ontario, in late December. The police were able to intercept some of Ahmad's cell phone communications during the training camp, but much of the information about what took place at the camp – firearms training, simulated military-type exercises, and lectures on Jihad – and who did what was initially provided to the police by Shaikh and corroborated through subsequent seizures of evidence.[15]

Recognizing that Shaikh's evidence would be helpful in any future prosecution, the police had asked Shaikh if he would be prepared to waive his status as a police informant and become a police agent, which would mean the eventual disclosure of his identity and that he testify at trial. Several weeks after the training camp, Shaikh agreed to do so.[16]

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13 R v. Leipert, [1997] 1 S.C.R. 281, 143 D.L.R. (4th) 38; R v. Basi, 2009 SCC 52; Named Person v. Vancouver Sun, 2007 SCC 43.

14 R v. Ahmad, [2009] O.J. No. 6162.

15 Subsequent computer searches revealed video footage of a lecture given by Ahmad at the camp, which amply described the terrorist purposes of the group. Another video surfaced much later on the Internet depicting some of the firearms training, marching, and quasi-military exercises that were held during the camp. This particular video had an interesting backstory – it was originally seized from an individual who was charged with terrorism-related offences in the United Kingdom. It was posted online by the NEFA foundation after it was played at the trial of the accused in the U.K. It would seem that that individual received the video from Ahmad, who was intercepted by the police on one occasion advising Amara that he had shown the video to another individual who had been impressed.

16 R v. N.Y., 2008 CanLII 51935 (ON SC).

The police investigation of Ahmad, Amara, and the other camp attendees continued – communications were intercepted, surveillance was conducted, and Shaikh continued to gather evidence. However, Amara grew frustrated with Ahmad, severed his ties with the group, and recruited Shareef Abdelhaleem, Saad Khalid, and Saad Gaya to join him in a conspiracy to bomb targets in downtown Toronto and elsewhere in Ontario.[17]

Fortunately, a friend of Abdelhaleem, Shaher Elsohemy, had been recruited as a human source by CSIS. Elsohemy was eventually introduced to Amara by Abdelhaleem and was taken into their confidence. In particular, on April 8, 2006, Amara expressed an interest in acquiring large quantities of ammonium nitrate[18] and revealed his plan to bomb three targets. This information was promptly passed on to the police by CSIS, and four days later, Elsohemy became a police informer. In the ensuing weeks, Elsohemy had discussions with Abdelhaleem and Amara about the bomb plot and provided a great deal of helpful information to the police, but because Elsohemy was an informer, none of that information could be used as evidence at trial. The police, therefore, sought to have Elsohemy become a police agent and, on May 10, 2006, Elsohemy agreed to do so. The police then obtained authorization to intercept communications, and, from that point on, Elsohemy's conversations with Abdelhaleem and Amara about the bomb plot were intercepted and recorded.[19]

Abdelhaleem and Amara placed an order for three tonnes of ammonium nitrate with Elsohemy. In the meantime, police surveillance officers recorded Amara meeting with Khalid and Gaya at McMaster

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17 Amara's targets were the CSIS regional office and the Toronto Stock Exchange in downtown Toronto, as well as an unidentified military base. Unbeknownst to Amara and his co-conspirators, the offices of the Department of Justice and the Public Prosecution Service of Canada would have been collateral targets if the bombings were carried out, because both offices were located in the same building as the TSX.

18 Ammonium nitrate is the main component of a fertilizer bomb, such as was used in the bombing of the federal building in Oklahoma City. Amara's plan was to build three bombs, each containing one tonne of ammonium nitrate. In order to establish the explosive force of such a bomb, the INSET investigators had a similar bomb constructed and detonated under scientific conditions. The expert report established that a bomb made of one tonne of ammonium nitrate would cause death and serious bodily harm to persons in the vicinity of the explosion and cause serious damage to an office building.

19 R v. Abdelhaleem, [2010] O.J. No. 5693.

University and having a discussion, during which Amara made a hand gesture of detonating a bomb. On June 2, 2006, undercover officers delivered three tonnes of an inert substance packaged as ammonium nitrate to a warehouse that Abdelhaleem had rented. Khalid and Gaya, wearing t-shirts with the logo "Student Farmers,"[20] were recorded unloading much of the "ammonium nitrate" until they, and all of the other individuals who comprised the Toronto 18, were arrested and charged with terrorism-related offences. The case then moved to the prosecution phase.

As mentioned in the introduction to this chapter, the Toronto 18 case posed the usual difficulties for the prosecution that can arise in any lengthy wiretap investigation of multiple accused persons. Managing and vetting voluminous disclosure materials; reviewing extensive evidence to ensure that the standard for initiating a prosecution is met for each individual accused and that the appropriate charges have been laid; determining whether and how to sever accused persons, so the Crown can present a coherent and manageable case at trial; and responding to the inevitable attacks on the admissibility of seized evidence are routine challenges that confront prosecutors who deal with complex investigations of criminal organizations. But overlaying those routine challenges were two that were unique to this particular prosecution and arose from the intersection of CSIS and national security interests with the police investigation.

The first challenge arose in the context of the Crown's disclosure obligation: to what extent, if any, did the involvement of CSIS impact the Crown's obligation to disclose information to the accused? The second challenge arose in the context of the review of the initial authorization to intercept communications: if the police relied on information provided by CSIS as grounds to obtain an authorization to intercept communications, how does this impact the review of that authorization, and what are the implications for disclosure? In what follows, I will discuss how we dealt with these issues in the prosecution of the Toronto 18 but also suggest how such issues might be dealt with in the future given more recent developments in the case law.

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[20] The logo would seem to have been intended to explain to any passers-by why they were handling a large quantity of ammonium nitrate, a fertilizer.

III. Navigating National Security – Disclosure of the Fruits of the Investigation

It has been well established, since the decision of the Supreme Court of Canada in *R v. Stinchcombe*, that the accused's constitutional right to make full answer and defence under section 7 of the *Charter of Rights and Freedoms* imposes a duty on the Crown prosecutor to disclose relevant information in their possession or control, unless the information is privileged.[21] This duty to disclose includes both inculpatory and exculpatory information.[22] Information is relevant in the context of disclosure if it can reasonably be used by the accused to meet the case for the Crown, advance a defence, or otherwise make a decision that could affect the conduct of the defence.[23]

Because the Crown obtains the materials for use in a prosecution from the police, and the right to disclosure would be a hollow one if the police could cherry-pick what they give to the Crown, the police have a corollary duty to provide the prosecutor with "all material pertaining to the investigation of the accused."[24] This corollary duty encompasses the "fruits of the investigation" – the material created or acquired by the police in the course of their investigation – but it also includes any other information

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21 R v. Stinchcombe, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97; R v. Gubbins, 2018 SCC 44; R v. Quesnelle, 2014 SCC 46; R v. McNeil, 2009 SCC 3.

22 *Stinchcombe*, S.C.R.; *Gubbins*, SCC at para 22.

23 *Gubbins,* SCC at para 18; R v. McQuaid, [1998] 1 S.C.R. 244 at paras 20–22, 37 W.C.B. (2d) 204. The requirement that information be disclosed if it could be used to "make a decision which could have affected the conduct of the defence" has the potential to denude relevancy of meaning if it is interpreted too broadly. One could argue that the defence needs disclosure of everything in the investigative file in order to ensure that they have advanced all possible pre-trial motions and applications. For example, if none of the non-disclosed information in an investigative file could reasonably support an application for abuse of process, the defence might still argue that they require production of the material so they can decide that an abuse of process application is without merit. Pushed to absurdity, the defence could argue that they require production of all of the irrelevant information because it would help them make a decision as to whether the Crown has withheld relevant or irrelevant information. Information that is irrelevant becomes "relevant" because the defence would see that it is irrelevant. It seems that when the court made the reference to decisions affecting the conduct of the defence, it was referring to tactical decisions at trial, such as whether the accused should testify, or whether certain evidence should be called or admitted.

24 *McNeil*, SCC at paras 23, 52.

that is "obviously relevant to the accused's case," such as the criminal record of a witness.[25]

The prosecutor's duties in respect of disclosure can reach beyond the *Stinchcombe* disclosure obligation and the "fruits of the investigation" and "obviously relevant" information in the hands of the investigative agency. If the prosecutor has reason to believe that another government agency is likely in possession of information that is relevant to the defence of the accused, the prosecutor has a duty, under *R v. McNeil*,[26] to request that information from the agency. This duty to seek out information from third-party government agencies is referred to as the "*McNeil* duty." If the prosecutor is provided with the information, then the *Stinchcombe* standard of relevance applies. If, however, the agency refuses to provide the information, the defence is required to bring an application for production from a third party, the standard for which was laid down by the Supreme Court in *R v. O'Connor*.[27] I discuss the *McNeil* duty and its application in the context of the Toronto 18 prosecution in Part IV below.

The Crown prosecutor's duty to disclose is a broad one. Prosecutors are required to err in favour of inclusion and may only withhold information that is "clearly irrelevant," privileged, or subject to some other legislative regime governing disclosure.[28] The disclosure obligation essentially operates as a form of open discovery of the investigative file and seems to be grounded in the rationale that records created during the investigation are presumptively relevant to the prosecution and defence of the offence charged.[29]

While the underlying rationale for the broad disclosure obligation – that investigative materials are presumptively relevant to the trial of the offence charged – may be well-founded in the context of routine criminal investigations, it begins to lose its force as the length and complexity of an investigation increase. Anyone who has prosecuted an offence that came

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25 *McNeil*, SCC at para 59; *Gubbins*, SCC at para 23. The criminal record of a witness is relevant to an accused's case because such records can be used to impeach the witness at trial. See David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011), 448.

26 *McNeil*, SCC.

27 R v. O'Connor, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235.

28 *McNeil*, SCC at para 18. For example, the disclosure of medical and therapeutic records of complainants in sexual assault trials is governed by ss. 278.1-278.91 of the *Criminal Code*.

29 *Quesnelle,* SCC at para 56.

out of a long, complex investigation can attest that much of the investigative file is completely irrelevant to the issues at trial. Much of what investigators generate during an investigation is more aptly described not as "fruits," but as withered buds on the vine. During a lengthy investigation, extensive surveillance may be conducted, much of which reveals nothing going towards guilt or innocence; myriad communications may be intercepted, furnishing nothing of evidentiary value; administrative documents may be created seeking approval for overtime or travel; and potential avenues of investigation may arise and be pursued until the investigators realize they are blind alleys. By way of example, during the investigation of the Toronto 18, investigators conducted routine surveillance on the subjects of the investigation. If a subject was seen waving or talking to someone in the parking lot of a mosque after prayers, surveillance officers would often note down the licence plate of that person for follow-up. Investigators would then conduct background enquiries of the person on police databases and open sources on the Internet – such enquiries typically were dead-ends and resulted in nothing that could assist the defence at trial.

In a lengthy and complex investigation, in which there are large quantities of material irrelevant to the prosecution of the offence, the task of culling through the investigative file to remove the information that is "clearly irrelevant" can pose a significant burden if the Crown takes seriously its obligation to "sort the wheat from the chaff."[30] And if information in the file materials is privileged, the burden is only magnified. In the "Toronto 18 case," the review and vetting of file materials for disclosure was laborious and spanned many months. Every investigator is required to make notes during an investigation, and a significant portion of the disclosure materials consisted of such notes. An investigator's notes are typically handwritten. They include notations of the investigator's personal observations and activities, but they will also commonly record information that is conveyed to the investigator by another investigator. For example, if a group of investigators attend a meeting where they obtain a debriefing on recent developments in the investigation, each investigator may well record that information in their notebooks. There will often be considerable overlap and duplication of information in the investigators' notes.

When sensitive, privileged information is shared among investigators during the investigation, a careful review of the notes is, therefore, required

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[30] *Stinchcombe*, S.C.R. at 339.

in order to ensure that none of the privileged information is buried in someone's notes and inadvertently disclosed. The fact that the notes are commonly handwritten further complicates matters because, unlike the electronic text generated by word processing software programs, handwriting is highly variable among writers, and OCR software[31] cannot be used to search handwritten notations with any degree of certainty. In the Toronto 18 investigation, it was not uncommon for privileged information provided by CSIS to be shared among members of the investigative team. It was, therefore, necessary to engage in a line-by-line, page-by-page review of every investigator's notes to ensure that the information was redacted from the notebooks before they were disclosed to the defence. And because CSIS had a direct interest in the privileged information, CSIS needed to be provided with an opportunity to review the notations to verify that none of their sensitive information would be disclosed inadvertently.

In order to comply with its disclosure obligation in a timely manner, the Crown disclosed the relevant, non-privileged material in an electronic format in successive waves. The initial wave consisted of bail packages and the affidavits used to obtain authorizations to intercept communications and search warrants. Because those affidavits set out a detailed chronology of the investigation, the defence were able to quickly get up to speed on the nature of the allegations against the accused. Subsequent waves of disclosure were concerned with seized evidence, officer notes, surveillance reports, and other documentation generated by the police during the investigation. The bulk of disclosure was provided to defence counsel within six months of the arrests, and disclosure was essentially completed within ten months. To give some sense of the magnitude of disclosure in the case, at one point the disclosure provided to the accused consisted of more than 90,000 records, 82,000 text files of monitors' summaries of intercepted communications, and many media files.[32] After review by the police and CSIS, the Crown applied more than 9,600 redactions to these disclosure materials.[33] The redactions related to information that was subject to claims of privilege or public interest immunity – information that would reveal investigative techniques, the personal information of innocent third parties, or

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31 Optical Character Recognition (OCR) software is not currently sophisticated enough to consistently identity words that have been handwritten in cursive writing. Indeed, many human readers struggle to interpret the cursive handwriting of others.

32 R v. Ahmad, 2009 CanLII 84788 at para 3, 257 CCC (3d) 135 (ON SC).

33 R v. Ahmad, [2009] O.J. No. 6152 at para 2 [*Ahmad* 2009].

information that would compromise national security – as well as information that was clearly irrelevant.

The broad, common law disclosure regime in Canada does not allow for any consideration of proportionality or any assessment of the extent to which information is material to the determination of issues at trial. Information within the investigative file must be disclosed if there is a "reasonable possibility that it may assist" the accused in making full answer and defence, unless it is privileged or subject to some other statutory disclosure regime.[34] Although burdensome, our disclosure regime is arguably not that different than the regimes in other common law countries, and placing a broad disclosure obligation on the Crown is probably the safest way to guard against wrongful convictions and miscarriages of justice.

In the United Kingdom, the prosecution is required to disclose to the defence any material that they intend to rely on at trial, what is commonly referred to as "used material." But the prosecution is also required to disclose any other material relating to the investigation that "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused" (commonly referred to as "unused material").[35] This standard for disclosure is not much different than the *Stinchcombe* standard. I doubt that there is much difference in practice between a regime that requires the disclosure of information if "there is a reasonable possibility that it may assist" the accused and a regime that requires the disclosure of information that "might reasonably be considered capable… of assisting the case for the accused." Just as Canadian prosecutors have been instructed to err in favour of inclusion,[36] prosecutors in the United Kingdom have been told, "if in doubt, disclose."[37] If disclosure in Canadian criminal proceedings happens

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34 *McNeil*, SCC at para 17.

35 Criminal Procedure and Investigations Act 1996 (U.K.), 1996, s. 3.

36 *Stinchcombe*, S.C.R. at 339.

37 U.K., HC, *Mouncher Investigation Report* (Cm 292, 2017) at 225 (Richard Horwell), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/629725.pdf; U.K. Attorney General's Office, Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System (Cm 9735, 2018) at 12, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/Attorney_General_s_Disclosure_Review]. The U.K. disclosure regime in its application has been the subject of repeated criticism and resulted in enough miscarriages of justice that it is doubtful that that regime is an improvement over the

to be broader than in the United Kingdom, that probably follows from the fact that investigations in Canada are subject to greater scrutiny under the *Charter of Rights and Freedoms*. Simply put, more avenues are available to the defence in Canada to challenge the conduct of the police and make full answer and defence, and thus, more information within the investigative file is potentially relevant to triable issues and must be disclosed.[38]

Disclosure in federal criminal trials in the United States is governed by a mix of constitutional law and rules of procedure. Under *Brady v. Maryland*,[39] a violation of the due process clause of the 14th Amendment will arise whenever the prosecution withholds evidence that is favourable to the accused and "material either to guilt or punishment." This includes both exculpatory material and material that could be used to impeach key government witnesses.[40] Evidence is material in the *Brady* context if "its suppression undermines confidence in the outcome of the trial."[41] That is, there must be "a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different."[42]

Under Rule 16 of the *Federal Rules of Criminal Procedure*, the government must, on the defendant's request, disclose any relevant written or recorded statement of the defendant if: (1) the statement is within the government's

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Stinchcombe regime. See U.K., HC, *Disclosure of Evidence in Criminal Cases* (Cm 859, 2018) at 10–12, https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf.

38 A simple example will suffice to illustrate the point. In Canada, evidence that was seized illegally is an infringement of s. 8 of the *Charter* and is subject to exclusion if the admission of the evidence would bring the administration of justice into disrepute. In contrast, in England and Wales, any evidence that is relevant is admissible in criminal proceedings even if it was obtained illegally by the police, although the trial judge has a discretion to exclude evidence that would result in an unfair trial. See Public Prosecution Service v. McKee, [2013] UKSC 32 at para 9; Police and Criminal Evidence Act 1984 (U.K.), s. 78. Apart from statements, the admission of relevant evidence that was obtained illegally will only rarely have an adverse impact on trial fairness. Thus, an illegal seizure of evidence in Canada gives rise to a triable issue, while the same illegal seizure in the U.K. typically will not lead to a triable issue. In the result, the Canadian prosecutor will need to disclose more information that the U.K. prosecutor, but this arises from the nature of the justiciable legal issues in each jurisdiction, rather than meaningful differences in the disclosure regimes.

39 373 U.S. 83 (1963).

40 Giglio v. United States, 405 U.S. 150 (1972).

41 United States v. Bagley, 473 U.S. 667 (1985) at 678.

42 *Bagley*, U.S. at 682.

possession, custody, or control and (2) the attorney for the government knows, or through due diligence could know, that the statement exists. The government must also, on the defendant's request, permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and (1) the item is material to preparing the defence; (2) the government intends to use the item in its case-in-chief at trial; or (3) the item was obtained from or belongs to the defendant.[43]

In some respects, the disclosure obligation in the United States is narrower than in Canada. Under *Brady*, the failure to disclose information will only result in a due process violation if it is reasonably probable that the information would have affected the outcome at trial. In determining whether information needs to be disclosed, a federal prosecutor in the United States, therefore, must assess the probability that the information will assist the defence at trial, either in undermining the prosecution's case, advancing a defence, or mitigating a sentence. This can be a daunting exercise, particularly when the information is not clearly irrelevant to issues that may determine guilt or innocence or the imposition of sentence. As a prosecutor, do you take the risk that a guilty verdict or sentence will be overturned because you held back information that might have assisted the defence?

It is perhaps not surprising then that, as a matter of policy, U.S. federal prosecutors are encouraged to provide disclosure to the defence that goes beyond the *Brady* requirements. U.S. federal prosecutors are instructed as a matter of policy "to err on the side of disclosure in close questions of materiality."[44] Moreover, prosecutors are encouraged to disclose "relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an

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43 *Federal Rules of Criminal Procedure*, 2021 ed. (Michigan: Michigan Legal Publishing Ltd, 2020), Rules 16 (a)(1)(B), (E). If the defence makes a request under Rule 16(a)(1)(E), it triggers reciprocal disclosure on the part of the defence (see Rule 16(b)(1)). Under both the *Jencks Act*, 18 U.S.C. § 3500 and Rule 26.2, after a witness for the government has testified in-chief, the government is also required to disclose the statement of a witness relating to the subject matter of the testimony.

44 U.S., Department of Justice, *Justice Manual* (Washington, D.C.: U.S. DOJ, 2018), s. 9-5.001 C., https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings.

acquittal or, as is often colloquially expressed, make the difference between guilt and innocence."[45] This requires that prosecutors "disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense" and "information that either casts a substantial doubt upon the accuracy of any evidence the prosecutor intends to rely on... or might have a significant bearing on the admissibility of prosecution evidence," regardless of whether the prosecutor believes that the information will make the difference between conviction and acquittal.[46] But this is still a narrower standard than the *Stinchcombe* disclosure obligation, which requires that prosecutors disclose information that is of only marginal relevance to issues at trial.

The breadth of the *Stinchcombe* obligation in the context of a complex, lengthy investigation with significant privilege issues imposes an onerous burden on the prosecution. No doubt other equally effective disclosure regimes could be crafted, but the *Stinchcombe* standard at least has the benefit of providing clear guidance to prosecutors. It is relatively easy to identify information that is clearly irrelevant – it simply involves asking whether the defence could use the information in any way to undermine the Crown's case, lay the groundwork for a defence, or decide how to conduct the trial. A broad, clear standard for disclosure also has the advantage of protecting against wrongful convictions. If prosecutors are not required to make the judgment call as to whether the defence will be able to successfully use the information and are simply required to determine whether the information may reasonably assist the defence, there is less likelihood of error.

Generally speaking, whenever the prosecutor has redacted information on the basis of privilege or irrelevancy, the defence can ask the trial judge to review the prosecutor's decision.[47] If the judge finds that the redaction was not justified or was too broad, the judge will order that the redaction be lifted or varied. In most cases, responsible defence lawyers will be content with the Crown's redactions, provided that they are aware of the general reasons why the information is being withheld. In federal prosecutions,

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45 U.S. Department of Justice, *Justice Manual*, s. 9-5.001 C.

46 U.S. Department of Justice, *Justice Manual*, s. 9-5.001 C.

47 *Stinchcombe*, S.C.R. at 340–41. In *Stinchcombe*, Justice Sopinka stated, at p. 340, that the trial judge on a review should be guided by the general principle that, unless information it privileged, information should not be withheld if there is a reasonable possibility that withholding the information will impair the accused's right to make full answer and defence.

prosecutors typically tag each redaction with a code that informs the reader what the basis was for the redaction. For example, a redaction might be coded as "investigative technique," "solicitor-client privilege," "informer privilege," or "irrelevant." If information has been withheld as "irrelevant," prosecutors will often provide some additional information explaining why they say it is irrelevant, such as "unrelated investigation."

In theory, though, an accused person could ask the trial judge to review every single redaction made in disclosure materials. Indeed, that position was initially advanced by one of the counsel in the Toronto 18. As one might expect, the suggestion that the judge embark on a review of 9,600 redactions in thousands of pages of disclosure did not meet with a friendly reception, and Justice Dawson instructed the defence to meet with the Crown to narrow the scope of what he needed to review. After the Crown and defence met, the number of redactions for review was reduced significantly, and the review was completed in only a couple of days.[48]

When a redaction is made on the basis of national security privilege[49] – the claim that disclosure would cause injury to national security – an additional layer of complexity is added. This is because such claims have the potential to engage sections 38 to 38.14 of the *Canada Evidence Act* (*CEA*), which essentially provide that national security privilege claims may only be reviewed and set aside by a designated judge of the Federal Court of Canada. In other words, section 38 results in the bifurcation of jurisdiction relating to the review of Crown disclosure decisions. The trial judge has jurisdiction to review all Crown redactions in the disclosure materials, except those made on the basis of national security privilege; only the Federal Court has jurisdiction to review the latter and order disclosure. To better understand how the section 38 regime may become engaged in criminal trial proceedings and the difficulties it raises from a prosecutor's perspective, it is necessary to briefly review these provisions.

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48 *Ahmad* 2009, O.J. at paras 1–3.

49 I use the term "national security privilege" for ease of reference. The Supreme Court of Canada stated in Carey v. Ontario, [1986] 2 S.C.R. 637 at 653, 35 D.L.R. (4th) 161, that Crown privileges are more properly described as "public interest immunities." A public interest immunity involves the balancing of public interests and will arise whenever the public interest in non-disclosure of information outweighs the public interest in disclosure.

A. The Section 38 Regime

The section 38 regime in the *CEA* basically codifies the common law of public interest immunity in relation to national security, national defence, or international relations. The regime applies to both "potentially injurious" and "sensitive" information. As defined in the *CEA*, "potentially injurious" information means any information that could injure national security, national defence, or international relations if it is publicly disclosed; "sensitive" information means information relating to national security, national defence, or international relations that is in the possession of the Government of Canada, and that the Government of Canada is taking measures to safeguard.[50]

The regime is applicable to both criminal and civil proceedings. Under section 38.01 of the *CEA*, any person who, in connection with a proceeding, is required to disclose, or who expects to disclose or to cause the disclosure of, potentially injurious or sensitive information is required to give written notice to the Attorney General of Canada of the possibility of the disclosure. Notice is not, however, required if the government department or agency that is the owner of the information authorizes disclosure.[51]

Stated differently, the section 38 regime is intended to protect classified information from unnecessary disclosure in the context of criminal or civil proceedings. In the Toronto 18 case, information in the investigative file relating to national security was uniformly classified as "Top Secret."[52] In some instances, the RCMP was the "owner" of the classified information because the RCMP had produced the information or had received it from a non-government entity. In other instances, CSIS was the "owner" of the information. Either agency could authorize the disclosure of their own information by declassifying that information – this in fact occurred in respect of some material that had been originally classified as "Top Secret"

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50 Redactions based on claims that disclosure would cause injury to national defence or international relations are less common in the criminal prosecution context, but that is not to say that they never arise.

51 Canada Evidence Act, R.S.C. 1985, c. C-5, s. 38.01(6)(c).

52 Information is classified according to the extent of injury to the national interest that would be caused if the information were disclosed. If disclosure would cause "injury" to the national interest, the information should be classified as "Confidential". If disclosure would result in "serious injury", the information should be classified "Secret". "Extremely grave injury" to the national interest requires a "Top Secret" classification. In my experience, information that triggers national security privilege is invariably classified as "Top Secret".

during the investigation.[53] But where disclosure was not authorized by the agencies, if the defence wished to cause the disclosure of the information, or if the prosecutor was required to disclose the information, written notice to the Attorney General of Canada was required under section 38.01.

In general terms, if notice is given under section 38.01, disclosure of the information that is the subject of the notice is prohibited unless the Attorney General or a designated judge of the Federal Court subsequently authorizes disclosure.[54] Under subsection 38.03(1) of the *CEA*, the Attorney General may, at any time and subject to any conditions, authorize the disclosure of all or part of the classified information. The Attorney General is required to advise the person who provided the written notice of the Attorney General's decision with respect to disclosure within ten days.[55] If the Attorney General does not provide notice of a decision, or makes any decision other than authorizing full disclosure of the information without conditions, the person who wishes to disclose, or to cause the disclosure, of the information may apply, under paragraph 38.04(2)(c), to the Federal Court for an order in respect of disclosure. A person who is required to disclose information, other than a witness, must apply to the Federal Court under paragraph 38.04(2)(b) for an order.[56]

In other words, whenever an accused person wishes to cause the disclosure of classified information in a criminal proceeding and gives notice to that effect to the Attorney General, the accused may then bring an application in Federal Court for disclosure if the Attorney General has not authorized the disclosure of the information, in its entirety and without conditions, within ten days.[57] If a prosecutor is required to disclose classified information and gives notice, the prosecutor must bring an application in Federal Court for an order in respect of disclosure when the Attorney

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53 Everything relating to a national security investigation will ordinarily be classified as "Top Secret" during the investigation because disclosure would compromise the investigation. But once the investigation is completed and arrests are made, that particular concern usually dissipates.

54 Canada Evidence Act, s. 38.02(2).

55 Canada Evidence Act, s. 38.02(3).

56 If a witness is required to disclose, or wishes to disclose, classified information and serves notice, the Attorney General is required to bring an application in Federal Court in respect of disclosure.

57 Unless the accused and the Attorney General have entered into a disclosure agreement under s. 38.031 of the *Canada Evidence Act*, something I have yet to see used in criminal proceedings.

General does not authorize the disclosure of the information, in its entirety and without conditions, within ten days.

The Federal Court judge hearing the application in respect of disclosure may authorize disclosure of the information if the judge concludes that disclosure would not injure national security (or national defence or international relations).[58] If the judge concludes that injury to national security would ensue, the judge may only authorize disclosure of classified information where the public interest in disclosure outweighs the public interest in non-disclosure.[59] The judge must consider if there are ways to limit the injury to national security, such as by imposing conditions on disclosure or by ordering that only a summary of the information or written admission of facts be disclosed.[60]

As stated above, in the Toronto 18 case, some information that, if disclosed, would have caused injury to national security was included within the materials that had been generated or obtained by the police during the investigation. The information was redacted from the disclosure materials and withheld on the basis of a national security privilege. In accordance with a practice that first arose in *R v. Khawaja*, the prosecution served a section 38.01 notice on the Attorney General of Canada.[61] This particular practice has been followed in the years since, but on reflection, I think that the practice of the prosecutor giving notice rests on a misreading of section 38.01 and *R v. Stinchcombe*.

Section 38.01 only requires notice if a party to a proceeding is required to disclose, or expects to disclose or to cause the disclosure of, classified information. Nothing in the Crown's *Stinchcombe* disclosure obligation requires that the prosecutor disclose information that is subject to a privilege or public interest immunity. To the contrary, *Stinchcombe* recognizes that information may properly be withheld if it is subject to privilege. When we redacted information from the investigative file materials, we were asserting a public interest immunity. We were not required to disclose the information and had no intention of disclosing the information or causing its disclosure. In hindsight, the accused were required to give notice under section 38.01 because they were the persons

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58 Canada Evidence Act, s. 38.06(1).

59 Canada Evidence Act, s. 38.06(2).

60 Canada Evidence Act, s. 38.06(2).

61 For the procedural history of the s. 38 hearing in *R v. Khawaja*, see Canada (Attorney General) v. Khawaja, 2007 FC 490 at paras 11, 15, 31–34.

seeking to challenge the redactions and, therefore, the persons who expected to cause the disclosure of the redacted information in the criminal trial proceeding.

The practice of the prosecutor giving routine notice whenever sensitive or potentially injurious information is redacted from disclosure materials is problematic and should be avoided in the future. Once the notice is served, the section 38 process is triggered. That process inevitably results in a time-consuming and costly application to the Federal Court for an order in respect of disclosure. But much of the information that is redacted on the basis of national security privilege is only marginally relevant, at best. Left to their own devices, many defence counsel might well decide not to go behind any of the redactions, or to just try to do so in respect of a limited number of them. That is often what transpires in criminal trials – the defence accepts that the Crown discharged its disclosure obligations in a responsible manner and does not ask the trial judge to review redactions made on the basis of informer privilege or solicitor-client privilege. The only time that a prosecutor should serve a section 38.01 notice is when the prosecutor has been ordered to disclose the information by the trial court, or when the prosecution reasonably expects to disclose the information to the trial judge in the course of the trial proceedings.[62]

Even though a section 38.01 notice was served in the Toronto 18 prosecution, no Federal Court hearing was ever conducted. The reason for that was that the trial judge held that the section 38 regime was unconstitutional.[63] His ruling was eventually overturned by the Supreme

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62 Situations will likely arise where the prosecutor can reasonably expect that disclosure of sensitive information will be required during the trial proceedings to the trial judge. For example, in the context of a *Garofoli* review of a wiretap affidavit (discussed below), a prosecutor may ask the trial judge to consider information in the affidavit that has been withheld from the defence on the basis of privilege. In that type of situation, the prosecutor reasonably expects to cause the disclosure of privileged information to the trial judge and would be well advised to file a s. 38.01 notice at an early stage in the proceedings. In other cases, the prosecutor might reasonably expect that the defence will ultimately bring an application to compel disclosure of withheld information at trial, but the defence appears to be refraining from serving a s. 38.01 notice in a timely manner. In those circumstances, the prosecutor might well consider serving the notice on the basis that the prosecutor expects to disclose the privileged information to the trial judge for review.

63 R v. Ahmad, [2009] O.J. No. 6161.

Court of Canada,[64] but rather than wait until that appeal was decided (and occasion the risk associated with incurring delay in an important prosecution), the CSIS Director agreed to authorize disclosure[65] of the redacted materials to the trial judge for the purpose of determining whether they were protected by public interest immunity. The trial judge then embarked on a review of the redactions that were the subject of claims of national security privilege, "approximately 787 redactions in hundreds of documents."[66] The hearing conducted by Justice Dawson, a trial judge with deep experience in criminal law and criminal trials, took 15 days over roughly a month and a half, resulting in a comprehensive, written decision three days later.[67]

We were fortunate that we were able to conduct the section 38 review before Justice Dawson, and that he was able to dispose of the application so quickly. Had he not been able to carry out the review, it would have been conducted in the Federal Court and likely resulted in considerable delay. The bifurcation of the review of disclosure in the context of a criminal trial proceeding is exceedingly problematic from a prosecutor's perspective, as I discuss below.

B. The Trouble with Bifurcation

The decision whether to order the disclosure of information that is subject to national security privilege requires a balancing of interests. On the one side of the scale is the degree of harm that would be occasioned to national security through disclosure; on the other side is the impact that non-disclosure would have on an accused's right to make full answer and defence. These are both exceedingly important interests in the abstract, and where the balance is struck will very much depend on the nature of the classified information and the extent to which that information may assist in the determination of triable issues.

The rationale for vesting the jurisdiction to determine questions around national security privilege in the Federal Court seems to have been two-fold: (1) the Court has expertise in relation to national security matters, flowing from the fact that it is the Court that issues warrants under section

64 R v. Ahmad, 2011 SCC 6.

65 Pursuant to s. 38.01(6)(c) of the *Canada Evidence Act*.

66 R v. Ahmad, [2009] O.J. No. 6156 at para 1 [*Ahmad* 6156].

67 The time taken to conduct the review by Justice Dawson was much quicker than the time it typically takes to complete a s. 38 review in the Federal Court.

21 of the *Canadian Security Intelligence Act* and (2) the Court has both the physical facilities and security-cleared personnel to manage classified material. These are not insignificant considerations, but when held up to scrutiny, they do not adequately justify the bifurcation of disclosure proceedings.

Superior court trial judges should have little difficulty grasping the nature and importance of national security interests.[68] The assessment of whether an intelligence agency's sensitive information should be disclosed is not much different from the assessment of whether a police agency's sensitive information should be disclosed, and the considerations that must be taken into account are often quite similar. Intelligence agencies and the police are both concerned about disclosures of sensitive investigative techniques; they are both concerned about compromising the identities of their human sources; and they are equally concerned about disclosing caveated information that they have obtained from third-party (typically foreign) agencies. The concern that disclosure of seemingly innocuous details and information, when read together, could identify a source – the so-called "mosaic effect" – arises regardless of whether one is talking about a CSIS confidential human source or an RCMP police informer.[69] The nature of the national security interests at stake, and the harms to those interests that would be caused through disclosure, are established in section 38 hearings through oral or affidavit evidence tendered by the Crown. There is little reason to think that superior court judges would be any less likely than Federal Court judges to give due regard to the national security interests at stake in an application for disclosure.

Classified information can also be managed and protected in a secure manner in criminal trial courts. Indeed, the reality is that superior court judges are already dealing with classified information. Many of the affidavits submitted to superior court judges in support of applications to intercept communications in the context of terrorism-related investigations contain information classified as "Top Secret." CSIS records containing sensitive, classified information have been reviewed by superior court judges

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68 See for example, *Ahmad* 6156, O.J.

69 Criminal courts have made explicit reference to the mosaic effect in declining to order disclosure of information relating to a police informer. See, for example, R v. McKay, 2016 BCCA 391 at paras 20, 155; R v. Chui, 2018 ABQB 899 at para 28.

conducting terrorism trials.[70] Although provincial courthouses typically do not meet the standards required to store sensitive, classified information, it should be possible to implement procedures on an *ad hoc* basis, responsive to the needs of the individual case, the same way that classified information is handled in the United States under their *Classified Information Procedures Act* (*CIPA*).[71]

U.S. federal district courts, which have trial jurisdiction in federal criminal proceedings, are frequently called on to review sensitive, classified information under *CIPA* to determine whether the information must be disclosed to a defendant. They are also often called upon to review the legality of *FISA* warrants issued by the Foreign Intelligence Surveillance Court under the *Foreign Intelligence Surveillance Act of 1978*.[72] While the Foreign Intelligence Surveillance Court has a secure facility, security arrangements that may be required in a District Court with respect to the handling and storage of classified information are addressed on a case-by-case basis.[73]

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70 *Ahmad* 6156, O.J.; R v. Jaser, 2014 ONSC 6052; R v. Alizadeh, 2014 ONSC 1907. I was the lead prosecutor on the *Ahmad* and *Jaser* prosecutions and am aware that the trial judges reviewed classified information under special procedures that we developed in each case. My former colleague, Jason Wakely, prosecuted the *Alizadeh* matter and advised me that the trial judge in that case also reviewed classified information under special procedures put in place for that case.

71 18 U.S.C. App. III.

72 50 U.S.C. § 1801 *et seq*.

73 Davis S. Kris and J. Douglas Wilson, *National Security Investigations and Prosecutions*, 2nd ed. vol. 2 (Thomson Reuters West, 2012), 144; Bruce M. MacKay, "The Use of Classified Information in Terrorism Trials," *Southern Illinois University Law Journal* 42 (2017): 78. Under *CIPA*, the Chief Justice of the United States was required to issue security procedures to protect classified information. Those procedures call for the appointment of a classified information security officer, the storage of classified information in a safe and approved containers in secure areas that meet government standards for storing classified information, and that court personnel who will have access to the classified information hold appropriate security clearances. See *Revised Security Procedures Established Pursuant to Pub L 96–456, 94 Stat 2025 , by the Chief Justice of the United States for the Protection of Classified Information*, 18 U.S.C. App. 9. Similar procedures were implemented in the *R v. Ahmad* and *R v. Jaser* cases. In *Ahmad*, the classified information was stored on encrypted laptops that were kept in a secured facility when the trial judge was not reviewing the information. In *Jaser*, the classified information was contained in a binder that was kept in a locked briefcase and stored in a secure facility when it was not required for review by the trial judge. In each case, once the materials were no longer required, the trial judges ordered that the materials be

There is no real basis for the view that national security would be inadequately safeguarded in superior courts if those courts were to have the jurisdiction to determine section 38 applications. The nature of the national security interests at issue are similar to the public interest immunities that arise in complex criminal trials involving criminal organizations. Moreover, the superior courts already handle sensitive information and *ad hoc* measures can be put in place to protect classified information from unauthorized disclosure. In sum, superior courts are equally capable of assessing the national security part of the balancing that is required under section 38 and of protecting the information.

When we turn to the other side of the balance, the assessment of the impact of non-disclosure on the right to make full answer and defence, there is a distinct advantage to conferring jurisdiction on the superior courts to determine section 38 applications and to involving the prosecutor in the process.

Assessing the impact of non-disclosure requires a sound understanding of the nature of the criminal proceeding and the viable issues that are likely to arise at trial. Many of the issues that arise, such as *Garofoli* reviews of authorizations and warrants, can be complex, and evaluating the actual usefulness of information to the determination of those issues often calls for sophisticated expertise in criminal law, the type of expertise that is found in many superior court judges.

In addition, superior court trial judges who hear disclosure applications in the context of criminal trials benefit from submissions from both the prosecutor and the defence. A superior court judge, therefore, obtains the benefit of getting the perspective of the prosecutor – an individual who carries out a quasi-judicial role requiring objectivity, fairness, and independence – on the nature of the allegations, the anticipated evidence, the criminal law issues in play, and the utility of the information at issue to the determination of those issues.

In contrast, the Federal Court has no institutional expertise in criminal law or criminal trial proceedings. Moreover, the counsel who have carriage of section 38.06 hearings in Federal Court on behalf of the Attorney General of Canada are typically litigation counsel from the Department of Justice who often have little to no background in criminal law or conducting

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sealed and stored in a secure government facility. The process followed in R v. Alizadeh, 2013 ONSC 7540 was the same as in *Jaser*.

criminal trials. If the court appoints *amicus* to assist the court, *amicus* may or may not have expertise in criminal law.

Although the accused person is invariably granted party status and given an opportunity to make submissions, the prosecutor is afforded no role in section 38.06 hearings and is often kept in the dark on the status of any application. Indeed, in the Toronto 18 case, the prosecutors only learned that Justice counsel had filed an application in the Federal Court when defence counsel advised the trial judge of the fact that they were participating in case management teleconferences convened by the Chief Justice of the Federal Court.

Thus, the section 38.06 hearing in the Federal Court is heard and conducted by actors who, except for defence counsel, come to the application with no knowledge of the underlying criminal trial proceeding and have little to no expertise in criminal law or the conduct of criminal litigation. The perspective of an important participant in the underlying criminal litigation – the prosecutor – is effectively muzzled. Pace and momentum, so important to the conduct of a criminal trial proceeding in the post-*Jordan* world,[74] are lost as an important issue is hived off for determination in a distant court. Neither the United Kingdom nor the United States proceed in this manner: the determination of whether the public interest in disclosure outweighs the public interest in non-disclosure is made by the judge overseeing the criminal trial; the applications are brought by the Crown Prosecution Service in the United Kingdom and by federal prosecutors in the United States. The section 38 regime is constitutional, but it leaves much to be desired.

IV. NAVIGATING NATIONAL SECURITY: DISCLOSING RELEVANT INFORMATION IN CSIS HOLDINGS

The defence in the Toronto 18 obtained extensive disclosure of the RCMP investigative file materials, but they wanted to reach beyond that and obtain production of all information that CSIS held relating to any of the accused persons. Their argument was that CSIS was an investigating agency that investigated the accused in relation to terrorism, and, as such, CSIS

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74 Under R v. Jordan, 2016 SCC 27, trials in superior courts should be completed within 30 months of the date that the charge was laid. Delay beyond 30 months will result in an infringement of the right to trial without unreasonable delay under the *Charter*, unless the delay is justified by exceptional circumstances or caused by the defence.

was subject to the same corollary obligation as the police to provide the fruits of their investigation to the prosecutor.[75]

The trial judge rejected this argument, concluding that the corollary obligation only arose in relation to the "fruits of a police or similar investigation undertaken as the foundation for a particular prosecution."[76] As Justice Dawson recognized, although CSIS conducted a wide-ranging investigation of the accused and other persons, it did so in furtherance of its own intelligence mandate, not for the purpose of prosecution.

The presumption that the fruits of an investigation are likely relevant to the prosecution of the charge, which is the underlying rationale for the Crown's *Stinchcombe* disclosure obligation and the corollary duty placed on the police, is not applicable to an investigation conducted for a different purpose and kept separate from the police investigation. The mere fact that CSIS shared some limited information with the police did not impose an obligation on CSIS to disgorge all of their holdings relating to the accused to the prosecutor.[77]

The defence were, therefore, required to meet the *O'Connor* standard for the production of records that were held by CSIS. Under *O'Connor*, an applicant who seeks the production of records in possession of a third party must first establish that the records exist and are likely relevant to the determination of an issue at trial. While the burden to establish likely relevance is not onerous, bare assertions of relevance will not suffice. The applicant must show some basis to believe that the records sought will assist in the determination of a triable issue. If the applicant meets this threshold requirement, the records are produced to the judge, who then assesses their true relevance. But at this second step of the *O'Connor* test, the judge should only deny production of the records where it is apparent after inspection that the records are clearly irrelevant.

We had concluded relatively early on that the defence would be able to meet the threshold of showing likely relevance for certain records in the possession of CSIS. For example, Shaikh and Elsohemy were both expected to testify at trial about events that they had witnessed while they had been CSIS sources. There was a reasonable basis to believe that records existed

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75 R v. Ahmad, [2009] O.J. No. 6153 at para 5 [*Ahmad* 6153].

76 *Ahmad* 6153, O.J. at paras 18–19.

77 The same result was reached in R v. Alizadeh, 2013 ONSC 5417 at para 15; R v. Nuttall, 2015 BCSC 1125 at para 46; R v. Peshdary, 2017 ONSC 1225 at para 9.

within CSIS that were contemporaneous to the events in question and recorded what Shaikh and Elsohemy had communicated to their source handlers and that those records were likely to be more useful than the source debriefing reports prepared by the police, which were created sometime after the events and deliberately omitted specific details to protect source identities.

At the time, CSIS did not maintain individual investigative files like the police do, but rather maintained the information it gathered during intelligence investigations in different source holdings, some electronic, some hard copy. I concluded that even if only a small subset of records in the CSIS holdings were likely relevant to a few discrete triable issues, combing the database for relevant records would be a laborious process. Although the Supreme Court had yet to articulate the Crown's *McNeil* duty,[78] there was little point in waiting for the inevitable *O'Connor* application to begin the search for records possessed by CSIS that were likely relevant. We, therefore, adopted a pro-active approach and asked the Service to search for records relating to certain areas of likely relevance that we defined for them.[79]

The process of reviewing and culling the CSIS holdings took many months. The Service first searched for records relating to the various accused. CSIS counsel and DOJ counsel then reviewed those records and identified approximately 600 records for review by the prosecutors. Two prosecutors then reviewed those documents, applying a generous approach that tended to be over-inclusive, and determined that 284 of them should be disclosed to defence, with redactions applied to protect national security

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78 *R v. McNeil* was handed down approximately six months after we initiated the review process with CSIS.

79 The areas of likely relevance were defined by the Crown in consultation with the defence. They were the product of negotiation, meaning that they were broader than probably would have been ordered by a court. And one of the areas of relevance would be resisted by the Crown under the law as it has developed in the intervening years. In the Toronto 18, CSIS agreed to produce any information in its possession that pertained to grounds set out in the police authorizations and search warrant applications, including records that would undermine the grounds. See *Ahmad* 6153, O.J. at para 67. In World Bank v. Wallace, 2016 SCC 15, decided several years later, the Supreme Court clarified that records held by a third party will ordinarily not be relevant to the review of an authorization or search warrant, because that review is concerned with the affiant's belief in the grounds. *World Bank* is discussed in Part V below.

privilege.[80] The trial judge subsequently reviewed the redactions and upheld the vast majority of them.

As illustrated in the case of the Toronto 18, although it is wrong to presume that records outside of the police investigative file are relevant, records that are in the possession of CSIS, or any other government agency, may well still be relevant to a triable issue and subject to production under the *O'Connor* test. Whether they are likely relevant will depend on the nature of the issues arising in a particular prosecution and the extent to which the records could reasonably assist in the determination of those issues. Any concerns about disclosing information that could cause injury to national security can be addressed by redacting the information and asserting public interest immunity.

The potential need to search the holdings of an intelligence agency for relevant information is not unique to national security prosecutions in Canada. Depending on the circumstances of an individual case, prosecutors in the United Kingdom, United States, and Australia also may be obliged to make enquiries of members of the intelligence community in an effort to obtain information relevant to the defence. In the United States, for example, the Rule 16 discovery obligation applies to the "government" writ at large, not just the prosecutor. Thus, federal prosecutors there often have to make enquiries of other government agencies, including members of the intelligence community, in order to comply with Rule 16. The decision whether to search for information held by an intelligence agency is typically guided by the concept of "alignment" in the U.S. If there is sufficient alignment between the intelligence agency and the investigation, the prosecutor is required to determine whether the intelligence agency is likely in possession of discoverable material under Rule 16. The prosecutor does so by requesting the intelligence agency to search its holdings for records relating to specific issues. Once the agency has identified records for review, the prosecutor attends and determines whether the material is discoverable. If it is, the prosecutor may resort to the provisions of *CIPA* to withhold the information or disclose it in a fashion that will not compromise national security. This is not much different than how the disclosure process unfolded in the Toronto 18 case.

When CSIS shares information with police investigators during an investigation, it may result in CSIS being required to produce further

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[80] *Ahmad* 6153, O.J. at paras 67–72; R v. Ahmad, [2009] O.J. No. 6166 at para 10.

information for the purposes of the trial. The scope of production is shaped by (1) the nature of the information shared and (2) the issues at trial. In some instances, it is easy to anticipate the breadth of production that will ensue from information sharing. For example, if a CSIS human source, like Shaikh, becomes a Crown witness testifying to events that were first recounted to the Service, it is reasonable to anticipate that notes made by the CSIS source handler and other records relating to the reliability and credibility of the source might readily meet the test for production under *O'Connor*. If a CSIS surveillance officer observes a significant event and is going to be a witness at trial, any notes made by the officer will need to be produced.

In other instances, it will be much more challenging to assess the extent to which information sharing by CSIS may lead to demands for the production of further information at trial. In particular, when the information provided by CSIS has been relied upon by the police to obtain authorization to intercept communications, what are the implications for the production of additional information from CSIS holdings? Can the defence obtain production of the CSIS facting documents[81] relating to that information? If the shared information was obtained under a section 21 warrant (of the *CSIS Act*), can the defence require production of the CSIS warrant, the CSIS affidavit, and even perhaps the records relied on by the affiant?

V. NAVIGATING NATIONAL SECURITY: THE *GAROFOLI* REVIEW

As described in Part II above, in the Toronto 18 investigation, the information provided by CSIS in Advisory Letters became part of the foundational grounds used by the police to obtain their first authorization to intercept communications. When additional CSIS records were produced in response to the defence's *O'Connor* application, it became clear that some of the grounds relied on by the police had been obtained as a consequence of CSIS intercepting communications under a section 21 warrant. This created a thorny issue for the prosecution because of the rule that requires a judge reviewing a warrant or authorization for compliance

[81] A "facting document" is the document in CSIS holdings that was relied on by the affiant to assert a particular fact in the affidavit.

with section 8 of the *Charter* to excise from the supporting affidavit any grounds that were obtained in contravention of the *Charter*. Under this rule, if the CSIS warrant was constitutionally deficient, any communications intercepted under that warrant and relied on by the police as grounds in their affidavit would have to be excised on review. Some further explanation about the review process may help in understanding how this issue unfolded at trial, the challenge it posed for the Crown, and how we dealt with it.

Assuming the accused have standing,[82] they have a constitutional right to challenge the admissibility of evidence seized by the state. Where the evidence at issue is a communication intercepted under a wiretap authorization, the defence may bring what is commonly referred to as a *Garofoli* application and seek to challenge the reasonableness of the search under section 8 of the *Charter*. A *Garofoli* application involves an examination of the record that was before the issuing judge and the determination by the reviewing judge whether the statutory preconditions for a wiretap authorization were met.

The standard of review is narrow. The focus is on whether the affiant reasonably believed in the existence of grounds that were sufficient to satisfy the statutory preconditions.[83] Errors or misstatements in the affidavit must be excised by the reviewing judge, but only if the affiant knew or ought to have known of the error or misstatement.[84] In addition, if the error or misstatement is a minor or technical error that was made in good faith, it need not be excised – the reviewing judge can amplify the record to correct the mistake. Omissions of material facts that were known or ought to have been known by the affiant are addressed by adding those facts to the affidavit that was before the issuing justice. Once the record has been

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82 R v. Edwards, [1996] 1 S.C.R. 128, [1996] 1 R.S.C. 128; R v. Marakah, 2017 SCC 59.

83 *World Bank*, SCC at paras 117, 119.

84 *World Bank*, SCC at para 121 ("the accuracy of the affidavit is tested against the affiant's reasonable belief"). The observant reader will have noted that we agreed to produce records in the hands of CSIS that related to the grounds set out in the police affidavit. Why did we do so, when those records were not in the hands of the affiant and thus could not inform his belief? The answer is that the law was somewhat unclear at the time. We thought it possible that the defence could argue that, because CSIS had reviewed the draft affidavit, factual errors that CSIS ought to have caught should be excised. The position of the Crown today would be quite different as a result of the decision in *World Bank* – generally speaking, the production of records in the hands of CSIS to establish errors or omissions in the RCMP affidavit would not be relevant to the *Garofoli* review. See *World Bank*, SCC at para 124.

amplified to take into account material errors and omissions, the reviewing judge then asks whether the issuing justice, based on the record as amplified on review, could have granted the authorization.[85] In other words, does the affidavit, as amplified, set out enough reliable information to satisfy the statutory preconditions for issuance?

Although the *Garofoli* application is supposed to be concerned with what the affiant reasonably believed at the time the authorization was granted, this is not always the case under the current law. In a trilogy of cases[86] decided in the early days of the *Charter*, the Supreme Court held that information obtained as a result of a *Charter* violation must be excised from the supporting affidavit.[87] The rationale for this rule of automatic excision was that the state ought not to benefit from "the illegal acts of police officers."[88] Courts reviewing warrants and authorizations in a *Garofoli* application now routinely excise information obtained as a result of a *Charter* infringement, without asking the question of whether the affiant reasonably believed that the information had been gathered lawfully.

This rule of automatic excision is conceptually unsound and problematic for several reasons. First, under subsection 24(2) of the *Charter*, evidence that was obtained in a manner that infringed the *Charter* may only be excluded if its admission would bring the administration of justice into disrepute. The same evidence that must automatically be excised on a *Garofoli* review can nevertheless be admitted to determine guilt or innocence. In principle, it is difficult to understand why the state can use constitutionally deficient information to deprive a person of their liberty interest, perhaps for life, but cannot use the same information to deprive them of their privacy interest.

Second, a *Garofoli* application is concerned with the review of the evidentiary record – the sworn affidavit – that was before the issuing justice. The so-called "excision" of sworn evidence from that record on the basis of a *Charter* infringement really amounts to nothing less than the exclusion of

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85 R v. Garofoli, [1990] 2 S.C.R. 1421 at 1451–453, [1990] 2 R.C.S. 1421.

86 R v. Grant, 2009 SCC 32; R v. Plant, [1993] 3 S.C.R. 281, [1993] 8 W.W.R. 287; R v. Wiley, [1993] 3 S.C.R. 263, 84 C.C.C. (3d) 161.

87 The standing requirement applies at the excision stage. To seek excision of a fact as unconstitutionally obtained, the accused must show it violated his own *Charter* rights. He is not entitled to seek excision of facts allegedly obtained in violation of the rights of third parties. See R v. Chang, 2003 CanLII 29135, 170 O.A.C. 37 (ON CA); R v. Vickerson, 2018 BCCA 39.

88 *Grant*, SCC.

evidence in the review proceeding. The rule of automatic excision is an automatic exclusionary rule that is contrary to the express wording of subsection 24(2) of the *Charter*.

Third, if the *Garofoli* application is supposed to be concerned with what the affiant reasonably believed at the time that the authorization was granted, it is confounding that the affiant's belief in the lawfulness of the grounds is not a relevant consideration.

Fourth, the rule of automatic excision is unnecessary to guard against unconstitutional acts of state agents. Under existing jurisprudence, evidence is obtained in a manner that infringed the *Charter* if there is a sufficient temporal, contextual, or causal nexus between the evidence and a *Charter* breach.[89] There is no need for a rule that magnifies the constitutional infringement and distorts the analysis under subsection 24(2) by taking the focus from where it should properly lie – on the initial breach and whether it warrants the exclusion of the evidence subsequently seized.

Finally, the rule of automatic excision has the potential to turn the *Garofoli* application into an expansive inquiry into collateral matters reaching far beyond the confines of the police investigation, generating time-consuming and sweeping disclosure requests. This was a real concern in the Toronto 18 prosecution.

The reader will recall that some of the grounds relied on by the police affiant in the Toronto 18 investigation came from the interception of communications by CSIS, acting under a section 21 warrant. The defence, therefore, contended that they should have access to the CSIS warrant and underlying affidavit, so they could challenge the lawfulness of the CSIS seizure of communications and argue for their excision from the police affidavit. But if the CSIS warrant, in turn, rested on information intercepted under an earlier warrant, then that warrant and its supporting affidavit would need to be produced, and so on, and so on.[90] We expected that the defence would also argue that, in order to challenge the CSIS warrant(s), they would need access to the source documents that were relied on by the CSIS affiant(s). Any CSIS materials ordered and produced would

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89 R v. Goldhart, [1996] 2 S.C.R. 463, 136 D.L.R. (4th) 502; R v. Strachan, [1988] 2 S.C.R. 980, 56 D.L.R. (4th) 673.

90 At one point during discussions in open court, the trial judge said this reminded him of Russian nesting dolls that can potentially go on endlessly, and there had to be some point at which you stop. The retort of defence counsel might be that you stop when there are no more dolls to open.

inevitably need to be heavily redacted to protect national security, and, depending on the extent to which judicial summaries could be prepared, it might not even be possible to conduct a review of a heavily redacted CSIS affidavit.[91] The CSIS investigation had been a broad, wide-ranging investigation extending over a significant period of time. There was a significant risk that the prosecution would be derailed by expansive disclosure requests to facilitate fact-checking by the defence. In order to avoid going down this road, the Crown decided not to rely on any of the information derived from the CSIS intercepts and agreed to the excision of that information on the *Garofoli* review. Once we made that decision, the CSIS warrant and affidavit were no longer relevant to a triable issue and thus not subject to production under the *O'Connor* framework.

This approach only worked in the Toronto 18 prosecution because there was enough information remaining in the police affidavit after excision to support its issuance. Many of the grounds had been furnished by Shaikh, and those grounds had been substantially corroborated by observations made by both the police and CSIS. In cases where the police authorization rests on CSIS interceptions, a similar approach would be fatal to the police wiretap. However, the law relating to production from third parties in the context of a *Garofoli* application has been developed and clarified since the Toronto 18 case. Where a third-party agency seized evidence under judicial authorization and that evidence was relied on as grounds to obtain a wiretap by a police affiant, there are solid arguments that can be advanced supporting a narrow scope of production from the third-party agency and keeping the *Garofoli* application within reasonable bounds.

In light of *World Bank* and its reminder that the *Garofoli* review is focused on the affiant's reasonable belief, it seems to me that the question that should actually be asked on the review is not whether the grounds relied on by the affiant were legally obtained, but rather whether the affiant reasonably believed that the grounds had been legally obtained. The focus should be on whether the affiant knew, or ought to have known, that the

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91 Under the *Garofoli* "Step Six" procedure, a judge reviewing a redacted affidavit may consider the redacted material in assessing the sufficiency of the warrant, but only if the defence have been provided with a judicial summary of the nature of the material that is sufficient to permit them to challenge it by way of evidence or submissions. Moreover, the Step Six procedure was not being used by criminal courts at the time of the Toronto 18 prosecution. It was not until the later decisions in *R v. Learning*, 2010 ONSC 3816, and *R v. Rocha*, 2012 ONCA 707, that the Step Six procedure was resurrected.

grounds were the product of an unlawful seizure. If the affiant reasonably believed that the grounds were legally obtained, there is no basis upon which to excise that information from the affidavit. I appreciate that this calls for an end to the rule of automatic excision, but it is a rule that is suspect and should be discarded.[92]

As I pointed out above, abandoning the rule of automatic excision would not mean that prior state illegality would be insulated from review in all instances. If the accused can establish that there is a sufficient nexus between the gathering of the evidence and previous state illegality, then the accused can still seek exclusion of the evidence under subsection 24(2).

But discarding the rule would have the benefit of keeping the production of material from third parties in the context of *Garofoli* applications within reasonable bounds and maintaining consistency of approach in the review of the affiant's belief. In the Toronto 18 prosecution, if what mattered was the affiant's reasonable belief in the lawfulness of the CSIS information, there would have been no basis for production of the CSIS warrant, affidavit, or source documents. Unless the defence could point to some evidence to the contrary, the affiant was entitled to reasonably believe that CSIS had acted lawfully under its mandate.

If it is thought to be too radical of a step to get rid of automatic excision, it may still be possible to keep production of CSIS records within reasonable bounds by insisting on a strict application of the principles articulated in *World Bank* and *O'Connor*. That is, the disclosure of third-party records should only be ordered where the accused shows that the records will tend to undermine one of the statutory preconditions for issuance of the police authorization. This might justify production of the CSIS warrant and the underlying affidavit in a redacted form to the defence because those documents are probative of whether the CSIS warrant was lawfully issued.[93] But without more, it would not justify production of source documents relied on by the CSIS affiant or previous CSIS warrants and affidavits – extending the scope of production this far begins to look like a fishing

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92 Ireland has an almost absolute exclusionary rule where evidence was obtained in conscious and deliberate violation of constitutional rights, and a presumptive exclusionary rule where the constitutional violation was not conscious and deliberate. See Director of Public Prosecutions v. JC, [2015] IESC 31 (SC Ireland). However, unconstitutionally obtained evidence may be relied on to obtain a warrant. See *JC*, IESC at para 65; Director of Public Prosecutions v. Cash, [2010] IESC 1 (SC Ireland).

93 *Alizadeh*, ONSC.

expedition and inefficient use of resources. Absent some basis for believing that the CSIS affidavit contains misstatements or material omissions, production of the source documents relied on by the CSIS affiant should be refused.[94]

So far, I have discussed the scope of production from CSIS in the context of a *Garofoli* review of the police wiretap authorization, assuming that we continue to retain the rule of automatic excision. But what if the defence wishes to bring a *Strachan*-type of argument and seek the excision of communications intercepted by the police on the basis that there is a sufficient temporal, contextual, or causal nexus to a CSIS warrant that allegedly infringed the *Charter*? Here, again, I would argue that the answer lies in *World Bank* and *O'Connor*. If the defence can show that a sufficient nexus exists, there is a basis upon which they can seek production of the CSIS warrant and affidavit. Those documents are likely relevant to the determination of the legality of the CSIS warrant, and the legality of that warrant is determinative of the admissibility of the evidence seized by the police. Going beyond those documents into underlying CSIS source documents is not justified – the only reason to obtain production of the latter is so the defence can engage in "fact-checking." Absent some basis for believing that the production of source documents will tend to undermine facts set out in the CSIS affidavit, production should be refused.[95]

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94 *Alizadeh*, ONSC.

95 The same approach should be followed if the Crown seeks to tender into evidence a communication intercepted by CSIS. While the defence has a right to challenge the admissibility of that evidence and, therefore, a right to disclosure of the CSIS warrant and supporting affidavit, absent some reasonable basis for believing that source documents will undermine the grounds set out in the affidavit, disclosure of source documents should generally be refused. The mere assertion that the records might assist in "fact-checking" of statements in the affidavit is not a sufficient basis to require the production of source records from a third-party agency. See, for example, R v. Grant, 2013 ONSC 7323, where the accused sought to subpoena a confidential informant's file (a third-party record) so that the judge could then compare the way the CI was described in the Information To Obtain (ITO) with the facts reported in the CI file. Justice Goldstein refused to order production, holding that if the accused has not shown a reasonable likelihood that the file contained information that would undermine the ITO, then there was no basis to order its production simply to engage in comparative fact-checking. He described this as "random virtue testing" of the affiant.

VI. Conclusion

Effective investigations of terrorist groups will often require that the police and intelligence agencies share intelligence information. When the police rely on sensitive information relating to national security in the course of their investigation, complex issues will almost inevitably arise for the prosecutor. However, as I hope this chapter demonstrates, experience to date has shown that the challenges that arise can be managed in a principled manner without compromising either national security or the accused's right to make full answer and defence.

Curing Complexity: Moving Forward from the Toronto 18 on Intelligence-to-Evidence

JAY PELLETIER AND CRAIG FORCESE [*]

ABSTRACT

This chapter addresses one aspect of Canada's "intelligence to evidence" (I2E) problem that both featured in the Toronto 18 prosecutions and has since occupied courts (and presumably agencies): criminal trial challenges to warrants supported by intelligence and used to collect information employed either to seed a subsequent RCMP investigation (or wiretap warrant) or as evidence of guilt in a subsequent prosecution. These matters implicate so-called *Garofoli* applications. The awkward interface between these *Garofoli* applications and I2E may constitute the single most perplexing (and possibly resolvable) I2E issue. Specifically, this chapter asks whether *Garofoli* applications heard *ex parte* (that is, with only the government party before the court) and *in camera* (that is, in a closed court) would be constitutionally viable under section 7 of the *Charter*. We conclude that closed material *Garofoli* applications with built-in procedural protections — namely statutorily-mandated special advocates — would meet constitutional standards.

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[*] This chapter represents the views of the authors and not of the organizations with which they may be affiliated. At the time it was written in 2019, Craig Forcese was Jay Pelletier's professor, as Mr Pelletier completed his JD degree at the University of Ottawa. Mr. Pelletier is now counsel with the Department of Justice. Craig Forcese is a professor of law at the University of Ottawa. The views expressed in this article are those of the authors and do not reflect those of the Department of Justice, the Government of Canada, or any institution with which they are affiliated.

I. INTRODUCTION

The Toronto 18 trials were successful prosecutions. They were also complex, even as measured against the complexity of almost all Canadian post-*Charter* criminal proceedings. Complexity stemmed from the novelty of the matter — terrorism offences were uncommon and raised questions of interpretation. But the organization of Canada's anti-terrorism bureaucracy also contributed to their complexity. As Murray and Huzulak (Chapter 8) and Michaelson (Chapter 6) discuss, two separate but equal agencies lead investigations into terrorism matters in Canada: the police, and especially the Royal Canadian Mounted Police (RCMP), empowered to investigate and charge for terrorism crimes; and the Canadian Security Intelligence Service (CSIS), responsible for gathering intelligence on threats to the security of Canada, including prospective terrorists.

These two agencies cooperate, but only from consciously-created siloes and in a choreographed manner. Sometimes this choreography means agencies do not share seemingly important information — and, especially, CSIS does not share with the police. Consider this passage from *Ahmad*:

> CSIS was aware of the location of the terrorist training camp ... This information was not provided to the RCMP, who had to uncover that information by their own means. Sometimes CSIS was aware that the RCMP were following the wrong person, or that they had surveillance on a house when the target of the surveillance was not inside, but [CSIS] did not intervene.[1]

In describing these events, the court did not condemn CSIS. Instead, it explained how Canada has managed inter-agency relationships: parallel RCMP and CSIS investigations. The court described a "firewall" between "parallel" investigations run by CSIS and the RCMP, one that tries to avoid CSIS intelligence "contaminating the police investigation". Observers have sometimes called this system "less is more"[2] – the less information shared to meet inter-agency needs, the better. At present, CSIS and the RCMP call

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1 R v. Ahmad, 2009 CanLII 84776 at para 43 (ON SC) [*Ahmad*, 2009]. For a more recent example in which CSIS did not share information with police in a terrorism case, see at R v. Peshdary, 2017 ONSC 1225 at para 20.

2 Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Final Report*, vol. 2 (Ottawa: Public Works and Government Services Canada, 2010), 543.

the bureaucratic framework designed to manage this segregated investigative system One Vision (now in its second version as "One Vision 2.0").[3]

One Vision 2.0 attempts to regulate an institutional distance produced by history, institutional culture, and different legal mandates. But it also responds, however imperfectly, to legal preoccupations that have assumed quasi-mythical status in Canada's security and intelligence community. The "intelligence-to-evidence" (I2E) dilemma is the short-hand for describing these concerns. Today, more than a decade after the Toronto 18, intelligence-to-evidence remains a challenge. David Vigneault, the Director of CSIS, described the I2E process as one of Canada's most significant national security challenges.[4] Bob Paulson, former Commissioner of the RCMP, expressed concern that the I2E process could compromise public safety.[5] With the rise of the extremist traveller phenomenon, the I2E problem has become even more acute, as Canada has struggled to prosecute extremist travellers for crimes committed while abroad.

This chapter does not address the full scope of I2E issues. In their chapter, Murray and Huzulak note how I2E drives CSIS and the RCMP's siloed relationship, reducing the sharing of actionable intelligence and potentially jeopardizing public safety. One of us, meanwhile, has written a paper discussing these same issues and proposing several solutions.[6] Here, we focus on a specific I2E problem, one that both featured in the Toronto 18 prosecutions and has since occupied courts (and presumably agencies): criminal trial challenges to warrants supported by intelligence and used to collect information employed either to seed a subsequent RCMP investigation (or wiretap warrant) or as evidence of guilt in a subsequent prosecution. These matters implicate so-called *Garofoli* applications. The awkward interface between these *Garofoli* applications and I2E may constitute the single most perplexing (and possibly resolvable) I2E issue.

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3 "CSIS-RCMP Framework for Cooperation One Vision 2.0," Secret Law Gazette, last modified November 10, 2015, http://secretlaw.omeka.net/items/show/21.

4 David Vigneault, "An INTREPID Podsight: CSIS Director David Vigneault," episode 36, in *INTREPID*, podcast, https://www.intrepidpodcast.com/podcast/.

5 Robert Paulson, "An INTREPID Podsight with Rob Paulson (Former Commissioner of the RCMP)," episode 41, in *INTREPID*, podcast, https://www.intrepidpodcast.com/podcast/.

6 Craig Forcese, "Threading the Needle: Structural Reform & Canada's Intelligence-to-Evidence Dilemma," *Manitoba Law Journal* 42, no. 4 (2019): 131. Portions of this chapter incorporate discussions drawn from this article, setting the stage for a more detailed analysis of the *Garofoli* process.

Specifically, this chapter asks whether *Garofoli* applications heard *ex parte* (that is, with only the government party before the court) and *in camera* (that is, in a closed court) would be constitutionally viable under section 7 of the *Charter*. For ease of reference, we call these *ex parte* and *in camera* proceedings "closed material proceedings." We conclude closed material *Garofoli* applications with built-in procedural protections — namely statutorily-mandated special advocates — would meet constitutional standards.

We organize our following discussion into two parts. First, we offer an overview of disclosure rules in Canadian criminal law as they relate to intelligence. Second, we focus on how *Garofoli* applications might be organized to avoid unnecessary I2E dilemmas that prejudice legitimate state interests while doing nothing to enhance trial fairness.

II. DISCLOSURE RULES AND EVIDENTIARY INTELLIGENCE

A. Overview of I2E Evidentiary-Intelligence Shield Issues

"Intelligence-to-evidence" is the unwieldy phrase used to describe several discrete types of issues. The first — at issue in the *Ahmad* matter — is the movement of intelligence procured by intelligence services to support law enforcement, typically the police. We call that the "actionable-intelligence" issue.

Police or other law enforcement agencies could act on actionable-intelligence without worrying about its use as evidence, perhaps to pre-empt a public safety threat. However, law enforcement agencies exist to investigate crimes, and securing convictions for offenders depends on legal proceedings. To perform their mission, police cannot disregard the laws of evidence, at least not without running the risk of a court then invalidating their conduct. Likewise, intelligence agencies must contemplate how police in their more legalized environment will use — and especially, disclose — the information intelligence services provide. For these reasons, actionable-intelligence is tied to a second, closely related component of I2E: something we call the "evidentiary-intelligence" issue. Evidentiary-intelligence has two aspects: the "evidentiary-intelligence sword" and the "evidentiary-intelligence shield."

The evidentiary-intelligence sword issue involves the use of intelligence in legal proceedings to justify state action. For example, the prosecutor may wish to use intelligence provided by CSIS to the RCMP to prove that an

accused has committed a terrorist offence. At issue here is the use of intelligence as evidence in a legal proceeding, either to justify police conduct or to prevail in a legal dispute. In using intelligence as a sword, police and prosecutors must worry about the quality of the information, measured against evidentiary standards. In comparison, the evidentiary-intelligence shield is about CSIS and its lawyers protecting intelligence from disclosure as part of a legal proceeding. For example, the government often seeks to protect CSIS intelligence about the accused from disclosure to the defence. CSIS wishes to ensure that its "Crown jewels"[7] — its targets, means, methods, and sources — are not disclosed to an accused who may, in fact, be a threat actor and in open court.[8]

Evidentiary-intelligence shield issues are most acute in criminal proceedings, where Canada's exceptionally broad disclosure obligations put CSIS's intelligence — and the sensitive sources and investigative methods used to collect it — at risk of being exposed in open court. In *R v. Stinchcombe*, the Supreme Court of Canada held that section 7 of the *Charter* requires the Crown to disclose all relevant material to the accused to ensure the accused can make full answer and defence. "Relevance" was defined as anything which is clearly not irrelevant to an issue at trial.[9]

The Crown, for the purposes of *Stinchcombe* disclosure, constitutes the Crown attorneys prosecuting the offence and the police investigating the offence, including their investigative file and any police "third-party" material that is "obviously relevant to the accused's case."[10] This "third party" is any entity other than the Crown and the police. Any third-party information already in police or Crown possession is presumptively subject to *Stinchcombe*.[11] However, CSIS — a third party — is not subject to *Stinchcombe* unless its information is already in the Crown's possession or

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7 Canada, *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182: Final Report*, in *Air India Flight 182: A Canadian Tragedy*, vol, 3 (Ottawa: Supply and Services, 2010), 195.

8 The standard, CSIS "boilerplate" description of information CSIS will protect is set out in Huang v. Canada (Attorney-General), 2017 FC 662 at para 23, aff'd 2018 FCA 109.

9 R v. Stinchcombe, [1991] 3 S.C.R. 326 at 338–39, 1991 CanLII 45; Morris v. The Queen, [1983] 2 S.C.R. 190 at 200–01, 1 D.L.R. (4th) 385; R v. McNeil, 2009 SCC 3 at paras 17–18.

10 *McNeil*, SCC at paras 22–25, 59.

11 *McNeil*, SCC at paras 22–25, 59.

the CSIS investigation becomes so interwoven with the police investigation that there is only one investigation leading to prosecution.[12]

As a third-party, CSIS (or any other intelligence service) does not escape disclosure obligations. The legal regime for third-party disclosure in criminal trials is found in *R v. O'Connor*. Under *O'Connor*, the accused must demonstrate that the information sought is "likely relevant." This threshold is different than *Stinchcombe*, requiring the defence to demonstrate that there is a "reasonable possibility" that the information is logically probative to an issue at trial.[13] If the defence meets this threshold, the judge must examine the information to weigh the salutary benefits and deleterious effects of production, and then determine whether non-production constitutes a reasonable limit on the accused's right to make full answer and defence. The Court will examine several factors when applying the balancing test.[14]

Since the *O'Connor* regime provides more (procedural) protection, CSIS goes to great lengths to remain a third party. However, *O'Connor*'s protections should not be exaggerated because the likely relevance threshold is not a high bar and the balancing test does not, at all, weigh in CSIS's favour. Thus, even as a third party, CSIS is at great risk of having its sources and methods dragged into criminal proceedings.

It is noteworthy, however, that both *Stinchcombe* and *O'Connor* are subject to privileges and immunities. As such, CSIS may invoke a special national security-related public interest immunity under section 38 of the *Canada Evidence Act* to protect information, the disclosure of which would be injurious to international affairs, national defence, or national security.

B. Evidentiary Intelligence and the Warrant Process

1. Police Warrants

I2E disclosure issues may arise where evidence in a prosecution comes from a wiretap (or possibly, other forms of a search warrant). Judges issue police wiretaps after a closed-door (*in camera*) proceeding in which only the

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12 *Ahmad* 2009, CanLII at para 12.

13 R v. O'Connor, [1995] 4 S.C.R. 411 at paras 19–22, 130 D.L.R. (4th) 235.

14 *O'Connor*, S.C.R. at paras 30–32. These factors include: the extent to which the information necessary for the accused's ability to make full answer and defence; the probative value of the information; the degree of reasonable expectation of privacy in the information; whether the disclosure is premised on discriminatory belief; and potential prejudice to the third-party's dignity, privacy, and security.

government side appears (*ex parte*) — in other words, a closed material proceeding. Police applications in these closed material proceedings must be supported by evidence, compiled through an "Information to Obtain" (ITO). ITOs include an affidavit in which police affiants spell out the facts for their "reasonable grounds to believe" (also known as "reasonable and probable grounds") that interception of specified people's communications may assist in the investigation of an offence.[15]

A wiretap is constitutional if it meets the strict requirements in the *Criminal Code*.[16] A defendant prosecuted because of evidence stemming from the wiretap may wish to challenge the admissibility of that evidence by showing that a court unlawfully issued the warrant or the police used the warrant in an unlawful manner. Defendants mount this challenge through a *Garofoli* application.[17] The material issues in a *Garofoli* application are, only, whether the record before the original, warrant-authorizing judge satisfied the statutory preconditions for the warrant and whether that record accurately reflected what the affiant knew or ought to have known. If the record fails this standard, the question then is whether the errors were egregious enough to affect the issuance of the warrant. The reviewing judge is not to substitute their view in place of the issuing judge's; a *Garofoli* application is not a *de novo* review. But in making their assessments, reviewing judges will excise any extraneous or improperly obtained information from the ITO and amplify the record with any relevant, correct evidence that was available at the time of the warrant.[18] The reviewing judge will invalidate the warrant where, upon review of the material before the authorizing judge, as amplified, the reviewing judge believes there was "no basis upon which the authorizing judge could be satisfied that the preconditions for the granting of the authorization existed."[19]

To make these *Garofoli* applications, defendants need all the information about the original warrant proceedings — and this requires

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15 Criminal Code, R.S.C. 1985, c. C-46, s. 185(1). Sometimes called "reasonable and probable grounds" in the constitutional caselaw, "reasonable grounds to believe" is much lower than the criminal trial standard of "beyond a reasonable doubt." Instead, it is defined as a "credibly-based probability" or "reasonable probability." See R v. Debot, [1989] 2 S.C.R. 1140, 37 OAC 1.

16 See discussion on this point in *Huang*, FC at para 14.

17 R v. Garofoli, [1990] 2 S.C.R. 1421, 43 OAC 1.

18 *Garofoli*, S.C.R. at 1452.

19 R v. Pires; R v. Lising, 2005 SCC 66 at para 7.

disclosure to the defence. For a police warrant, the information undergirding a warrant may already be part of the police investigative file, already disclosable to the defence under *Stinchcombe*'s broad relevance test. Here, the *Garofoli* challenge does not broaden the aperture of disclosure already applicable to the actual criminal trial. However, if the Crown and police have not disclosed the supporting information related to the warrant (because it is clearly irrelevant to the trial under *Stinchcombe*), this supporting information is now potentially disclosable under this new *Garofoli* challenge. In a *Garofoli* challenge, the affidavit supporting the warrant authorization and the documents before the authorizing judge are presumptively disclosable.[20] The defence may also cross-examine the affiant with leave of the court. The court will grant leave where cross-examination is necessary to make full answer and defence. To this end, the defence must show cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the warrant authorization.[21]

Still, the threshold for disclosure — relevance — does not authorize a fishing expedition through documents never before the affiant whose affidavit supported the warrant application, in part because the courts have been sensitive about revealing confidential sources.[22] To access these materials, the accused must, "establish some basis for believing that there is a reasonable possibility that disclosure will be of assistance on the application" to challenge the warrant.[23] Applying this standard, lower courts have found instances where some police information — for example, notes kept by the handler of a confidential informant — are irrelevant, both for the trial and for challenging a search warrant.[24]

2. Police Warrants Supported by CSIS Information

CSIS can collect intelligence through wiretaps authorized by the Federal Court under its own separate *CSIS Act* warrant procedures. Here, CSIS supports the warrant application with an affidavit asserting the facts

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20 World Bank Group v. Wallace, 2016 SCC 15 at para 134.

21 *Garofoli*, S.C.R. at 1465.

22 *World Bank Group*, SCC at para 129 *et seq*.

23 R v. Ahmed et al., 2012 ONSC 4893 at paras 30–31, an approach cited without objection in *World Bank Group*, SCC at para 131.

24 See, e.g., R v. Ali, 2013 ONSC 2629, cited without objection in *World Bank Group*, SCC at para 131.

believed, on reasonable grounds, to show why the warrant would enable CSIS to investigate a threat to the security of Canada.[25]

In investigating under a warrant, CSIS sometimes discovers actionable-intelligence. In a functioning I2E system, CSIS will share this actionable-intelligence with the RCMP in an advisory letter – that is, a letter from CSIS to the RCMP containing intelligence and permitting its use in legal proceedings.[26] The CSIS information would then find its way into the police investigation, one that may culminate in charges and a prosecution. Consequently, CSIS may worry that the contents of its wiretap intercept (or potentially, other types of searches), shared to further an RCMP investigation, might later attract *Garofoli*-style scrutiny of CSIS's own, original Federal Court authorization and the basis for it.[27] That original CSIS warrant authorization may have been supported by confidential, human source information, foreign origin intelligence, and signals intelligence, all of which CSIS would not wish to disclosed in open court. Moreover, the CSIS warrant may be broad, focused on targets beyond the person(s) charged. This information is extraneous to the criminal proceeding, and CSIS will need to protect it from disclosure.

The Toronto 18 case demonstrates the complexity of this specific I2E dilemma. There, the defence initiated *Garofoli* applications on five *Criminal Code* RCMP wiretaps, the first of which relied on three CSIS advisory letters to establish reasonable and probable grounds.[28] The defence alleged CSIS's failure to disclose information in its advisory letters was misleading and that the destruction of CSIS operational notes violated section 7 of the *Charter*.[29]

The court held that CSIS's destruction of the notes violated section 7 of the *Charter* and that CSIS, though it did not act misleadingly, breached its duty of candour to the court. As a result, the court excised any information relating to the destroyed notes and any information that was

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25 Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, s. 21 [CSIS Act].

26 An "advisory letter" "contains information that may be used by the RCMP to obtain search warrants, authorizations for electronic surveillance, or otherwise used in court. In the case of Advisory letters, CSIS requires the opportunity to review any applications for judicial authorizations prior to filing." See Secret Law Gazette, "CSIS-RCMP Framework," 2.

27 For an example, see Peshdary v. Canada (Attorney General), 2018 FC 850; Peshdary v. Canada (Attorney General), 2018 FC 911.

28 R v. Ahmad, 2009 CanLII 84784 (ON SC) at paras 3, 17-18 [*Ahmad 84784*].

29 *Ahmad 84784*, CanLII at para 29.

presented inconsistently with the duty of candour. Moreover, the Crown prosecutors opted not to rely on any information obtained through CSIS warrants or information derived from CSIS warrants to avoid lengthy and complex *Garofoli* applications at the Federal Court.[30] As a result, the Crown relied on virtually no CSIS information at the *Garofoli* application. The only information relied on with a nexus to CSIS was that which the human source had collected during his time with CSIS and then gave to the RCMP after the hand-off of that source to the police. The court found, nevertheless, that the warrant was properly authorized.[31]

As this decision suggests, CSIS's warranted intercept activity must stand up to scrutiny where the information collected under it becomes evidentiary-intelligence used in a police investigation. The CSIS warrant under which CSIS collected this intelligence — and its supporting information — becomes material, triggering disclosure obligations. But to add to the complexity, CSIS is likely a "third party," not the Crown. And where CSIS has the resulting *O'Connor* third-party status, disclosure of information relevant to this warrant-challenge purpose will follow the *O'Connor* two-step process: first, the defence will need to show the "likely relevance" of the documents being sought; second, if they do so, the documents are reviewed *in camera* and *ex parte* by the judge.[32] In practice, application of this test has meant that (at least redacted) copies of the CSIS affidavit supporting the CSIS warrant will be disclosed, along with any supporting material actually before the warrant-authorizing judge.[33] Courts

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30 *Ahmad 84784*, CanLII at paras 76–78, 83–86, 133–38. The court found that CSIS's advisory letters did not comply with the duty of full, frank, and fair disclosure. The letters filtered out unreliable information pertaining to material matters, but the letters did not disclose that it excluded information. The court expressed concern that the letters could trick the reader. However, it found that CSIS did not intend to mislead by excluding such information.

31 *Ahmad 84784*, CanLII at paras 34–36, 182–83, 212, 215–36.

32 R v. Jaser, 2014 ONSC 6052. See also Canada (Attorney-General) v. Huang, 2018 FCA 109 at para 19.

33 *Jaser*, ONSC at para 18 (observing that the "CSIS Affidavit on which the Federal Court authorization depends easily meets the first stage O'Connor/McNeil test of 'likely relevance'"); R v. Alizadeh, 2013 ONSC 5417. The test is whether the documents will be of probative value on the issues in the application – that is, the validity of the warrant. More specifically: "would the justice have had reason to be concerned about issuing the warrant had he or she been made aware of the other facts." See R v. Peshdary, 2018 ONSC 2487 at para 9 *et seq*.

may also oblige disclosure of draft warrant applications.[34] There is also the possibility that the CSIS affiant may be cross-examined, but only with leave of the court and confined to the question of whether the affiant knew or ought to have known about errors or omissions in the warrant application.[35] It is unlikely that source materials undergirding the warrant documents must also be disclosed. Where CSIS is a third party under the *O'Connor* rule, lower courts have required the defence to show that "there is a factual basis for believing that the material sought will produce evidence tending to discredit a material pre-condition in the *CSIS Act* authorization."[36]

The full CSIS investigative file is not, in other words, thrown open to the public. But the interposition of a protracted and complex adjudication creates uncertainty and risk about how much sensitive CSIS sources, methods, and intelligence might end up in the public domain. Delay and complexity are compounded where CSIS concludes its intelligence at risk in a *Garofoli* application must be protected through a section 38 *Canada Evidence Act* proceeding.[37] Cumulatively, these evidentiary-intelligence shield uncertainties compound the I2E issue and add grit, thereby deterring the flow of actionable-intelligence from CSIS to the police. To summarize representative concerns:

- Sensitive CSIS information may be subject to disclosure in a *Garofoli* application on the relevance threshold, and CSIS will then need to decide whether to protect this information using the section 38 *Canada Evidence Act* national security privilege.
- If CSIS succeeds in protecting this information, it is no longer available to justify the issuance of the *CSIS Act* warrant. Should the remaining information not suffice to sustain the reasonableness of the warrant, the warrant will fail, as might a prosecution dependent on it or any RCMP warrant built on the information collected under the CSIS warrant.

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34 R v. Peshdary, 2018 ONSC 1358.

35 *Pires*; *Lising*, SCC at para 40 *et seq*. See also *World Bank Group*, SCC at para 121 *et seq*.

36 R v. Peshdary, 2018 ONSC 1358 at para 20. See also Peshdary v. Canada (Attorney General), 2018 FC 850.

37 For a fuller discussion of trials and tribulations associated with section 38 *Canada Evidence Act* proceedings, see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015), 305 *et seq*; Forcese, "Threading the Needle".

- The collapse of the prosecution may follow, even though the CSIS warrant was perfectly lawful on the full record.

This scenario is a happy outcome for the accused, but no broader public interest is served by it. It introduces a structural impediment to the use of the criminal law in national security matters where the criminal law is the most appropriate state tool. Again, it is worth recalling that in their *Garofoli* application, the Crown opted not to rely on CSIS information to avoid disclosure entanglements. It will not always be the case, though, that other information is available to use as evidence in a criminal case.

The question is, therefore, whether there is a way to reconcile the defendant's fair trial interests with the legitimate interests of CSIS in protecting its properly sensitive materials, in a manner that avoids this game of "disclosure chicken."

III. CLOSING *GAROFOLI* APPLICATIONS

A. Overview

We believe that a warrant issued via a closed material proceeding can be reviewed in a closed material proceeding, when scrutinized to ensure that the statutory niceties required for its issuance were met. Put another way, there is no principled reason to demand that a warrant, which may be constitutionally issued in a closed material, one-sided process, must then be reviewed in a fully open proceeding. A rule permitting an intelligence warrant to be reviewed in a closed material proceeding would create no more risk to sensitive CSIS sources, means, and methods than did the original CSIS warrant application. In this manner, it would eliminate the problem of disclosure chicken, at least in this area.

The public safety advantages are obvious. A statutory scheme allowing for *Garofoli* applications to be heard in a closed material hearing would streamline, and potentially facilitate, more seamless CSIS and police investigations by creating a zone in which CSIS could share intelligence with the RCMP without worrying about disclosure at all. Doing so would ensure that CSIS information, other than that which is (already) relevant under

Stinchcombe or *O'Connor*, is protected from external disclosure while still helping the RCMP build a criminal case.[38]

Under this proposal, CSIS could share intelligence derived from sensitive sources that it otherwise would not share with the RCMP, such as human sources, signals intelligence (SIGINT), or foreign-origin information given in confidence. For example, CSIS may rely on Communications Security Establishment or foreign-origin SIGINT to collect intelligence because such agencies have the technical capability to target extremist travellers abroad. However, the government would never allow SIGINT to be exposed in court, as it is often derived from extremely sensitive technical means that would be rendered useless if exposed. Under our proposal, this information could be used to support the police warrant, both in its initial issuance and subsequently in the closed *Garofoli* challenge. Likewise, CSIS could comfortably share intelligence that does form evidence on the merits where that evidence is derived from its own *CSIS Act* wiretaps, much like in *R v. Huang*.[39]

In this manner, CSIS intelligence could be used as an evidentiary-intelligence sword in defending CSIS (or dependent police) warrants or where wiretap information is used in trial. However, the intelligence, means, methods, and sources that are relevant in a *Garofoli* application are assessed behind closed doors, in an *ex parte* proceeding. That is, they remain shielded from external disclosure (but not from review *per se*). Closing *Garofoli* applications would also sidestep the impetus for collateral section 38 *Canada Evidence Act* proceedings in which intelligence agencies seek to protect their sensitive information from open court disclosure.[40] The key question is, however, whether a closed *Garofoli* application would be constitutional.[41]

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38 *World Bank Group*, SCC at paras 129–32. See *Ahmad 84784*, CanLII for an example of how the Crown was unwilling to disclose sensitive information at a *Garofoli* application and, as a consequence, could not rely on the information.

39 *Huang*, FCA.

40 This is not small improvement. Right now, *Garofoli* applications are collateral proceedings to criminal trials that then prompt their own collateral proceedings under section 38. It is hard to imagine a more byzantine system.

41 On this issue, see also Canada, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, by Kent Roach, in *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 Research Studies*, vol. 4, Catalogue No. Cp32-89/5-2010E (Ottawa: Supply and Services, 2010), 113.

B. The Constitutionality of Closed *Garofoli* Applications

Closing *Garofoli* applications appears inconsistent with the "open court principle" that "applies to all judicial proceedings," described as a "hallmark of a democratic society"[42] and protected by section 2 of the *Charter*. The principle is necessary for society to hold the courts accountable in administering justice fairly and impartially, thereby enhancing public confidence in the justice system.[43] Still, the open court principle is not absolute — indeed, it does not apply to the initial issuance of a warrant.[44] Nor does it preclude closed material proceedings in *Canada Evidence Act*, section 38 matters — cases in which the Federal Court's decision on disclosure may have a sizable impact on the defendant's ability to offer answer and defence.[45] The open court principle is, therefore, an unlikely barrier to a closed material *Garofoli* proceeding.

We focus, therefore, on a more serious objection: section 7 of the *Charter*, guaranteeing everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[46]

1. The Right to a Make Full Answer and Defence

The right to make full answer and defence, though not a free-standing right, is a principle of fundamental justice under section 7's liberty interest.[47] *Stinchcombe*, described above, is the post-*Charter* starting point. Following *Stinchcombe*, the Supreme Court in *Dersch* and *Garofoli* was clear that withholding the contents of the sealed packet supporting the warrant — the affidavit — would violate the accused's right to make full answer and defence. It would effectively trap the accused in catch-22.[48]

However, in addition to establishing the Crown's disclosure obligations, *Stinchcombe* also established that the right to a fair trial does not

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42 Vancouver Sun (Re), 2004 SCC 43 at para 23.

43 *Vancouver Sun,* SCC at paras 23–26.

44 For the balancing exercise often used in relation to the "open court principle," see, e.g., Toronto Star Newspapers Ltd v. Ontario, 2005 SCC 41. In relation to sealing orders and warrants, see, e.g., R v. Nur, 2015 ONSC 7777; R v. Paugh, 2018 BCPC 149 (in relation to warrants).

45 See, e.g., Canada (Attorney General) v. Khawaja, 2007 FC 463.

46 Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

47 Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 1505, 77 D.L.R. (4th) 473.

48 *Dersch*, S.C.R. at 1514–515.

mean a perfect trial. It held that where information is withheld, the trial judge must determine whether non-disclosure constitutes a "reasonable limit" on the right to full answer and defence.[49]

The Court has since held that section 7's principles of fundamental justice represent a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be interpreted considering those interests and against the applicable principles and policies that have animated legislative and judicial practice in the field.[50] Courts must balance the interests of the individual and those of the state in providing "a fair and workable system of justice."[51] Accordingly, a fair trial is not the most advantageous or perfect trial from the accused's perspective. Rather, it is one "which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused."[52] The right to full answer and defence will be implicated where the information "is part of the case to meet or where the potential probative value is high."[53]

In the *Garofoli* context, the Supreme Court has recognized that while the accused is entitled to the packet underlying the warrant, the trial court may need to edit the contents of the packet to protect police sources and methods. In doing so, courts must balance competing public interests of police sources and investigative techniques with the right to make a full answer and defence, allowing maximum disclosure without rendering warrants useless as a law enforcement tool.[54] When weighing public interests, trial judges should consider the relevancy of the source's identity, prejudice to the sources or police methods, and whether there is an ongoing investigation.[55] In cases where the trial judge edits the contents, they may rely on the information if they provide a summary of the information to the

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49 *Stinchcombe*, S.C.R. at 340. The SCC also stated, in relation to summary conviction offences, that the content of the right to full answer and defence may be of a more limited nature.

50 R v. Seaboyer, [1991] 2 S.C.R, 577 at 603, 83 D.L.R. (4th) 193; *O'Connor*, S.C.R. at paras 62, 65; R v. Harrer, [1995] 3 S.C.R. 562 at para 14, 128 D.L.R. (4th) 98. *O'Connor* and *Harrer* later affirmed that trial fairness requires balancing societal and individual interests.

51 *Harrer*, S.C.R. at para 14.

52 *Harrer*, S.C.R. at para 45 per McLachlin J, noting also a fair trial is a trial that appears fair from the perspectives both of the accused and the community.

53 R v. Mills, [1999] 3 S.C.R. 668 at paras 60, 71, 75, 94, 180 D.L.R. (4th) 1.

54 *Garofoli*, S.C.R. at 1458.

55 *Garofoli*, S.C.R. at 1460.

accused such that the accused can still challenge the information.[56] Taken together, these authorities suggest there is no absolute right to disclosure in a *Garofoli* context to meet fair trial standards.

2. The Public Interest in Closed Material Garofoli Applications

The Supreme Court's jurisprudence suggests that the right to a fair trial requires a balancing between society's interest in a workable justice system and individual interests. If the right to full answer and defence is not absolute, what qualities of intelligence gathering might justify a departure from the "perfect" trial? First, it is true that society's interest in ensuring accused persons can respond to the allegations is fundamental, especially because terrorism offences carry large penalties and stigma. However, society's interest in effectively prosecuting terrorism offences is also enormous.[57] Therefore, society's interest in ensuring the justice system can address, efficiently, I2E dilemmas is high.

Second, disclosure of CSIS information is even more likely to compromise security intelligence sources and methods than is the case when police disclose their own information in *Garofoli* challenges. Relative to police investigations, the confidentiality interest in security intelligence is often enduring because the collection of information is the end in and of itself, whereas the collection of information in law enforcement is a means to an end (that is, prosecution). As such, the disclosure of security intelligence in an affidavit is more likely to compromise ongoing investigations.[58] The result is the game of "disclosure chicken" which, as we have suggested, imperils public safety by encouraging security service silos. This reality engages important public interests.

Third, as bears repeating, the initial warrant at issue in a *Garofoli* process was issued in a closed material proceeding. There is one obvious reason for this: the presence of the warrant target would defeat the purpose of a covert communications interception warrant. This concern no longer matters once a target is arrested. That distinction, however, does not negate the public interests that remain engaged, even after arrest: disclosure of, for example, sensitive CSIS sources, means, and methods in a *Garofoli* proceeding could defeat other public interests, including the sustainability of other, ongoing

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56 *Garofoli*, S.C.R. at 1461.

57 On these points, see R v. Hersi, 2019 ONCA 94 at para 54.

58 Henrie v. Canada (Security Intelligence Review Committee), [1989] 2 FC 229 at paras 11–12, 1988 CanLII 5686.

investigations. At the same time, the impact of a closed *Garofoli* application on the accused's rights to full answer and defence would be indirect, at best. *Garofoli* applications do not test the merits of the criminal case. Rather, the issue is only whether there was a reasonable basis upon which the authorizing judge could find that the statutory preconditions for a warrant existed. Relevance under *Stinchcombe* or *O'Connor* in the application is tied to this narrow *Garofoli* test. The accused's right to know the criminal case to be met does not drive the disclosure equation in this area.[59] Closed material *Garofoli* applications would have a narrow adverse effect on that core section 7 rights. Instead, *Garofoli* applications amount, more plausibly, to a proxy protection for section 8 *Charter* rights.[60] The most important virtue of a *Garofoli* challenge is to introduce a retrospective adversarial challenge to the original closed material proceeding.

3. The Defence and Public Interest in Adversarial Testing

Examined from this optic, an open *Garofoli* application imperils key public interests, chiefly (and indeed, arguably exclusively) to permit an accused and their counsel to introduce adversarialism to a prior closed material proceeding. If so, the obvious question is whether this goal of adversarial testing of the warrant might be accomplished through a means that does not produce the "disclosure chicken" problem and its resulting I2E dilemmas. We believe there are obvious lessons to be drawn from the special advocate system under the *Immigration and Refugee Protection Act* (*IRPA*) – lessons that apply even though the *IRPA* system is (technically) an administrative proceeding.

Under the *IRPA*, the Minister may issue a security certificate to detain and deport individuals (that is, the "named person") who the Minister has reasonable grounds to believe are inadmissible on security grounds.[61] A judge will then review the certificate for reasonableness, and the Minister may request that the review occur *ex parte* and *in camera*, excluding the named person or their counsel entirely. The named person may receive a summary of the information only if disclosure would not be injurious.[62] In the closed material proceeding, special advocates represent the named

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59 *Pires*; *Lising*, SCC at para 30; *Mills*, S.C.R. at paras 71, 75, 94.

60 See, *Garofoli*, S.C.R. at 1445 (addressing the rationale for *Garofoli* hearings with a focus on section 8 of the *Charter*).

61 Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 77, 81 [IRPA].

62 IRPA, ss. 78–79.

person's interests, subject to strictures on their ability to communicate with the defendant once they have seen the classified information.[63] Special advocates are security-cleared lawyers selected from an established roster of such advocates by the named person. These lawyers are then statutorily charged with representing the interests of the named person in the closed material proceedings. They have an unlimited ability to meet with the named person before reviewing the classified information. Thereafter, any further communication with the named person is done with permission of the judge. As this discussion suggests, special advocates are not in a solicitor-client relationship with named persons – such that they do not owe them the duty of candour that would otherwise exist and which would be difficult to reconcile with a system in which the special advocate must withhold classified information.

The immediate reaction of readers may be to bristle at the idea of applying this (controversial) model, developed in an *IRPA* context, to a (collateral) proceeding in a criminal trial. Our purpose is not to normalize a controversial immigration tool. Rather, we are interested in the jurisprudence developed under it and what it says about the ingredients of a section 7-compliant closed material proceedings. On this point, we observe the Supreme Court has been unambiguous in concluding section 7 applies to immigration security certificates. Security certificates are, in other words, about the same procedural rights to fundamental justice in play in *Garofoli* applications. Moreover, section 7 has been applied here to a system whose outcome, the Supreme Court has also acknowledged,[64] may be more serious than any penalty available under the criminal law. Specifically, the named person risks possible removal to torture or worse. The Supreme Court has also considered section 7 in relation to closed material proceedings that deal with the actual merits of the case – that is, matters where the right to know the case against the named person is squarely in play. Recall, this is not the case with *Garofoli* matters. Despite all these features of the security certificate regime that make its circumstances more pressing to trial fairness than *Garofoli* matters, the Court has upheld the constitutionality of closed material proceedings, when accompanied by special advocates.

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63 IRPA, ss. 85–85.6.

64 IRPA, ss. 85–85.6; Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 at paras 13–15 [*Charkaoui* 2007]; Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37 at para 1.

If closed material proceedings are constitutional in this context, it is difficult to see how they would be unconstitutional in *Garofoli* challenges – collateral proceedings having much less immediate impacts on the defendant. To conclude otherwise would simply be formalistic, treating something associated with criminal proceedings as entitled (by simple categorization) to more constitutional protections than something with even graver impacts, done as part of administrative proceedings. We do not believe that the *Charter* operates according to such pigeonholes.

We turn, therefore, to lessons to be drawn from the jurisprudence on security certificates in designing closed material proceedings triggering section 7 interests.

C. Lessons from the Security Certificate Regime

The Supreme Court has considered the security certificate regime on two occasions. In *Charkaoui*, the Court found that the *IRPA* violated section 7 because it did not allow the named person to know and respond to the case against them.[65] In *Harkat*, the Court revisited the issue after Parliament established a system of special advocates and found that the regime complied with the *Charter*.[66]

In *Charkaoui*, the SCC affirmed that section 7 requires a fair process considering the interests at stake, the nature of the proceedings, and the context within which they take place. The procedures may reflect the exigencies of the security context as well as the need to protect sources and investigative methods. However, national security cannot justify a fundamentally unfair process.[67] Ultimately, the amount of disclosure must be proportionate to the individual's interests at stake. Circumstances (such as those in security certificates) that are closer to criminal proceedings will require greater disclosure.[68]

To meet section 7's requirements, the security certificate regime must afford the individual three procedural protections: the right to a hearing before an independent and impartial magistrate; a decision on the facts and law; and a proceeding that allows the individual to know and answer the

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65 *Charkaoui*, SCC 2007 at para 3.
66 *Harkat*, SCC at para 10.
67 *Charkaoui*, SCC 2007 at paras 23–25, 27, 58–61.
68 *Charkaoui*, SCC 2007 at paras 24–25.

case against them.[69] With respect to judicial independence, the Court found that the designated judge's role permitted sufficient challenge to the government's position to prevent state excess while assessing reasonableness.[70] As long as the judge did not allow the matter to morph into an inquisitorial proceeding with the judge seeking to advance either the Minister's or the defence's case, the judge's role would remain independent.[71]

Next, the Court held that the *IRPA* scheme, at that time, did not allow for decisions to be based on the facts and law, nor did it allow the named person to know and respond to the case against them. In security certificate proceedings, almost all information before the judge will be the government's information. The named person might not see any of the information because the procedure required the judge to withhold any information that would be injurious to security if it was disclosed. In turn, the Court found named persons might have insufficient disclosure to correct inaccuracies or challenge the credibility of the Minister's information.[72] Without sufficient defence submissions, the judge was at risk of deciding the matter without all facts. Therefore, the *IRPA* did not meet section 7's requirements for a fair hearing.[73]

The Court then found that the *IRPA* regime was not justified under section 1 of the *Charter*. The Court recognized that the non-disclosure of sensitive sources and methods is a sufficiently important objective.[74] However, the Supreme Court found that the *IRPA* was not minimally impairing on the fair hearing entitlement. Among other things, the Court stated that the United Kingdom's special advocate system might be a constitutionally acceptable procedure because it allows security-cleared lawyers to act on the named person's behalf in closed proceedings.[75]

Another possibility, noted by the Court, is to security-clear the named person's own lawyer. Security clearance is, however, a protracted and expensive process – and it cannot be assumed that every lawyer a named person might wish to employ would wish to subject themselves to this

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69 *Charkaoui*, SCC 2007 at paras 29–31.

70 *Charkaoui*, SCC 2007 at paras 37, 39–42.

71 *Charkaoui*, SCC 2007 at paras 44–45.

72 *Charkaoui*, SCC 2007 at paras 49-50, 53–55, 63–65.

73 *Charkaoui*, SCC 2007 at paras 63–65.

74 *Charkaoui*, SCC 2007 at paras 68–69 (disclosure could adversely affect Canada's ability to collect intelligence and receive intelligence from other countries).

75 *Charkaoui*, SCC 2007 at paras 80–82, 85–87.

process. Nor, once the security-cleared defence lawyer is privy to classified information, might the lawyer wish to subject themselves to the permanent strictures of the *Security of Information Act*, with its stiff criminal sanctions for unauthorized disclosures.[76] Finally, the security-cleared defence lawyer would be in a conflict between their obligations under that *Act* and their obligations of disclosure to their client. As noted, this system would sit uncomfortably with the professional responsibility of a lawyer to be "honest and candid" when advising clients.[77] The rules of professional conduct do allow information to be received "for counsel's eyes only," with client consent. But in regular litigation, these "protective orders" are rare – not least because "the entire solicitor–client relationship can break down if the client is unable to give instructions to counsel because they lack the relevant information."[78]

As noted, in responding to *Charkaoui*, Parliament did not opt for a security-cleared defence counsel model. Instead, it enacted the slightly different "special advocate" system. The Court considered the constitutionality of this proxy system of adversarialism in *Harkat*. There, it affirmed that, to meet section 7's requirements, the closed material procedure must use a "substantial substitute" to full disclosure, recognizing that the process must be flexible to accommodate national security concerns.[79] As such, the named person must, at minimum, know the "essence of the information... supporting the allegations" so that they can instruct the special advocates on how best to act on their behalf.[80] Moreover, the Supreme Court of Canada found the *IRPA* maintains the judge's role as gatekeeper of the fair proceeding because judges may only withhold information where there is a serious risk that disclosure would, in the judge's opinion, be injurious.[81]

Lastly, in assessing the special advocate regime, the Supreme Court recognized that the regime's restriction on the special advocate

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76 R.S.C. 1985, c. O-5, ss. 13–14.

77 See, e.g., Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2000, Rule 3.2-2.

78 William Horton, "Confidentiality in Canadian Litigation," in *Privilege and Confidentiality: An International Handbook, eds.* David Greenwald and Marc Russenberger *(London: Bloomsbury Professional, 2012)*, 68–69.

79 *Harkat*, SCC at paras 43, 46–47.

80 *Harkat*, SCC at paras 56–57.

81 *Harkat*, SCC at paras 61–63.

communicating with the named person once the former has seen the classified information is significant, but it does not render the regime unconstitutional. First, the restriction is not absolute: the judge has broad discretion to authorize communication and should apply that discretion liberally.[82] Second, the named person can freely send one-way communications to the special advocates, so the public summaries should help elicit information and instructions to the special advocate.[83] The Court concluded, therefore, that the *IRPA* regime is constitutional. However, the designated judge, as the gatekeeper, must always assess the overall fairness of the proceeding on a case-by-case basis.[84]

These decisions establish signposts for a closed material *Garofoli* proceeding. First, both proceedings implicate section 7's liberty interest.[85] The Supreme Court recognized that security certificates could have greater consequences than criminal proceedings.[86] *Garofoli* applications, in contrast, implicate the accused's liberty interest, but to a lesser extent than non-disclosure at trial because *Garofoli* applications do not adjudicate the merits of the case.[87] As we have suggested, security certificates, therefore, likely implicate section 7 interests to a greater extent than do *Garofoli* applications.[88]

Second, like with security certificates, closed material *Garofoli* applications are required to address a specific and pressing national security problem: I2E. Thus, the national security context should weigh in favour of closed material *Garofoli* applications.

Third, closed material *Garofoli* applications meet the basic criteria for a fair hearing, as outlined in *Charkaoui*.[89] Both the issuing and reviewing authorities for a warrant are judges, clothed in full judicial independence. The *Garofoli* reviewing court may vet CSIS or the RCMP's information and, indeed, has latitude to excise any problematic information and amplify information available at the time of the warrant. CSIS and the RCMP also have a duty of candour in closed material proceedings, requiring that

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82 *Harkat*, SCC at paras 69–70.
83 *Harkat*, SCC at para 71.
84 *Harkat*, SCC at para 77.
85 Charkaoui v. Canada (Citizenship and Immigration), 2008 SCC 38 at para 54; *Charkaoui*, SCC 2007 at paras 13–15; *Garofoli*, S.C.R. at 1461.
86 *Charkaoui*, SCC 2007 at para 13–15; *Harkat*, SCC at para 1.
87 *Pires*; *Lising*, SCC at para 30.
88 *Charkaoui*, SCC 2007 at paras 24–25.
89 *Charkaoui*, SCC 2007 at paras 29–31.

applicants include both inculpatory, exculpatory, and any improperly obtained information in the warrant application and the *Garofoli* proceeding.[90]

Still, as with security certificate judges, the *Garofoli* judge can only assess that which the government puts before the court. Even with the duty of candour, the court would be hard-pressed to uncover information that supports excision and amplification. Rather, the defence must raise information that supports excision or amplification through their own investigatory efforts or cross-examination. This is the virtue of adversarialism. Thus, just as with the security certificate regime, closed material *Garofoli* applications require a substantial substitute for disclosure to be constitutional.[91]

As found in *Harkat*, security-cleared special advocates are a substantial substitute because they can make oral submissions on the accused's behalf and cross-examine affiants in closed material proceedings.[92] However, special advocates can only be effective if the accused has minimum disclosure upon which they can adequately instruct the special advocate on how to challenge the Crown's case. Therefore, any statutory scheme for closed material *Garofoli* applications must afford the accused a summary of the information in the affidavit and must allow the special advocate to communicate with the accused, with leave of the court.[93]

The statutory scheme must also maintain the judge's role as the gatekeeper of fairness.[94] We propose two additional safeguards. The procedure should allow the trial judge to weigh the fair trial interest in disclosure against the public interest in non-disclosure – a procedure that the security certificate regime does not accommodate.[95] Further, in *Garofoli* applications, the defence must acquire leave of the court to cross-examine an affiant.[96] However, closed material *Garofoli* applications should follow

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90 *Harkat*, SCC at paras 100–02; R v. Morelli, 2010 SCC 8 at para 102.

91 *Harkat*, SCC at paras 49–50, 53–55, 63–65.

92 *Harkat*, SCC at para 77.

93 *Harkat*, SCC at paras 56–57, 70.

94 *Harkat*, SCC at paras 61–63.

95 *Charkaoui*, SCC at para 77. The Court contrasted section 38 of the *Canada Evidence Act*'s balancing process with the lack thereof in the *IRPA* in its discussion of minimal impairment.

96 *Garofoli*, S.C.R. at 1465 (the defence must demonstrate a reasonable basis that cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization).

the model of security certificates and endow special advocates with a right to cross-examine the affiant.[97]

IV. CONCLUSION

By all accounts, the Toronto 18 investigation and prosecutions were a success. However, they struggled with operational issues stemming from I2E dilemmas. CSIS failed to share intelligence with the RCMP, and at the *Garofoli* application, the Crown was unable or unwilling to rely on CSIS information to justify the RCMP's ITO.

The I2E problem arises from the Crown's disclosure obligations under *Stinchcombe* and third-party disclosure obligations under *O'Connor*. The use of CSIS intelligence, and especially CSIS-warranted intercepts, raises pressing I2E challenges because of *Garofoli* applications. To improve (but not resolve) I2E in Canada, we propose a statutory scheme allowing *Garofoli* applications implicating information supplied by Canada's intelligence services to be heard as closed material proceedings, using special advocates representing the accused's interests. From a public safety perspective, closed material *Garofoli* applications would minimize the risk of public disclosure of (properly) sensitive information used to support CSIS warrants, which then produce information shared with the RCMP.

Critics of this view may immediately question the constitutionality of a closed material *Garofoli* proceeding. We believe that, properly legislated,[98] it would be constitutional. The reason for a *Garofoli* proceeding is to allow an accused to test – through an adversarial process – a warrant originally issued in a closed material warrant proceeding. That adversarial testing requires someone to press the state and take positions on the evidence that was before the issuing judge, adverse to the state's view. But that person need not be the accused or the accused's lawyer, who cannot (after all) bring new evidence unavailable at the time of the warrant and who, in a *Garofoli* challenge, is not confronting the criminal case to be met. Instead, a special advocate may play the adversarial role, just as they play an adversarial role

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97 IRPA, s. 85.2.

98 We do not believe it advisable to establish this system based on some *ad hoc* inherent power of the court. First, it is not clear to us that the court has this power. Second, a statute is the best vessel through which to create the special advocate system and, indeed, that system already exists under *IRPA* and could be re-tasked for this new purpose. Third, *ad hoc* arrangements might wary between courts and jurisdictions, producing uncertainty and confusion.

in security certificate cases where the stakes are (in fact) higher than in *Garofoli* proceedings. In sum, closing *Garofoli* applications would help minimize the risk of Canadian national security trials becoming games of "disclosure chicken," in which technical application of Canada's complicated disclosure rules take primacy over the administration of justice while encouraging public safety-impairing siloes among Canada's security services.

Improving the Intelligence to Evidence (I2E) Model in Canada

DAVE MURRAY AND DEREK HUZULAK [*]

ABSTRACT

This chapter examines some of the key issues and challenges of the intelligence to evidence (I2E) process, mainly regarding the exchange of information between the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP). For historical perspective, the authors cite findings from the 1981 McDonald Commission Report, concluding that subsequent events proved McDonald over-optimistic in terms of the expected level of cooperation and sharing of information between the new CSIS and the RCMP. The intervening years between the creation of CSIS in 1984 and the Toronto 18 case saw marginal progress towards improving inter-agency cooperation. Landmark judicial rulings, such as *R v. Stinchcombe*, only served to dampen any incentive to freely share information between the agencies and build an effective I2E operational model. The authors argue that the current I2E model, known as One Vision 2.0, developed in the years following the Toronto 18 case, while representing a notable improvement in the process, nevertheless falls short of achieving a robust framework. More recent improvements stemming from the joint CSIS/RCMP initiative "Midnight Horizon" are helpful but unlikely to move the needle substantially closer to the ideal. Pre-empting terrorist/hate-related attacks requires a more aggressive response than at present, one focused more on eliminating the threat through arrest and prosecution rather than lesser measures aimed at "threat reduction" or "threat containment." To that end, this chapter offers some recommendations. The authors conclude that while CSIS and the RCMP

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have accomplished much towards improving the I2E process, there are clear limits to what they can achieve on their own in the absence of broader government action. Parliament can and must do more to champion needed legislative and policy changes to provide intelligence and law enforcement officials with the additional tools and resources they need to achieve a maximum level of security against terrorist and hate-inspired attacks.

I. INTRODUCTION

The security/intelligence landscape in Canada has undergone considerable change in the past few years with new policy and legislation aimed at providing intelligence and enforcement agencies with additional tools to combat terrorist threats. At the same time, new accountability mechanisms have been introduced to ensure an appropriate balance is maintained with respect to civil and *Charter* rights.

Out of necessity, intelligence agencies conduct most of their investigations in the shadows, away from the public and media spotlights. Often, it is the perceived intelligence failures that make the headlines, while the far greater number of successes in detecting and preventing terrorist attacks, espionage, and foreign-influenced activities go unreported to protect the identities of confidential intelligence assets, methods of operation, and third-party information.

Critics of intelligence agencies and law enforcement sometimes paint a misinformed or exaggerated picture of a national security and public safety regime in crisis or plagued by inefficiencies and inter-agency turf wars.[1] While every country's security and intelligence apparatus labour under some degree of bureaucratic inefficiency and suffer occasional intelligence failures, Canadians can feel confident in having one of the most professional and accountable national security regimes in the world. That does not mean there are no major challenges or room for improvement.

One challenging area is the issue of I2E. This chapter lays out our thoughts as former intelligence insiders and practitioners familiar with the

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[1] CSIS has many critics, ranging from civil liberties organizations to academics and journalists. While some criticism is based in fact, as validated through formal external review, the criticism often reflects the uneasy tension and balance of perception and values that exist in any democratic society between those who advocate for more effective national security models versus those who see national security more decidedly through the lens of civil liberties.

workings of I2E. We will argue that despite some evident success, the current I2E model has inherent vulnerabilities and that more can, and should, be done to effect model improvements. Other authors within these pages will have touched upon, directly or indirectly, the case-specific strengths and weaknesses of the I2E process as it unfolded during the Toronto 18 prosecutions. Instead, our objective is to broadly assess the currently accepted model that developed over several years following the Toronto 18 case and offer a perspective on how it might be made even stronger going forward. But first, it is important to consider some of the background to the issue in order to better understand the evolutionary factors at play.

II. The McDonald Commission

As part of an examination or study of Canadian national security policy, it is worth taking a step back in time to review the 1981 McDonald Commission Report, which proved wide-ranging in the scope of its inquiry and the foresight of many of its observations and recommendations. The Commission conducted arguably the most in-depth review of the national security framework ever conducted in Canada, before or since, and provided a number of insightful recommendations towards establishing sound, well-balanced national security policy and legislation.

The Commission was conducted in the aftermath of a domestic terrorism-related crisis (October 1970) perpetrated by members of the *Front de libération du Québec* (FLQ) and resulting in illegal or inappropriate activities by the RCMP Security Service. The fundamental question the Commissioners confronted was how to achieve an effective balance between national security and basic civil liberties. While the Commissioners focused on RCMP Security Service wrongdoings, their forward-looking recommendations were designed to create institutions that could effectively deal with the emergence of a more complex and challenging threat environment while adhering to the rule of law.

In the end, the Commissioners recommended the establishment of a new civilian intelligence agency – CSIS – and provided core terms of reference for the *CSIS Act* and subsequent operating policies. In recommending the establishment of a civilian intelligence agency to replace the RCMP Security Service, CSIS would not be granted police powers or a

mandate to deter, prevent, or counter threats.[2] As argued by the Commission, the danger would be that the new organization could "be both judge and executor."[3] Instead, the Commission saw prevention and countering as the role of relevant departments and agencies having enforcement powers, especially the police (specifically the RCMP), acting on CSIS intelligence.[4] CSIS thus became strictly a collection, analysis, advisory, and reporting agency expected to feed various government and law enforcement agencies information for the purposes of countering threats by way of arrest and prosecution, or other means.[5] CSIS would also collect security-related threat information for non-enforcement purposes to keep senior government officials and policymakers informed about major security issues and trends, both domestically and internationally. Additionally, unlike foreign intelligence collection as defined in section 16 of the *CSIS Act*, there was no statutory or geographic limitation or boundaries imposed on CSIS's ability to collect security-related intelligence (i.e., espionage, foreign-influenced, and terrorist-related activities directed against Canada or detrimental to Canadian interests) which can be collected globally through direct means or via established liaison channels with foreign partners.

From the start, the decision to establish separate mandated functions between police work (criminal) and intelligence collection naturally resulted in several hurdles, both anticipated and unanticipated, in efforts to carefully bridge the divide between the collection of intelligence and its use as evidence. As time passed and the threat environment grew more severe, the challenges of migrating intelligence to the enforcement side became more apparent and problematic.

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2 Canada, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security Under the Law*, vol. 1, 2nd Report (Ottawa: Supply and Services Canada, 1981), 613.

3 Commission of Inquiry, *Freedom and Security Under the Law*, 613.

4 Commission of Inquiry, *Freedom and Security Under the Law*, 613.

5 It should be noted that the amended *CSIS Act* under Bill C-51 allows for certain threat reduction activities within strict policy guidelines or judicial approval. The introduction of CSIS's threat reduction powers remains highly controversial and suspect as to their effectiveness in fully neutralizing threats. As a matter of corporate practice and perhaps Ministerial direction, it would be reasonable to expect that threat reduction activities undertaken by CSIS should be used sparingly with caution and not be allowed, over time, to become the default or preferred means of addressing public safety and national security threats or justification by law enforcement in opting not to pursue a criminal investigation leading to arrest and prosecution.

III. INTELLIGENCE TO EVIDENCE (I2E) – A WORK IN PROGRESS

Although the mandates would be separate, the McDonald Commission foresaw a close working relationship between the new CSIS and law enforcement. The Commission Report references joint operations with the police, liaison officers embedded in respective RCMP and CSIS offices to facilitate and control the exchange of information, and a resulting "mutual dependency" between CSIS intelligence collection and police enforcement.[6] The Commission anticipated that CSIS and the police would liaise and cooperate in a way that would "avoid duplication."[7] In the years immediately after the 1985 Air India bombings, liaison was taken to the level wherein RCMP and CSIS liaison officers were embedded in each other's major offices, with RCMP liaison officers having the authority to review "all" CSIS terrorist-related reporting. It should come as no surprise that CSIS produced a disproportionate amount of the combined terrorist-related reporting between the agencies. RCMP liaison officers were routinely copied on all CSIS terrorist-related reports and were free to request formal disclosure of any information contained therein. CSIS, in turn, was free to approve or reject disclosure, the latter without an obligation to provide detailed justification. Although CSIS retained ultimate control over the disclosure of its information, in many ways the CSIS/RCMP liaison program, discontinued shortly after 9/11, gave the RCMP an unprecedented right of review and potential access to a daily stream of CSIS counterterrorist reporting, a level of access, albeit indirect, never before or since enjoyed.

Much has changed in the legal landscape since the McDonald Commission report, primarily because of *Charter*-based decisions by the courts. Of particular importance was the Supreme Court of Canada's decision in *R v. Stinchcombe*,[8] which reinforced full and fair disclosure to the accused. This had a profound impact on terrorism cases brought before the courts. It also had an additional chilling effect on the level of information sharing between CSIS and the RCMP. On the one hand, CSIS became increasingly concerned about disclosing information to the RCMP for fear that broader disclosure obligations to the defence post-*Stinchcombe* might

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6 Commission of Inquiry, *Freedom and Security Under the Law*, 772.

7 Commission of Inquiry, *Freedom and Security Under the Law*, 423.

8 R v. Stinchcombe, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1.

endanger and reveal sensitive sources and methods of operation. This fear was somewhat understandable given that "Canadian disclosure obligations are broader than equivalents in the United States and United Kingdom."[9]

On the other hand, the RCMP was more reluctant to rely too heavily on CSIS information in any potential criminal proceedings for fear that CSIS might at some point initiate an objection to disclosure under the *Canada Evidence Act*,[10] potentially resulting in a stay of proceedings. While the impact of *Stinchcombe* in creating a more demanding disclosure regime is real, it remains the case that if sensitive information was ever at jeopardy of being disclosed during court proceedings, the government could always invoke an objection under section 38 of the *Canada Evidence Act* "using what is known as an Attorney-General's certificate."[11] While certainly not the preferred outcome, the AG certificate does provide an important layer of protection against the risks associated with disclosure.

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9 Craig Forcese, "Staying Left of Bang: Reforming Canada's Approach to Anti-terrorism Investigations," *Criminal Law Quarterly* 64 (2017): 493. This point is reinforced by Leah West in her comparative assessment of U.K. and Canadian disclosure regimes. As West argues, in addition to the material on which they have based their case, British prosecutors are only obligated to disclose information "which might reasonably be considered capable of undermining the case against the accused, or of assisting the case for the accused." This contrasts with the more demanding Canadian model under Stinchcombe which provides that "[u]nless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession." This plays out on numerous levels but is particularly relevant on the issue of British Security Service intelligence used to initiate a police investigation. West illustrates this by considering:

> [A] scenario where MI5 has human source intelligence that gives them reason to believe that a target of investigation is planning to detonate a bomb at a tube station one particular morning in London. This intelligence is passed from MI5 to the Metropolitan police who attend at the tube station. The police identify the subject, find explosives in his possession and arrest him. How the police knew to look for the accused in the station on that date is not subject to disclosure unless the prosecution concludes that something about the human source or the information they provided would undermine the Crown's case.

See Leah West, "The Problem of 'Relevance: Intelligence to Evidence Lessons from UK Terrorism Prosecutions," *Manitoba Law Journal* 41, no. 4 (2018): 76, 81, 93. This would be not the case in Canada under Stinchcombe, with the initial CSIS role being subject to disclosure and raising concern about the protection of source identities, which is critical to CSIS longer term investigative efforts.

10 R.S.C. 1985, c. C-5.

11 Forcese, "Staying Left of Bang," 503.

In order to limit sensitive CSIS intelligence and methodologies from being revealed in court proceedings, CSIS and the RCMP have developed the "One Vision" framework in which CSIS and the police conduct separate but parallel investigations against the same individual(s). One Vision was developed and formalized in the years following the Toronto 18 case and was directly informed by the procedures followed during the investigation by the RCMP and CSIS and related judicial rulings. The courts have generally accepted this framework, with CSIS collecting intelligence under its mandate for advisory purposes (and possibly threat reduction purposes) and the police for *Criminal Code* purposes. The model allows for strategic case management discussions at senior levels between CSIS and the RCMP, but disclosure to police investigative teams at the division level, formal or otherwise is, by design**,** limited to lessen the exposure of CSIS information during judicial proceedings. The result is the exact opposite of the McDonald Commission's views that close cooperation and liaison would help to "avoid duplication." Instead, One Vision rests heavily on duplicating investigations, with the police attempting to re-establish, through their own separate inquiries, things that CSIS may already know but cannot formally disclose to support court processes.[12] Even discussions at the senior levels of CSIS and the RCMP are routinely conducted in a manner so as to limit exposure of CSIS intelligence and focus only on what is strictly necessary for deconfliction and case management purposes.

Rather than increasing disclosure of CSIS intelligence, the focus, especially post-*Stinchcombe* and even more so after 9/11, has been on minimizing disclosure of CSIS information to the RCMP under what is termed the "less is more" approach. The guiding principle here is that CSIS provides the RCMP only the bare minimum amount of information it possesses in the form of a "disclosure letter" (versus an "advisory letter," which authorizes the use of CSIS information in court proceedings) directly linked to the elements of a criminal offence, sufficient in content to support the RCMP initiating their own criminal investigation, thus limiting the exposure of CSIS information. While the "less is more" approach is

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[12] For an additional perspective on One Vision, see commentary by then-Director Richard Fadden at a February 11, 2013 session of the Standing Senate Committee on National Security and Defence: Ottawa, Senate, *Proceedings of the Standing Senate Committee on National Security and Defence*, 41-1, No. 12 (11 February 2013) (Richard Fadden).

attractive in theory, it has not always achieved the desired outcome in practice. Moreover, limiting the amount of CSIS information in the form of a disclosure letter does not necessarily guarantee an impenetrable shield around CSIS's information.

As the Air India Inquiry, chaired by former Supreme Court Justice John Major, concluded:

> There is a lack of institutionalized coordination and direction in national security matters. Canadian agencies have developed a culture of managing information in a manner designed to protect their individual institutional interests.
>
> The current practice of attempting to limit the information CSIS provides to the RCMP in order to prevent its disclosure in criminal proceedings is misguided... The result of such efforts to deny intelligence to the police is an impoverished response to terrorist threats.
>
> The processes and procedures by which decisions are made as to what information should be passed/exchanged between the intelligence and law enforcement communities are seriously flawed and require substantial revision.[13]

For the McDonald Commission, in recommending the establishment of CSIS, separation of the security intelligence function from the RCMP was the blueprint for moving forward by preventing any further illegal activities or dirty tricks and establishing a robust accountability regime and independent oversight of CSIS's activities. The McDonald Commission, while acutely aware of the risks of non-cooperation, appeared over-optimistic that inter-agency goodwill would ultimately prevail and lead to seamless cooperation. In fact, what developed was an initial period of organizational friction that hindered early efforts to achieve an effective model of cooperation. While the Commission proved insightful in most of its predictions and recommendations, this was perhaps its single and most consequential miscalculation. The *Stinchcombe* decision merely added an additional issue to what was already a relationship defined, more often than not in the early years, by inter-agency friction and institutional self-interest.

The initial years of organizational friction between CSIS and the RCMP have long since given way to a genuinely productive partnership and much closer cooperation in the greater public interest. CSIS and the RCMP have sought to adapt to legal realities through One Vision and, more recently,

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[13] "John Major's Air India Inquiry's Key Findings on Relationship between Intelligence and Evidence," *Georgia Straight*, December 11, 2012, www.straight.com/article-329962/Vancouver/john-majors-air-india-inquirys-key-findings-relationship-between-intelligence-and-evidence.

One Vision 2.0.[14] The One Vision initiative, while a credit to both organizations' commitment to building a closer working partnership and more effectively co-manage threats, also seeks the seemingly opposite goal of maintaining "an appropriate degree of separation between (their) respective (or parallel) investigations." Furthermore, in addressing the "triggers" for CSIS initiating discussions with the RCMP, One Vision 2.0 states: "CSIS has discretion with respect to why and when it chooses to disclose information to the RCMP. An assessment is undertaken by CSIS to determine whether to initiate Strategic Case Management discussions with, and possibly disclose information to, the RCMP."[15] While One Vision is a step in the right direction, we believe a more effective model is attainable, one that would further reduce the risk to public safety through greater sharing of information and the establishment of an integrated (also sometimes referred to as blended) model of investigation rather than continuing to conduct separate or parallel tracks of investigation.

It is difficult to conclude that a model based on duplication and paralleling of investigative activity, with a narrow range of interaction between the primary investigative bodies, strengthens national security. Questions must therefore be asked. First, is the current intelligence to evidence model better described as the institutions making the best out of a very difficult and complex legal disclosure regime? The answer, in our judgement, is yes. Secondly, does it create a greater risk than we should accept in the current heightened threat environment? Again, the answer is yes. Finally, while front-line agencies may be doing their best to successfully navigate around the challenges posed by I2E, is the legal framework now in place adequate for Canada's needs? The answer is no. The current legal framework around disclosure places unnecessary and unreasonable pressures and requirements on agencies like CSIS and the RCMP, often creating roadblocks to arrest and prosecution of serious threats.

To date, front-line agencies have made considerable progress towards improving collaboration, co-managing threats, and tailoring information exchanges through One Vision and other initiatives. What is missing and

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[14] Colin Freeze, "Concerns over Bill C-51 Prompt CSIS to Brief Other Agencies on Operations," *Globe and Mail*, September 8, 2016, www.theglobeandmail.com/news/national/concerns-over-bill-c-51-prompts-csis-to-brief-other-agencies-on-operations/article31788063/.

[15] "CSIS-RCMP Framework for Cooperation: One Vision 2.0," Secret Law Gazette, November 10, 2015, secretlaw.omeka.net/items/show/21.

what is additionally needed is action by lawmakers to introduce new legislation and/or amend existing legislation that would better protect sensitive information from disclosure in court proceedings without negatively impacting an accused's right to a fair trial. The McDonald Commission cautioned: "Indeed, we consider a potential lack of cooperation between the Force (RCMP) and a separate civilian security intelligence agency as the greatest risk involved in the structural change we are proposing."[16] With that in mind, and despite much-improved cooperation as of late, in today's heightened threat environment, we should not underestimate the risk of failure of an intelligence to evidence model that creates challenges to exchange and disclosure, and that requires complex adaptations by front-line agencies charged with protecting national security. Intelligence enabling enforcement should become the driving force for change and the basis of future I2E model enhancements.

IV. DISCLOSURE AND THE FEDERAL COURT

Related to the question of I2E is the role of the Federal Court in ruling on disclosure of national security intelligence in court proceedings. Public discussion has centred on the issue of whether rulings on disclosure of sensitive security intelligence should be made by the trial judge, not the Federal Court as is the current practice. Concern has been raised that the existing bifurcated court model creates a "cumbersome" system wherein the Federal Court rules on disclosure and the trial judge must then accept the decision and determine whether a fair trial can then be held.[17] Although the Air India Commission "recommended that Canadian trial judges, like trial judges in Australia, the United Kingdom, and the United States, should be able to make – and if necessary, revise – non-disclosure orders during the course of terrorism trials... the federal government rejected these recommendations without any public explanation."[18] Ultimately, the matter was referred to the Supreme Court on appeal following a decision "by one of the judges in the Toronto 18 prosecution (who) held that the system was unconstitutional because it denied trial judges the right to control their own

16 Commission of Inquiry, *Freedom and Security Under the Law*, 771.

17 Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015), 305–08.

18 Forcese and Roach, *False Security*, 306–07.

trial."[19] The Supreme Court disagreed, deciding in favour of the government.[20] Despite the Supreme Court ruling, in our view, it only stands to reason that doing away with a bifurcated court system in favour of having the trial judge determine all matters related to disclosure would contribute greatly to a more efficient and just model. The constitutional and legal arguments may have been settled for now, but future governments interested in introducing substantive prosecutorial reforms to the national security area would be well advised to revisit the issue and bring this part of the legal system in line with that of some of our closest allies.

V. Lessons From Our Friends

In seeking to improve upon the current I2E model, much can be learned from some of our closest allies and how they have adapted to the contemporary terrorist reality. For example, in the United Kingdom (U.K.), the accepted practice is that all terrorism-related intelligence obtained by the police is provided to MI5, which sets the overall counterterrorism requirements and priorities for the country.[21] The U.K. model is based on some very hard lessons learned from security intelligence and law enforcement failures in a challenging counter terrorism environment.

Decades of living under a serious threat environment in which there have been dozens of mass-casualty terrorist attacks have focused the minds of authorities (police, intelligence, judicial, and government) on developing a relatively transparent and seamless model of cooperation, supported by a secure means of migrating intelligence to evidence. Given the high number of terrorist plots that have been detected and foiled in the U.K., particularly over the past several years, it is reasonable to conclude that the number of successful terrorist attacks in the U.K. would have been more numerous and deadlier absent the current model. As noted by the Director-General of MI5 in 2018: "Since the Westminster attack in March 2017, with the police we have thwarted a further 12 Islamist terror plots – 12 occasions where we have good reason to believe a terrorist attack would otherwise have taken

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19 Forcese and Roach, *False Security*, 307.

20 Forcese and Roach, *False Security*, 307.

21 Frank Foley, *Countering Terrorism in Britain and France: Institutions, Norms and the Shadow of the Past* (Cambridge: Cambridge University Press, 2013), 131–32.

place. That brings the total number of disrupted attacks in the U.K. since 2013 to 25."[22]

Following the 7/7 attacks in 2005, U.K. intelligence and law enforcement concluded that the existing model of "siloed anti-terrorism" and "reactive policing" was "unworkable." A collective effort was undertaken to better integrate resources and investigations with "MI5 and police investigative units (now) co-located and (their personnel) embedded." The more integrated model must still pay attention to "careful management of disclosure issues," but the traditional fears and constraints surrounding disclosure are relaxed, and each other's mandates and roles are clearly understood and respected. For their part, MI5 is "confident" that the courts will protect "sensitive information" from disclosure based on "public interest immunity." While the U.K. system is not perfect, it has successfully overcome some of the major "dilemmas that bedevil Canadian anti-terrorism."[23]

VI. THE WAY FORWARD

I2E is but one challenge – albeit a major one – in building a more robust and effective counterterrorism response. The nature of the terrorist threat today in which groups like Al Qaida (AQ) and the Islamic State in Iraq and Syria (ISIS) and their sympathizers are prepared to engage in the indiscriminate mass killing of innocent civilians, including using suicide operatives, demands a firm response. We should also not exclude the growing threat of right-wing extremists who are equally prepared to commit serious acts of racially motivated or anti-government violence. As Craig Forcese and Kent Roach have correctly noted, while "criminal prosecutions are not the proper response to every terrorist threat and will not be possible in every case… they remain the most transparent, fair and likely effective answer to those who are prepared to use violence to achieve political, religious or ideological objectives."[24] Today's most dangerous terrorists are

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22 "Director General Andrew Parker Speech to BFV Symposium," MI5 Security Service, May 14, 2018, https://www.mi5.gov.uk/news/director-general-andrew-parker-speech-to-bfv-symposium.

23 Forcese, "Staying Left of Bang," 502. Readers are encouraged to directly reference Forcese's detailed description of the U.K. model.

24 Kent Roach and Craig Forcese, "Intelligence to Evidence in Civil and Criminal Proceedings: Response to August Consultation Paper," *SSRN Electronic Journal* (2017): 3, http://dx.doi.org/10.2139/ssrn.3035466.

determined to inflict the maximum number of casualties and widespread damage. Authorities need to work together more closely and demonstrate an equal determination in response to such threats by making arrest and prosecution the preferred outcome at the outset of every terrorist investigation. The response in most cases should not be limited to "threat reduction" or "threat containment" but should instead focus on "threat elimination" through arrest, prosecution, and incarceration. Canada's terrorism offences "introduced since 9/11 are almost all strongly pre-emptive."[25] This provides law enforcement, acting on intelligence, ample opportunities to prosecute terrorist activities under a wide range of related criminal offences.

Policymakers need to think holistically about a national security model that achieves a maximum level of protection and security while respecting civil and *Charter* rights. More than three decades ago, the McDonald Commission understood that an effective national security model must be framed around a bold and comprehensive vision that connects all the parts. In our view, the way forward should include:

1. Addressing overall deficiencies in the I2E model. Toward this end, Canada can learn much from the British experience. It is indeed encouraging that efforts in this regard are reportedly already underway via "Midnight Horizon," a joint CSIS/RCMP initiative launched in 2018 and focused in part on a review of the U.K.'s Counter-Terrorism model with the goal of identifying best practices adaptable to the Canadian model that would result in more "robust information sharing… while protecting methods and sources."[26] Of the changes publicly acknowledged to date, one in particular merits specific mention: "An effort known as the Leads Pilot to assess incoming national security information, which CSIS and the RCMP say has already reduced duplication of effort."[27] This is a welcome and important change. Efforts to identify best practices among foreign allies

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25 Forcese, "Staying Left of Bang," 489.

26 Jim Bronskill, "CSIS, RCMP Modelling New Security Collaboration Efforts on British Lessons," *Canadian Press*, March 14, 2021, https://www.cbc.ca/news/politics/csis-rcmp-collaboration-effort-1.5949531.

27 Bronskill, "New Security Collaboration."

need not, and should not, be limited to the U.K. Other close foreign intelligence and law enforcement partners may have proven processes and practices they are willing to share that might improve upon and be adaptable to the Canadian model. In our view, however, the main pillars of the U.K. model offer the best prospect of solving the I2E conundrum in Canada.

2. Members of Parliament must take a more active and determined role in identifying and seriously addressing weaknesses in the I2E process and making recommendations for legislative and mandate changes. Standing Parliamentary Committees having oversight of the issue in both the House and Senate have recently acknowledged that I2E continues to face legal, policy, operational, and organizational challenges and hurdles that merit formal review.[28] It is important to emphasize that the improvements achieved through One Vision and the adjustments arrived at via Midnight Horizon represent efforts to work around the elephant in the room: the need to conduct parallel investigations under the current legal framework wherein intelligence flows are restricted to the barest of minimums between CSIS and RCMP investigations. To reiterate, the current model remains one built on duplication, exactly what the McDonald Commission sought to avoid. What we see are efforts by institutions to do their best to work within a challenging disclosure regime by building in points of interaction to better coordinate their efforts. Despite improvements, this model will likely remain fraught with challenges and risks in managing disclosure through these narrow windows of engagement. Parliamentarians tasked with national security responsibilities have an obligation to ensure they fully understand the current model, why it has been shaped this way, and where legislative changes are required.

3. Give serious consideration to a model based on closer CSIS and RCMP integration, facilitating more seamless cooperation and information

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28 House of Commons, *National Security and Intelligence Committee of Parliamentarians, 2019 Annual Report* (March 2020) (Chair: Honourable David McGuinty); Jim Bronskill, "Canadian Senator Calls for Study of Hurdles to Using Secret Intelligence in Court," *The Associated Press*, January 23, 2021, https://globalnews.ca/news/7595278/secret-intelligence-court-cases/.

sharing aimed at identifying and countering terrorist threats and hate-related crimes. To be truly effective, any such model would likely require legislative changes given the impact of *Stinchcombe* as well as changes to agency core mandates. Collaborative approaches could range from operationally embedded employees in respective offices to potentially creating fully integrated CSIS-RCMP counterterrorism teams. At a minimum, co-location of personnel at the regional level, and specialized training of such staff in all facets of intelligence work and related enforcement operations, would mark a major leap forward in the evolution of I2E.[29] Such a model could even take on the characteristics of a permanent counterterrorism task force with members from both organizations seconded full-time to units for a minimum of several years or longer. Existing Integrated National Security Enforcement Teams (INSETs), created shortly after 9/11, could possibly provide a foundational basis for the establishment of such teams. That, however, would require re-defining the role and mandate of INSETs, restructuring of their current operational model, and a substantial increase in the commitment of personnel and level of information sharing by participating agencies.

VII. Final Thoughts

CSIS and the RCMP should be commended for their work in improving upon the I2E model which has resulted in a number of successful arrests and prosecutions. These successes alone have undoubtedly saved countless lives from terrorist attacks. The significant progress made, however, should not be viewed as the best that can be achieved. We believe the next step should be to address the limitations of the One Vision framework, principally by replacing separate, parallel investigations with a more integrated model where information/intelligence is more freely shared among CSIS and RCMP counterterrorism experts and where

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[29] Counterintelligence cases would continue to be investigated initially by CSIS and separate from the blended integrated model due to their sensitivity and "non-threat-to-life" nature. See also fn 9 in reference to the greater flexibility built into the U.K. model, which helps facilitate greater ease of interaction between the British Security Service and the police.

prosecution becomes the overarching objective from the outset of all terrorist-related investigations. To date, terrorism and hate-related offences resulting in prosecutions have been few in number in Canada when compared to many other countries. This is clearly not explainable by a lack of *Criminal Code* offences and anti-terror laws under which to charge individuals, particularly post-9/11, but is believed to be more a result of shortcomings and roadblocks in the I2E model which have tended to discourage authorities in many cases from pursuing a prosecutorial path. The Federal Government's recent decision to establish a new office of Director of Terrorism Prosecutions is a positive development that will hopefully result in more terrorist-related and hate-inspired prosecutions in the future and provide an incentive for changes at the investigative/operational level in line with what we are proposing.

The changes we propose may be viewed by some as unnecessary in light of enhancements to the One Vision framework, most recently those resulting from the Midnight Horizon initiative. Fair enough. But the ultimate goal of every terrorist or hate-inspired investigation should be to reduce the risk and element of chance to an absolute minimum in detecting and preventing violence as part of a zero-tolerance policy. Any model built on narrow and restricted points of engagement between separate but parallel investigations will likely continue to fall short of that ideal, with risks relating to both issues of disclosure and for the potential for things to be missed or fall through the cracks. On this, there is only so much CSIS and the RCMP can achieve on their own. Unless and until Parliament considers the various shortcomings of the I2E model and recommends meaningful legislative and policy fixes beyond what front-line agencies can achieve working together independently, the ability to aggressively deal with threats through prosecutorial means will remain, inherently, an area of concern and vulnerability.

Financing the Toronto 18

JESSICA DAVIS*

ABSTRACT

The thwarted Toronto 18 terrorist plot was an early indication of things to come for terrorist financing in Canada and internationally. The self-financed plot demonstrated how terrorist cells, even those not directed by a terrorist group, could obtain enough money to fully fund a sophisticated and complex attack. In total, the main elements of the Toronto 18 plot likely cost thousands of dollars, but the organizers of the plot had accumulated far more than they needed for the components of the attack and had enough money to rent a safe house, pay for plane tickets to escape prosecution after the attack, and develop a plausible cover story for their activities. Despite the financial elements of the plot, no terrorist financing charges were laid in the case. This may have been due to the lack of international funding of the plot and a conceptualization within Canada's law enforcement and security services at the time that terrorist financing came from "abroad." The lack of financing charges, in this case, may have had longstanding implications in Canada, where, to date, very few charges of this nature have been laid, even 15 years after the plot was disrupted.

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I. INTRODUCTION

The Toronto 18 terrorist cell was a harbinger of things to come in terms of terrorist financing in Canada and abroad. From 2005 onwards, self-financing, and the challenges present when terrorists lack funds, would be seen repeatedly in terrorist incidents in Canada and abroad, and these were all trends that were seen in the case of the Toronto 18. The Toronto 18 case also foreshadowed another important trend in Canadian national security: the failure of the Toronto 18 investigation to generate any terrorist financing charges. The lack of charges may have laid the groundwork for the subsequent lack of terrorist financing charges in Canada in following years that call into question Canada's commitment to tackling the financing of terrorism.

The Toronto 18 terrorist cell[1] that developed over the course of 2005 and 2006 was responsible for one of the most ambitious plots[2] in Canada in recent history. The complexity of the plot itself stemmed from the number of individuals involved or associated with it and was also partially the result of a schism within the group that ultimately resulted in two separate plots led by two very different individuals. Zakaria Amara led a plot to detonate truck bombs in downtown Toronto, while Fahim Ahmad led a plot to behead then-Prime Minister Stephen Harper in Ottawa.[3]

This chapter will explore the financing of the Toronto 18 cell and its terrorist plots. A brief overview of terrorist financing will be provided and will include a discussion of the difficulties inherent in analyzing the financing of a terrorist plot compared to a terrorist attack, as well as a description of expansive vs. narrow analyses of terrorist financing. The

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1 A terrorist cell is two or more individuals who seek to conduct terrorist activity. Cells have no upper limit, although, in practical terms, most cells are composed of less than a dozen individuals. In the case of the Toronto 18, the broader terrorist cell ultimately developed two separate plots and can be conceptualized as two separate cells. For the sake of simplicity, these will be referred to as plots, while the broader group will be referred to as the cell that spawned the plots.

2 A terrorist plot is a terrorist attack that was thwarted, most often by law enforcement or security services. Not all plots have the same or even similar levels of development; some plots may be disrupted very early in their development, while other disruption activity may take place at the last minute.

3 Both of these individuals can be considered as "entrepreneurs" of their plots, but the capabilities that each brought to bear on their respective plots varied significantly. The concept of terrorist entrepreneur is drawn from Petter Nesser, *Islamist Terrorism in Europe* (London: C. Hurst & Co. Ltd, 2015).

majority of the analysis will focus on the financing of the cell and the two separate plots that emerged in this case. To date, there has been no comprehensive analysis of the financing of the Toronto 18 plot. This analysis will illustrate the very different levels of preparedness of the two cells and explore questions about the approach to charges pursued. The conclusion will focus on counter-terrorism financing in Canada in 2006, and now.

The financing of the Toronto 18 cell took place in three distinct phases, with some overlap. The first phase involved financing the cell's preparatory activities (primarily training), while the second and third phases involved the financing of the plots. These three phases demonstrate different sources and use of funds, as well as very different strategies to move, manage, store, and obscure those funds. The Toronto 18 cell and its preparatory activities were primarily self-financed by members of the group. Ahmad's plot was limited in scope, in part because of his inability to obtain funds (as well as by other operational and organizational limitations). On the other hand, Amara's plot was well funded and managed, and he was able to obtain (or so he thought) all the required material for his improvised explosive devices.

II. Terrorist Financing

Terrorist financing is often conceptualized as the raising and moving of funds[4] for terrorist purposes. While this is certainly a core component, terrorist financing encompasses a much broader range of activities. Equally important and worthy of analysis is how terrorists use, move, store,[5] manage, and obscure the source and ultimate use[6] of their money.[7] An analysis of

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4 Maurice R. Greenberg, William F. Wechsler, and Lee S. Wolosky, *Terrorist Financing: Report of an Independent Task Force Sponsored by the Council on Foreign Relations* (New York: Council on Foreign Relations, 2002).

5 Matthew Levitt and Michael Jacobson, "The U.S. Campaign to Squeeze Terrorists' Financing," *Journal of International Affairs* 62, no. 1 (Fall 2008).

6 Phil Williams, "Terrorist Financing," in *Fighting Back: What Governments Can Do About Terrorism*, ed. Paul Shemella (Palo Alto: Stanford University Press, 2011), 44.

7 This is a modified version of the framework used by the Financial Action Task Force (FATF). In 2015, FATF described their model of terrorist financing; their typology focuses on the generation of revenue, the movement and use of funds, and the management of resources. See *FATF Report: Emerging Terrorist Financing Risks* (Paris, France: FATF, 2015), 5, 11, http://www.fatf-gafi.org/media/fatf/documents/reports/

terrorist financing also requires a distinction between organizational financing (i.e., the financing of a terrorist group or organization) and the operational use of these funds, which includes the direct financing of terrorist plots and attacks.[8] The financing of the Toronto 18 falls squarely in the domain of operational financing as there was no organizational financial support from a foreign/external entity, nor did the group aspire to provide an international terrorist organization with money. Their focus was exclusively on their plots.

Many (if not most) aspects of terrorist activity have a financial component to them, but generally speaking, the more elaborate or ambitious the plot or attack, the more elaborate and intentional the financial activity is. The Toronto 18 case is no exception. Fundamentally, terrorist financing is about much more than just raising funds for terrorist purposes. As such, this chapter will explore the various financing mechanisms employed by the Toronto 18 as a case study in the full spectrum of terrorist financing activities.

A. Analyzing Plots vs. Attacks

Analyzing the financing of terrorist attacks can be a complex endeavour. Effective analysis requires a full accounting of a terrorist cell or individual's activities, their related costs, and the financial logistics involved. To

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Emerging-Terrorist-Financing-Risks.pdf. Versions of this framework can be found throughout the terrorist financing literature, as noted in the preceding footnotes. This is not the only framework that addresses terrorist financing: the terrorist resourcing model is an alternate model, and it was put forward by John Schmidt in his testimony to the Air India Inquiry. While Schmidt asserts during his testimony that the model has been well-received by domestic and international partners, it has not been widely adopted in either international practice, nor in academic writing on terrorist financing. As part of the author's PhD dissertation, nearly 300 books, articles, and policy papers on terrorist financing were reviewed. Less than one percent of this literature has adopted the resourcing model. For more on the model, see Canada, *Commission of Inquiry into the Bombing of Air India Flight 182*, in *Air India Flight 182: A Canadian Tragedy*, vol. 3, Catalogue No. CP32-89/5-2010E (Ottawa: Supply and Services, 2010).

8 This distinction is first made in the terrorist financing literature by Horgan & Taylor. See John Horgan and Max Taylor, "Playing the 'Green Card'– Financing the Provisional IRA: Part 2," *Terrorism and Political Violence* 15, no. 2 (2003): 39. Freeman also makes this distinction in Michael Freeman, "The Sources of Terrorist Financing: Theory and Typology," *Studies in Conflict & Terrorism* 34, no. 6 (June 2011): 461–75, https://doi.org/10.1080/1057610X.2011.571193. Ridley, too, makes this distinction in Nicholas Ridley, *Terrorist Financing: The Failure of Counter Measures* (Cheltenham, U.K.: Edward Elgar Publishing, 2012), 1.

determine how an attack was financed, the analysis needs to include all the elements of its financing, from how the individuals raised funds, what they used their money to purchase, how they moved money to cell members or to people who were assisting the plot, etc. This analysis also needs to determine if they stored and managed funds in a particular way and if they employed any financial tradecraft (operational security measures[9] aimed directly at the financial components) to hide the source, destination, or use of funds.

A lack of information contributes to the difficulty in analyzing the financing of a terrorist attack; much of the required information is difficult to locate and has to be collated from court reports and media reporting. In many cases, much of the information related to an analysis of terrorist financing activity is not released publicly as part of trials or following a successful terrorist attack. Even in closed sources, the financing component is not always fully analyzed and understood, simply because of lack of time, analytic capability, or interest.

Analyzing the financing of a terrorist plot is often more complex than a completed attack because of the lack of concrete actions that may have occurred. The very nature of the plot itself (an incomplete or disrupted attack) contributes to the lack of clear information. The hypothetical nature of some or all of the activity must be considered, and even in jurisdictions where after-action reports of terrorist attacks are conducted regularly, plots are less likely than successful attacks to get a full public accounting. This lack of information means that each piece of financial information must be considered in the context of the plot, but also take into consideration the credibility of the source of information. While this is also true for terrorist attacks, the level of certainty in assessing terrorist plots is lower due to the incomplete nature of the activity.

In the case of the Toronto 18, the availability of information is relatively good due to the number of court proceedings and convictions of many of

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9 Terrorists often employ operational security measures during the preparation for their attacks or other terrorist activity. These measures are meant to hide their activities from authorities and can include acts such as developing a cover story for travel, splitting purchases of components for improvised explosive devices into multiple transactions to avoid detection, and using burner cell phones. For more on operational security measures employed by terrorists, see Bart Schuurman et al., "Lone Actor Terrorist Attack Planning and Preparation: A Data-Driven Analysis," *Journal of Forensic Sciences* 63, no. 4 (2018): 1191–1200.

the individuals involved. However, this information had to be gathered piecemeal from multiple records, as Canada did not pursue terrorist financing charges against the main financier of the plot (Amara). In addition, there may well have been other financial activity that took place that was never captured in the court proceedings, media reporting, etc.

Compounding the usual challenges that exist in analyzing the financing of a terrorist plot is the issue of Ahmad's credibility. Ahmad makes assertions repeatedly throughout the development of the plots about his weapons acquisition and intent to acquire more. Other cell members were also unconvinced by Ahmad's assertions. For instance, Amara found Ahmad to lack credibility: Amara believed that Ahmad was exaggerating and lying about his acquisition of plot-related material. He further wondered where Ahmad had spent "the money,"[10] a potential reference to Ahmad having had a role in managing the cell's funds at an early stage. Another example of Ahmad's less than truthful nature is his claim to have filmed a video of atrocities in Iraq; there is no indication he ever went to Iraq.[11]

Ahmad's credibility did not improve during his trial: his evidence was "riddled with lies and exaggerations."[12] Fundamentally, Ahmad's credibility issues make a financial analysis of the cell and plots less certain. Differentiating between what Ahmad said he did and what actually took place requires a close reading of the material, and even then, uncertainty remains.

B. Expansive vs. Narrow Financial Analysis

One of the core issues in the analysis of terrorist financing and, specifically, in the analysis of terrorist plots and attacks, is the issue of what is "counted." Some analysts consider only the narrowest aspects of the attack or plot, such as the direct cost of the components or weapons procured. Others take a hybrid approach and include elements like a safe house, transportation to the attack site, and other miscellaneous expenses. Still, others take a more expansive approach and include anything that a terrorist individual or cell engaged in from a financial perspective, including foreign travel (even months or years in advance of the plot or attack) or other activities and expenses incurred or undertaken that may not directly relate to the terrorist activity but helped the group or individual increase

10 R v. N.Y., 2008 CanLII 51935 at para 96 (ON SC).
11 *N.Y.*, CanLII at para 25.
12 R v. N.Y., 2012 ONCA 745 at para 63.

their capabilities.[13] All of these are valid ways to consider the financing of a terrorist plot or attack. The issue that arises is when analysts are not explicit in the type of analysis they are undertaking and their rationale for doing so.

For the purposes of the Toronto 18 cell and plots, an expansive analysis of their financing will be undertaken. This is particularly important in this context because of the complexity and the dynamics in the cell. Terrorist activity was undertaken (with a financial component) from very early on in the development of the cell, likely starting with Jamaal's travel to Pakistan seeking terrorist training. While not everything following that event constitutes terrorist cell or plot financing, this is a starting point for the analysis. The information presented in the financing sections below is the very least of what occurred; other goods and services may have been procured that the investigators were not aware of, was not made public, or simply was not deemed to be relevant or of enough significance to be included in the trials or related documents. This accounting of the plot is intended to provide an assessment demonstrating that attacks are often more expensive than they initially appear, there is more involved in financing than simply raising or using funds, and the ability to raise funds for terrorist activity is a critical aspect of whether or not it will be successful.

III. Financial Analysis of the Toronto 18 Cell

Understanding the financing of the Toronto 18 plot requires an understanding of the timeline of events (see Annex B) and the group dynamics of the plot (see Annex A). As such, this section examines how the group financed its activities as a whole and then how the two separate plots financed their plans. This section will also compare the various strategies employed by the two plots and demonstrate that while Amara's plot had the financial resources at hand to realize its terrorist intent, Ahmad's plot was hamstrung by a lack of concrete planning and financial resources.

A. Phase 1 Toronto 18 Cell Financing

The Toronto 18 cell undertook a number of preparatory activities for what would become two separate plots. The majority of these activities

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[13] Arabinda Acharya, "Small Amounts for Big Bangs? Rethinking Responses to 'Low Cost' Terrorism,'" *Journal of Money Laundering Control* 12, no. 3 (August 2009): 285–98, https://doi.org/10.1108/13685200910973655.

involved weapons acquisition and training camps. While these activities were relatively low cost, they demonstrated commitment on the part of the members (or, at the very least, the organizers) and did require some funding, albeit small and easily obtained amounts of money. There is little indication that the cell was involved in other aspects of financing such as the movement, storage, management, or obscuring of funds, other than working in cash.

The first terrorist financing activity undertaken by a member of the Toronto 18 was when Jahmaal James travelled to Pakistan and (unsuccessfully) sought out military training in 2005.[14] His intention was to learn firearms and explosives training and bring those skills back to the group.[15] There is no information that indicates how James paid for the trip but given its relatively low cost (likely around $1,000[16]), he probably financed the trip himself.

On August 13, 2005, in a separate preparatory activity, Ali Dirie[17] was arrested following his attempt to cross into Canada from the United States at the Fort Erie border crossing. He had two loaded handguns taped to his inner thigh as part of a plan to acquire weapons, potentially in anticipation of a terrorist plot, although plans were not well-developed at this stage. Ahmad had paid for the rental vehicle used by Dirie to travel to Ohio and purchase the guns and may have also provided some of the funds used to purchase the guns that were seized at the border.[18] The weapons acquisition likely occurred in order to facilitate some yet-undetermined terrorist activity.

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14 Michelle Shephard, "What Happened to the Toronto 18 Plotters?," *The Toronto Star*, May 29, 2016, https://www.pressreader.com/canada/toronto-star/20160529/282295319449966.

15 Isabel Teotonio, "Toronto 18: An Exclusive Account of How Canada's First Homegrown Terror Cell Was Created," *Toronto Star*, July 3, 2010.

16 All monetary amounts are represented in Canadian dollars and represent the cost or value at the time of the incident. In order to compare these amounts to subsequent plots or attacks, adjusting for inflation is required, as is controlling for variations in currency values.

17 Dirie's engagement in terrorism did not end with the Toronto 18 case. In 2012, Dirie left Canada, likely on a borrowed or stolen passport, and travelled to Syria. Once there, he joined an extremist group and died in 2013. See "'Toronto 18' member Ali Mohamed Dirie reportedly died in Syria," *CBC News*, September 25, 2013, https://www.cbc.ca/toronto-18-member-ali-mohamed-dirie-reportedly-died-in-syria-1.1868119.

18 *N.Y.*, ONSC at para 9.

Between August and November 2005, there is little evidence that any material or weapons acquisition took place, although Amara had access to weapons early in the development of the cell.[19] Ahmad alleged that he buried weapons in a park that were later stolen,[20] but Ahmad's credibility issues mean that this is quite possibly untrue. No other information supports potential weapons acquisition.

In December 2005, the confidential police informant Mubin Shaikh[21] was introduced to the Toronto 18 cell; subsequently, reporting on their activities became more granular. On December 4, 2005, Amara told Shaikh that he was taking a course that would allow him to purchase firearms.[22] It is unclear if this actually occurred or if Amara was simply stating an aspiration as a fact, but regardless, the training or intent to engage in it demonstrates planning and preparation activities and may also demonstrate that Amara was willing to put financial resources (albeit modest ones) in place in order to advance his aspiration to engage in terrorist activity. This is a key distinction between individuals who are simply radicalized and those who intend to take action on their ideas. Committing financial resources is a concrete activity that can demonstrate the seriousness of the individual's terrorist intent.[23]

The cell's activity in December was largely focused on the upcoming training camp and preparations. On December 5, 2005, Shaikh purchased a rifle and about 1,000 rounds of ammunition[24] at Amara's request.[25] It remains unclear who provided the funds for the purchase. Less than two weeks later, between December 18 and 31, 2005, the terrorist cell (encompassing most of the main members) went to the "Washago camp."[26] The cover story for the camp was that it was a religious retreat, but in actual

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19 Anne Speckhard and Mubin Shaikh, *Undercover Jihadi: Inside the Toronto 18 – Al Qaeda Inspired, Homegrown, Terrorism in the West* (Advances Press, 2014), 2692, Kindle.

20 Speckhard and Shaikh, *Undercover Jihadi*, 2692.

21 See the interview with Shaikh in Chapter 4 of this book. Shaikh had previously worked as a confidential informant of CSIS. See *N.Y.*, ONCA at para 12.

22 *N.Y.*, ONCA at para 12.

23 Canadian Security Intelligence Service, *Mobilization to Violence (Terrorism) Research: Key Findings* (Ottawa: CSIS, last modified May 3, 2018), https://www.canada.ca/en/security-intelligence-service/publications/mobilization-to-violence-terrorism-research-key-findings.html.

24 Teotonio, "Toronto 18; An Exclusive Account."

25 *N.Y.*, CanLII at para 17.

26 *N.Y.*, CanLII at paras 20–26.

fact, the purpose of the camp was to provide basic military-style training to some of the members of the cell and to test physical fitness. Preparations for the camp itself may have also involved the procurement of camouflage clothing, although there is no indication of who or how this was purchased other than that the clothing was handed out by Ahmad.[27] A pellet gun and scope were also used at the Washago camp,[28] and Shaikh was sent to buy targets and at least 250 rounds of ammunition. Thirty-five spent rounds of 9mm ammunition were also found at the camp.[29] Other material acquired for the training camp included propane canisters, a gas stove, an axe, and 2,000 rounds of paintball ammunition.[30]

Cell members likely contributed personal funds to support the camp's preparation. They may have also brought equipment that they already had in their possession or acquired the goods themselves, with the exception of weapons and ammunition. The use of existing goods and materials complicates the financial analysis of the plot in that there is less of a trail of financial activity, yet many of these goods provided real benefit to the members of the plot and advanced some aspect of their preparation to engage in terrorist activity.

With the exception of Shaikh's weapon acquisition, there is no mention of Ahmad or anyone else providing Shaikh with the funds for the weapons and ammunition, suggesting that Shaikh purchased them himself. In doing so, Shaikh may have provided resources for the training camp, assisting the cell in developing limited familiarity with weapons and other aspects of survival. This would have done little in the way of contributing to the overall capabilities of the group or the actual acquisition of materials for the plots. At most, the weapons and ammunition provided by Shaikh may have increased the cell members' familiarity with weapons but would not have been sufficient for them to develop any expertise or skills. However, the rifle itself could have been used in a low-complexity terrorist attack.

In the context of an undercover operative, it is also important to consider that any funds or goods that Shaikh provided to the group were likely necessary in order to prove his "bona fides" to the group and maintain access. Many terrorist cells and organizations assume that most counter-

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27 *N.Y.*, CanLII at para 23.
28 Teotonio, "Toronto 18: An Exclusive Account."
29 Teotonio, "Toronto 18: An Exclusive Account."
30 Teotonio, "Toronto 18: An Exclusive Account."

terrorism agents will not provide funds to a terrorist group, as this constitutes a terrorism offence. For Shaikh, or any undercover operative, providing a small amount of funds or goods can be critical in gaining trust. Ensuring that those resources do not actually enhance the capabilities of the group (such as through the procurement of weapons) is critical in ensuring that agents or under-cover operatives are not advancing the terrorist plot.

At Ahmad's behest and in preparation for another training camp, two of the youth involved in the cell shoplifted camping supplies from a Canadian store.[31] N.Y. and S.M.[32] were arrested for stealing camping utensils, an LED clip light, an axe, and an 18-inch machete.[33] The request by Ahmad to have the youth steal goods for the training camp demonstrates the lack of financial resources at Ahmad's disposal and also exposed the group to additional police scrutiny, exactly what many of the cell members would have been trying to avoid at this stage.

On February 3 and 4, 2006, some of the cell's members travelled to Opasatika to look at a property listed for sale[34] that was considered a contender for the cell's safe house, staging area, and/or weapons storage site. The property was listed at over $13,000 and within the financial resources of the group, as Amara had amassed a significant amount of personal funds that could be used to support the plot through a combination of personal savings and loans. While the property itself was not deemed to be suitable for their purposes, the inquiry demonstrated the cell's interest in operational security and their willingness to commit financial resources to it.

In March 2006, the schism in the group occurred,[35] and Amara and Ahmad began pursuing separate terrorist plots. Amara's activities after this point focused on constructing and testing a remote detonator and constructing bombs to be used in Toronto,[36] while Ahmad focused on training camps and the attack of government targets.

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31 *N.Y.*, CanLII at para 204.

32 The initials represent young offenders in the case. It is worth noting that Ahmad's plot involved a number of young offenders, which may speak to his maturity and competence.

33 *N.Y.*, CanLII at para 65.

34 R v. Chand, 2010 ONSC 6538.

35 *N.Y.*, CanLII at para 5.

36 *N.Y.*, CanLII at para 5.

While many of the preparatory activities that the Toronto 18 cell engaged in would not have cost significant amounts of money, the individuals involved also had limited financial means. As such, finding the money to rent a van and obtaining the goods required to conduct camping trips in late fall/early spring in Canada (even if those preparations were insufficient) would require some commitment of scarce resources.

B. Phase 2 (Ahmad's Plot)

After the schism occurred in the main Toronto 18 terrorist cell, Ahmad pursued his own terrorist plot, which involved a plan to storm Parliament Hill and behead politicians.[37] Ahmad's plot was far less developed than Amara's at the time of the arrests, and he had only undertaken a few preparatory activities.

Ahmad's main terrorist activity in preparation for his plot involved organizing another training camp. The Rockwood camp took place between May 20 and 22, 2006, at which time Durrani and Ahmad had 18-inch knives.[38] These knives may have been stolen in advance of the camp.[39] Knives of this length are not common or "everyday" knives and may have been procured specifically to undertake the stated intent of the plot: to behead members of parliament, specifically the Prime Minister. There is less clarity on what happened at the Rockwood camp or what other goods may have been procured as Shaikh was not invited to attend.

There is some indication that throughout the course of events, Ahmad had access to at least some funds since he rented the car for Dirie's ill-fated attempt to procure weapons in Ohio in phase 1 of the plot.[40] Ahmad may have raised whatever meagre resources he had from his own personal funds (self-financing), but he also solicited funds from members of his plot. In one instance, one of the young offenders agreed to give Ahmad his $20 weekly allowance[41] as a contribution towards the plot.

Ahmad's main financing activities involved obtaining weapons, or at least talking about obtaining weapons. In February 2006, Ahmad said that he had paid a $4,000 deposit on guns but was unable to pay the balance.[42]

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37 Teotonio, "Toronto 18: An Exclusive Account."
38 *N.Y.*, CanLII at para 109.
39 Speckhard and Shaikh, *Undercover Jihadi*, 3905.
40 Shephard, "Toronto 18 Plotters."
41 Teotonio, "Toronto 18: An Exclusive Account."
42 *N.Y.*, CanLII at para 70.

He indicated that the deposit also covered hand grenades and high-powered firearms that were to be sourced from Mexico.[43] Due to Ahmad's lack of credibility, it remains unclear if this actually occurred and, in all probability, did not. Following his arrest, police seized camping equipment, machetes, and a dozen two-way radios from his house. Given his prior theft and encouragement of theft in others, these goods were likely stolen.[44]

The police informant, Mubin Shaikh, appears to have made the most concrete use of funds to support Ahmad's activities. He purchased 250 rounds of ammunition for a handgun in Ahmad's possession[45] and on December 30, 2005, Ahmad asked Shaikh to buy a box of 9mm Luger ammunition and 14 targets.[46] It is unclear from the extant material whether Shaikh used his personal resources to buy these supplies, if the police provided him with the funds, or if Ahmad did. Regardless, Shaikh was the main mechanism for obtaining these goods.[47] In some cases, the RCMP provided funds for the plot, such as when Ahmad found a surveillance camera and Mubin suggested selling the camera. In fact, Mubin "sold" the camera to the RCMP.[48]

From the court records and media reporting, there is no indication that Ahmad undertook other financing activities, such as the management, storage, or obscuring of funds, and, in all likelihood, his plot was significantly constrained by a lack of funds (as well as a lack of concrete planning and preparation, a related issue). Ahmad did have access to some funds, potentially money he diverted away from his social assistance benefits.[49] His plot also suffered from a common terrorist issue: efforts to conduct large-scale, complex, high-casualty attacks. At one point, Ahmad suggested that he needed $50,000 and 600 men for his attack.[50]

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43 Teotonio, "Toronto 18: An Exclusive Account."

44 *N.Y.*, ONCA at para 84.

45 *N.Y.*, CanLII at para 26.

46 R v. Amara, 2010 ONSC 441.

47 In the trial of one of the young offenders, defence council argued that Shaikh was "liable for prosecution under virtually every provision [in the *Criminal Code*] relating to terrorism," but the trial judge did not accept this argument and found that "even if Shaikh had engaged in the criminal and other conduct alleged, the conduct was not 'sufficient egregious' to justify the 'rare case' imposition of a stay of conviction." See *N.Y.*, ONCA at paras 136–37.

48 Speckhard and Shaikh, *Undercover Jihadi*, 3845.

49 Speckhard and Shaikh, *Undercover Jihadi*, 2811.

50 Speckhard and Shaikh, *Undercover Jihadi*, 2753.

1. Alternative Efforts to Finance Ahmad's Plot

Only one individual was charged with a terrorism-financing-related offence in the entire cell: Steven Chand. Chand was convicted of "counselling to commit fraud over $5,000, for the benefit of, at the direction of, or in association with the same terrorist group, thereby committing an offence contrary to s. 83.2 of the *Criminal Code*."[51] However, Chand's activities were entirely hypothetical. He provided suggestions or advice on how to obtain money through the counselling of fraud, but this never actually occurred. The distinction between hypothetical and actual terrorist financing activities is critical: terrorist actors may have elaborate plans to raise and use funds, but few put them into practice.

Ahmad recognized that his plot was limited in scope and execution, in part due to a lack of financial resources, and he sought out assistance from Chand to rectify this shortcoming. Chand's fundraising efforts were directed towards raising the rest of the money for the assault rifles that Ahmad claimed to have put a down payment on.[52] Chand introduced Ahmad to Thomas Stella who could help him generate funds through financial schemes to help fund the plot.[53] The plot members believed that Stella engaged in bank and mortgage fraud through identity theft and the creation of false identities.[54] Stella detailed two moneymaking schemes. The first involved recruiting drug users (namely "white girls") who would use fake IDs to secure loans of between $10,000 and $25,000, which would then be cashed at an outlet.[55] The second scheme involved creating a false identity using the social insurance number of someone who had died or left Canada. Over time, this number would be used to build a good credit rating. Later, drug users would be recruited to apply for a mortgage or large-scale loan using this number.[56] Neither of these schemes were actually carried out to finance the Toronto 18 terror cell or its plots, and they were longer-term schemes that would have likely been detected given the plot members' relative lack of expertise in this type of financial crime and

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51 *Chand*, ONSC at para 2.

52 *Chand*, ONSC at para 47.

53 Teotonio, "Toronto 18: An Exclusive Account."

54 *Chand*, ONSC at para 48.

55 Isabel Teotonio, "Blondes part of plot, court told," *Toronto Star*, June 6, 2008, https://www.thestar.com/news/gta/2008/06/06/blondes_part_of_terror_plot_court_told.html.

56 By obtaining, using, and re-paying credit using the stolen SIN number, they would potentially be able to obtain a higher credit amount, such as for a mortgage or loan.

financial institutions' relatively advanced ability to detect fraud. These schemes would have taken months, if not years, to execute.

C. Phase 3 (Amara's Plot)

By March 24, 2006, Amara was proceeding with his own plot[57] to construct improvised explosive devices and deliver them to (likely) three locations in downtown Toronto.[58] In terms of the source of funds, Amara worked at a Canadian Tire gas bar,[59] but most of that money likely went to support his family, and little (if any) was diverted to his terrorist activity. Amara may have been given funds by other members of the plot, but there is no information to suggest that this is the case. Amara acquired money for the plot by maxing out his credit cards, using a student loan,[60] and receiving contributions from the group.[61] At the time of his arrest, he had a significant amount of cash on hand; he likely withdrew the funds from his accounts and conducted much of his acquisition activities in cash, a basic form of financial tradecraft meant to obscure the use of funds. Over the next decade, self-financing of terrorist activity through loans would become a significant method of terrorist financing for plots and attacks,[62] and, in fact, had already formed the basis of funding for both the London 7/7 terrorist attacks,[63] as well as a terrorist plot in Sydney in 2005.[64]

A potential alternative source of funds for Amara's plot was Abdelhaleem, who had the most financial resources of anyone in the Toronto 18. He was a computer engineer, earned a six-figure salary, and

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57 *Amara*, ONSC at para 18.

58 *N.Y.*, CanLII at paras 5, 73.

59 Shephard, "Toronto 18 Plotters."

60 Teotonio, "Toronto 18: An Exclusive Account."

61 Speckhard and Shaikh, *Undercover Jihadi*, 3130.

62 For instance, the San Bernardino shooters funded their attack, in part, through a personal loan. See Maggie McGrath, "Why it Would Have Been Perfectly Legal for the San Bernardino Shooter to Borrow $28,500 From Prosper," *Forbes*, December 8, 2015, https://www.forbes.com/sites/maggiemcgrath/2015/12/08/why-it-would-have-been-perfectly-legal-for-the-san-bernardino-shooter-to-borrow-28500-from-prosper/.

63 U.K., HC, *Report of the Official Account of the Bombings in London on 7th July 2005*, (Cm 1087, 2006), 23, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228837/1087.pdf.

64 Austl, AUSTRAC, *Terrorism Financing in Australia 2014*, *Commonwealth of Australia* (2014), http://www.austrac.gov.au/publications/corporate-publications-and-reports/terrorism-financing-australia-2014.

drove a BMW convertible. He also sought to profit from the attacks by playing the stock market (one of the potential targets).[65] However, while Abdelhaleem was involved in communicating with the second police agent with regard to the amount of chemicals Amara was seeking to make the bombs, there is no indication that he actually provided the funds for the improvised explosive devices. Other possible methods to finance the attack could include diverting money by other plot members from student loans or bursaries. For instance, Saad Gaya was a McMaster University student at the time of the plot,[66] but there is no evidence that he provided funds for the plot.

Amara's intent was to use the funds acquired to stage the "Battle of Toronto." This attack would involve three U-Haul trucks: one parked at the corner of Bay and King streets in Toronto with one tonne fertilizer bombs containing shrapnel (metal chips). This location was chosen for its proximity to the Exchange tower and the Toronto offices of the Canadian Security Intelligence Service.[67] There would be a similar setup at the CN Tower, and potentially a third target as well: a military base along Highway 401 (likely Canadian Forces Bases Trenton or Kingston).

Amara demonstrated significant flexibility in his planning and acquisition of material, particularly as part of his operational security. He had two plans for the purchase of the material for the bomb: one involved a bulk purchase through a friend (the second police agent in the case), while the other involved smaller purchases of chemicals (fertilizer, bleach, and household items) to make the bomb.[68] Amara ultimately purchased three tonnes of ammonium nitrate fertilizer (that was instead replaced with a benign substance) in bulk from an undercover agent. These chemicals cost $5,500, and Amara paid cash.[69] Amara also purchased material to make his improvised explosive devices such as a circuit board, a black box, a battery pack,[70] transistors, wires, electronic supplies, and multiple cell phones.[71] Amara also ordered three phone kits that created the ability to remotely turn equipment on or off with your phone from a company in Texas,[72] at a

65 Shephard, "Toronto 18 Plotters."
66 Shephard, "Toronto 18 Plotters."
67 Teotonio, "Toronto 18: An Exclusive Account."
68 *Amara*, ONSC at para 22.
69 Teotonio, "Toronto 18: An Exclusive Account."
70 Teotonio, "Toronto 18: An Exclusive Account."
71 Teotonio, "Toronto 18: An Exclusive Account."
72 *N.Y.*, CanLII at para 73.

cost of approximately $50 each. Amara also planned to rent 14-foot U-Haul trucks for the attack.[73] The improvised explosive devices alone would likely have cost at least $6,000.

Amara's main use of funds was for the bomb-making material, but he also spent money on operational security. Saad Khalid (likely with money from Amara) rented the warehouse (essentially a safe house for the construction of improvised explosive devices) where the fake explosive material was delivered.[74] "On May 1, Amara bought three pagers to be used by Khalid, Gaya and himself to communicate."[75] On June 2, Khalid and Gaya purchased a large quantity of corrugated boxes and plastic bags in which the plotters intended to store the fertilizer.[76] The boxes were also part of their operational security measures as they were specifically purchased in order for the plotters to detect any tampering with the materials. Amara also purchased t-shirts with the logo "Student Farmers" on them[77] and ordered "Student Farmer" business cards (200),[78] an attempt to develop a cover story for buying the ammonium nitrate fertilizer.

Amara primarily moved and stored his funds in cash. When he was arrested, $12,380 was found at his house along with $50 USD. Amara also appears to have given Gaya some of the operational funds, as he had $9,150 in cash in his backpack when he was arrested.[79] The funds were kept at Amara's home in envelopes in his safe.[80] This was by no means extraordinary: the use of cash is very common in terrorist attacks and plots, as it helps to obscure the electronic trail created by purchases, and it is also how individuals involved in nefarious activity, such as dealers in illicit weapons, accept payment.

Amara's management of funds for the attack was extensive. He conducted detailed planning for his terrorist plot and determined that the plan would cost $20,000 for Canadian expenses, including the bomb-making material, rental of a storage facility, and U-Haul trucks,[81] with

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73 Teotonio, "Toronto 18: An Exclusive Account."
74 Shephard, "Toronto 18 Plotters."
75 *Amara*, ONSC at para 28.
76 *Amara*, ONSC at para 35.
77 Teotonio, "Toronto 18: An Exclusive Account."
78 *Amara*, ONSC at para 16.
79 *Amara*, ONSC at para 36.
80 *Amara*, ONSC at para 25.
81 Teotonio, "Toronto 18: An Exclusive Account."

another $10,000 for travel and living expenses in Pakistan for those that intended to flee after the attack.[82] In total, Amara had acquired at least $27,000 to use for the plot and his get-away plan, not counting the other, smaller expense he incurred in planning for his improvised explosive devices and constructing a cover story for his purchases. Amara's planning for the plot was detailed and specific, and he included accurate estimates for how much the material would cost. This level of detailed planning is rare; most terrorists ballpark their costs and finance their activities "on the fly" or on an as-needed basis.

While there was no terrorism financing charge applied in Amara's case, the funds found at his residence were subject to an order of forfeiture. This covered the $12,380 Canadian dollars and $30 U.S. dollars.[83]

Ultimately, Amara was able to fund the entirety of what had the potential to be a spectacular, potentially high-casualty attack. He accurately identified the costs of his plan, self-funded the plot, and deployed those funds in cash to secure the goods and material required. Amara's plan would not have been limited by lack of operational funds, as so many terrorist plots are.

IV. COUNTER-TERRORIST FINANCING IN CANADA IN 2006

The Toronto cell and its subsequent plots demonstrate the importance of financing for the execution of successful terrorist activity. The broader Toronto 18 cell had minimal financing, most of which involved self-funding of preparatory activities like training camps by members of the group. Ahmad's plot was limited in scope and execution, in part because of his inability to obtain funds (as well as by other operational and organizational limitations). On the other hand, Amara's plot was well funded and managed, and he was able to obtain (or so he thought) all the required material for his improvised explosive devices.

In terms of countering the financing of the plot, there is little evidence that financing was taken into consideration as part of the investigation or that a separate, financially-focused, parallel investigation took place.[84] There

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82 *Amara*, ONSC at para 23.

83 *Amara*, ONSC at para 3.

84 While this is a best practice, the implementation of parallel financial investigations in terrorism cases only became a formal recommendation from the Financial Action Task

were no specific terrorism financing charges laid (sections 83.02–83.04 of the *Criminal Code*), despite an abundance of financial activity on the part of Amara. There is also no indication that FINTRAC — Canada's financial tracking intelligence unit — played a role in preventing or detecting the financing of the plot.

As the Toronto 18 cell was engaging in training activities and the separate plots were under development, FINTRAC would have been settling into its new mandate to facilitate the detection, prevention, and deterrence of terrorist financing.[85] The Toronto 18 plot would have been one of the first exposures to an ongoing terrorist investigation for the organization. However, the Centre would likely have had little in the way of information that would have been relevant to a terrorist financing investigation. Under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (*PCMLTFA*), FINTRAC is mandated to collect information on a variety of transactions, including large cash transaction reports, electronic funds transfers, suspicious transaction reports, and terrorist property reports.[86] Some of Amara's activities might have been reported to FINTRAC through suspicious transaction reports, but only if his withdrawal of funds raised suspicions at his financial institution. Even if his activity had been reported to FINTRAC, the Centre receives hundreds (at least) of these reports every year, meaning that FINTRAC would have had little chance of identifying this as terrorist financing.[87] Minimal amounts of

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Force (FATF) in 2012. See *FATF Report: Operational Issues Financial Investigations Guidance* (Paris, France: FATF, 2012), https://www.fatf-gafi.org/media/fatf/documents/reports/Operational%20Issues_Financial20investigations20Guidance.pdf.

85 The *Proceeds of Crime (Money Laundering) Act* was amended in 2001 to include terrorist financing, becoming the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17 [*PCMLTFA*]. See Financial Transactions and Reports Analysis Centre of Canada, *Proceeds of Crime (Money Laundering) and Terrorism Financing Act* (Ottawa: FINTRAC, last modified August 16, 2019), http://www.fintrac-canafe.gc.ca/act-loi/1-eng.asp. The *Act* was amended to comply with Canada's international obligations to criminalize terrorist financing, as per UN Resolution 1373, which calls on states to prevent and suppress the financing of terrorist acts. See *Resolution 1373 (2001)*, S Res 1373, UNSC, https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

86 For a full list of FINTRAC reports, see Financial Transactions and Reports Analysis Centre of Canada, *Financial Transactions that Must be Reported* (Ottawa: FINTRAC, last modified August 16, 2019), http://www.fintrac-canafe.gc.ca/reporting-declaration/rpt-eng.asp.

87 FINTRAC's 2007 annual report (which covered 2005–2007), does not provide the total number of suspicious transaction reports received, but did note that approximately 125

financial tradecraft[88] would have likely prevented any suspicions being raised, such as small and steady withdrawals of cash. It may have also been possible that FINTRAC would have received a large cash transaction report for any of the withdrawals that Amara made on his student loan or from his account (since he had cash well in excess of FINTRAC's reporting threshold of $10,000). While either of these reports could have been filed noting a significant cash withdrawal, there would not have been any connection to terrorism. The only instance in which a terrorist link might have been drawn was if and when reporting entities became aware of the names of the individuals in the cell; then, suspicious transaction reports or terrorist property reports would have been submitted to FINTRAC. Fundamentally, the financing of Amara's plot was unlikely to trigger any reports from financial institutions in Canada, nor any proactive disclosures on the part of FINTRAC. Instead, any analysis and disclosure were likely to have been conducted post-arrest. This situation remains the case today. Whether or not FINTRAC, or other financial intelligence units, and indeed the international counter-terrorism financing regime, are well-positioned to detect operational terrorist financing remains an open question.[89]

The Toronto 18 arrests took place in the summer of 2006, a little over two years after the arrest of Momin Khawaja, the first person arrested under Canada's revamped *Anti-Terrorism Act*. Khawaja's arrest is particularly significant because he was charged with terrorist financing, a first in Canadian history, but had not yet gone to trial — his terrorism financing conviction and the reasons for judgement would not be released until 2008.[90] The lack of terrorist financing convictions in Canada at the time of the Toronto 18 arrests, as well as the pending Khawaja trial, may have played a role in counter-terrorism investigators' understanding of terrorist financing and the willingness of the Crown to pursue a terrorist financing charge in the Toronto 18 case.

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cases disclosed involved these types of reports. See *FINTRAC Annual Report 2007* (Ottawa: Public Safety Canada, 2007), https://www.publicsafety.gc.ca/lbrr/archives/cn000029669116-2007-eng.pdf.

88 Jessica Davis, "New Technologies but Old Methods in Terrorism Financing," (2020) Project Craaft Research Briefing No. 2 at 7.

89 Nicholas Ryder, "Is It Time to Reform the Counter-Terrorist Financing Reporting Obligations? On the EU and the UK System," *German Law Journal* 19, no. 5 (October 2018): 1169–189, https://doi.org/10.1017/S2071832200022999.

90 R v. Khawaja, 2008 CanLII 92005 (ON SC).

Another possible explanation for the lack of terrorist financing charges is that the RCMP may not have conceived of the financial activities of Amara and Ahmad as terrorist financing. Terrorist financing has often been conceptualized (especially in the immediate post-9/11 years) as an international activity that involves terrorist groups abroad. It may be that the RCMP did not consider the activities of the cell terrorist financing because of a lack of an international connection or outside funders of the plots.

Another possibility that may explain the lack of terrorist financing charges is that the RCMP did not have sufficient evidence to lay terrorist financing charges. Much of the financial activity that forms the basis of this analysis was disclosed through the course of the trials and pleas for members of the Toronto 18. As such, this information may have only come to light later in the process. If this is the case, it suggests that the RCMP may not have prioritized the collection of financial information or information relating to terrorist financing, possibly indicating a failure on the part of the RCMP to conceive of terrorist financing broadly and to collect evidence (including financial evidence) to support such an investigation.

In Canada, given that sentences for terrorist activities are served consecutively (rather than concurrently), there would have been an incentive for the prosecutors to pursue a financing charge, as this could have added several years to a sentence. However, given that the most likely candidate for a terrorist financing charge was Amara (and he was already facing charges that would result in a life sentence), it is also conceivable that the Crown determined that pursuing a terrorist financing charge was not in the public interest.

The Toronto 18 cell and subsequent plots were not without precedent in the international community. Significant parallels can be found, particularly in the financing, between the Toronto 18 and the terrorist attacks of July 7, 2005, in London. In those attacks, two of the perpetrators travelled to Pakistan, potentially to receive training. The attackers also engaged in a variety of outdoor activities during the lead-up to their attack planning and rented a flat that they used as a safe house and bomb factory. Like the Toronto 18 plot, one of the 7/7 bombers provided most of the funding for the attack. He had credit, multiple bank accounts, and a

£10,000 personal loan, withdrawing funds slowly over time to finance the attack.[91]

While the investigation into the London attack was likely still ongoing at the time of the Toronto 18 cell development, and the methods of financing not yet public, given the close working relationship between law enforcement in the Five Eyes,[92] it is conceivable that the RCMP would have had information related to the financing of the London attack or that it would have been available to them had they asked. Understanding the financing of terrorist attacks and plots is critical to be able to proactively detect, and ultimately investigate and prosecute, operational terrorist financing activity. Understanding how the London attacks were financed, and indeed other plots such as one that was disrupted in Australia during the same time frame, would have provided the RCMP with a framework from which to understand how domestic operational terrorist activity is financed, potentially leading to a more robust terrorism financing investigation and more concrete counter-terrorist financing results.

The decision not to pursue terrorist financing charges in the case of the Toronto 18 may have resulted in long-standing repercussions for Canada. Following this case, there have been very few convictions for terrorist financing in Canada.[93] Why those charges have not been brought remains the subject of much conjecture. Whether the issue lies in prosecutorial or investigative capability remains unclear, but the reason behind the lack of charges is worth further study given the extensive financial resources that are dedicated to countering terrorist financing in Canada[94] (as well as

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91 HC, *Official Account of the Bombings*, 23.

92 This is a colloquial term for several transgovernmental policy networks known as the "Five Eyes" that include Canada, the United States, the United Kingdom, Australia, and New Zealand. The "Five Eyes" multilateral agreement evolved from a U.K.-U.S.A. framework; the legal basis for the broader information-sharing agreement is not public, but likely constitutes a combination of bilateral and multilateral agreements. See Tim Legrand, "Transgovernmental Policy Networks in the Anglosphere," *Public Administration* 93, no. 4 (2015): 973–91, http://doi.org/10.111/padm.12198.

93 Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2 (2019).

94 Anita I. Anand, "Combating Terrorist Financing: Is Canada's Legal Regime Effective," *University of Toronto Law Journal* 61, no. 1 (2011): 59–72.

internationally)[95] and recent evidence that terrorist financing remains an issue in Canada.[96]

[95] Niclas-Frederic Weisser, "The Effectiveness of the Global Combat against the Financing of Terrorism for Preventing Terrorist Activity," *ZIS Online*, 2013, 347, http://www.zis-online.com/dat/artikel/2013_7-8_764.pdf.

[96] Financial Transactions and Reports Analysis Centre of Canada, *Terrorist Financing Assessment: 2018* (Ottawa: FINTRAC, last modified August 16, 2019), https://www.fintrac-canafe.gc.ca/intel/assess/tfa-2018-eng.

Trial by Jury and the Toronto 18

KENT ROACH *

ABSTRACT

This chapter examines the trial of Fahim Ahmad, Steven Chand, and Asad Ansari, which was the only jury trial in the Toronto 18 prosecutions and the first held under post 9/11 terrorism offences. Part II examines the role of juries in past national security trials. These include those that occurred after the 1837 rebellions; after the assassination of D'Arcy McGhee; after the 1885 Métis resistance; after the Winnipeg General Strike; and after the October Crisis of 1970. The third part examines the public record of the Toronto 18 jury trial, including decisions about what questions could and could not be asked by the accused about potential jurors and the decision to require the three accused to stand in the prisoner's dock. Part IV examines the future of jury trials in terrorism cases in light of the exploration of this topic by the Air India commission and 2019 reforms to jury selection. Although the jury is often conceived as a shield for the individual from the state, it can also be a sword that the state can wield against unpopular accused. Sometimes unpopular accused may be better off selecting, if they can, trial by judge alone.

Keywords: Jury; Challenge for Cause; Prejudice; Political Violence; Terrorism Trials; Race; Religion

I. INTRODUCTION

The Toronto 18 prosecutions included the first jury trial held under Canada's new terrorism offences enacted after 9/11. Fahim Ahmad, Steven Chand, and Asad Ansari chose trial by jury. Ahmad pled guilty in the middle of the jury trial. Chand and Ansari were subsequently found guilty by the jury.

The jury looms large in the collective mythology of Anglo-American criminal justice starting with the reference to a jury of peers in the Magna Carta of 1215. Nevertheless, the criminal jury is used much less in Canada than in the United States, England, and Australia. Moreover, there are real debates about whether the jury is a burden or a benefit for some accused.

Jury trials in Canada are only mandatory when the accused is charged with murder, treason, intimidation of Parliament, or piracy.[1] Parliament did not add the new terrorism offences it created in the aftermath of the 9/11 terrorist attacks to this short list. The accused in the two other trials in the Toronto 18 prosecution selected or "elected" trial by judge alone.

Those accused have a right under subsection 11(f) of the *Canadian Charter of Rights and Freedoms* to a jury trial because they face five years imprisonment or more. In cases of multiple accused, which is frequently the case in terrorism prosecutions, trial judges can also force trial by jury on accused if a co-accused selects trial by jury[2] unless severance into separate trials is ordered in the interests of justice.[3] The Attorney General also can require trial by jury.[4]

A. Outline

The second part of this chapter will discuss the role that juries have played in Canadian trials involving allegations of involvement with political violence or terrorism. These include trials from the 1837 rebellions, Fenian

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* Professor of Law, University of Toronto. I thank Ben Berger, Michael Johnston, and Michael Nesbitt for helpful comments on an earlier version of this chapter.

1 Criminal Code, R.S.C. 1985, c. C-46, ss. 469, 473. Even in these cases, there may be a trial by judge alone if both the accused and the prosecutor consent.

2 Criminal Code, s. 567.

3 Criminal Code, ss. 473, 591(3). This power has been ordered in cases where the evidence is substantially stronger against one of the accused and where evidence against one accused would not be admissible against another. R v. Guimond, [1979] 1 S.C.R. 960, 94 D.L.R. (3d) 1. Canadian courts, however, tend to be reluctant to sever the trials of accused charged in a joint enterprise even when the evidence is, as in the case at hand, more prejudicial against one accused (Ahmad) than the others (Chand and Ansari). For example, in *R v. McLeod* (1983), 6 C.C.C. (3d) 29 at para 6, the Ontario Court of Appeal dismissed an American case (see *Bruton v. United States*, 391 U.S. 123 (1968) that held separate trials were required in cases where it was unrealistic to expect the jury to separate out the evidence). The Canadian Court concluded: "whether a jury can or cannot rise above such evidence, there is no question that the law presumes they can."

4 Criminal Code, s. 568. This section has been challenged by the accused but upheld under the *Charter*. See R v. Hanneson (1987), 31 C.C.C. (3d) 560 (Ont HCJ).

violence and the assassination of D'Arcy McGhee, trials during the Red Scare and after the Winnipeg General Strike, and trials involving the FLQ. Although the jury is conceived as a shield for the individual from the state, it can also be a sword that the state can wield against unpopular accused. Sometimes unpopular accused may be better off selecting, if they can, trial by judge-alone. Indeed, the most controversial acquittal in a Canadian terrorism case – the 2005 acquittal of two men accused of participating in the 1985 Air India bombings – came from trial by judge alone. [5]

The third part will examine what is known about the one jury trial that was held in the Toronto 18 case. Unfortunately, the public record about the jury and its selection is surprisingly scarce. I was unable to discover any press coverage or transcript of the jury selection process or even any media reports about the selection and composition of the jury. What is known, however, is that the trial judge allowed 11 questions to be asked of prospective jurors in an effort to determine whether they could be counted on to act impartially despite the massive pre-trial publicity in the case and the possibility of racial and religious prejudice against the accused who were Muslim and, in the case of Fahim Ahmad and Asad Ansari, were also Brown.[6]

Unfortunately, we do not know how prospective jurors answered these questions and which ones were excluded for not being impartial. We also do not know how or if Ahmad, Chand, and Ansari exercised the 12 peremptory challenges they each had or how the Crown exercised the 36 peremptory challenges it had that allowed it to keep prospective jurors off the jury without providing reasons.[7] There are also no press reports about how the jury reached their verdict over five days of deliberation. Unlike in the United States, it is illegal for Canadian jurors to disclose their deliberations.[8] Finally, juries, unlike judges, do not give reasons for their verdicts; they merely announce findings of guilty or not guilty associated with each criminal charge (or that the jury could not come to a unanimous conclusion on a charge or charges in the case of a "hung jury"). Although an appeal was taken from the jury's conviction of Ansari, the appeal focused

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5 R v. Malik and Bagri, 2005 BCSC 350.

6 R v. Ahmad et al., 2010 ONSC 256 [*Ahmad*]. Chand did not identify as a visible minority and the actual question asked was whether prejudice would result because the accused "could be considered to be members of visible minorities."

7 Criminal Code, s. 634, repealed S.C. 2019, c. C-25, s. 269.

8 Criminal Code, s. 649.

on alleged errors of law that the trial judge made in admitting evidence and explaining the law to the jury and not on the jury's verdict itself. In short, the jury room and much of the jury selection process in this case remains opaque.

Part IV will discuss the future role of juries in Canadian terrorism prosecutions. As the Commission on the Air India bombings concluded in its 2010 report, juries are here to stay because of their constitutional entrenchment. About half of those accused of terrorism since 2001 who have gone to trial have elected trial by jury and about a half have elected trial by judge alone. Two accused of involvement in the 1985 Air India bombings that killed 331 people were acquitted in 2005 after a judge-alone trial. The Air India Commission rejected requests by the victims' families to make jury trials mandatory in terrorism trials. It also rejected proposals that terrorism trials should be heard by a panel of three judges as opposed to one trial judge.[9] Denying the accused a jury trial is more common in Europe – including in Northern Ireland where judge-alone trials were used in terrorism trials – and in many countries on the continent which lack a right to trial by jury.

The jury selection process in Canada has changed since the 2010 Toronto 18 jury trial. Peremptory challenges have been abolished in part in response to an all-white jury's acquittal of a white farmer who killed Colten Boushie, a Cree man. This case, like the Toronto 18 jury trial, raised the sensitive issues of for whom the jury is a benefit and for whom it is a burden. This question is informed by the way that systemic discrimination against Indigenous and racialized groups, as well as against those who are not Canadian citizens, adversely affects the representativeness of Canadian juries. This raises important questions about equality that the late legal philosopher Ronald Dworkin reminded us were fundamental as we debated the shifting balance between liberty and security after the 9/11 terrorist attacks.[10]

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9 Canada, *Commission of Inquiry into the Bombing of Air India Flight 182*, in *Air India Flight 182: A Canadian Tragedy*, vol. 3, Catalogue No. CP32-89/5-2010E (Ottawa: Supply and Services, 2010). I was the research director for this inquiry.

10 Ronald Dworkin, "The Threat to Patriotism," New York Review of Books, February 28, 2002, https://www.nybooks.com/articles/2002/02/28/the-threat-to-patriotism/.

II. A Short History of the Canadian Jury in Cases Involving Political Violence

The jury was seen as an integral part of the English colonial justice system in Canada. Although Quebec was allowed to keep its civilian private law, English criminal law was imposed in Quebec in no small part because of the guarantee of a trial by a jury of peers. The jury was seen as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy."[11] At the same time, allowances had to be made for the geographically large and sparsely populated country. Six-person, as opposed to 12-person juries, were used in the West. The highest court in England upheld Parliament's jurisdiction to reduce the jury to six people in the 1885 treason trial of the Métis leader Louis Riel.[12]

A. The Riel Trial

The Riel and other trials stemming from the 1885 resistance were held before a six-person jury in Regina who were publicly identified as Protestants (Riel and many of the Métis were Catholic). Father Andre, an observer of the trials, complained that the jurors were "all Protestants, enemies of the Métis and the Indians, against whom they hold bitter prejudices. Before such a jury you cannot expect an impartial judgment."[13]

Riel, as an American citizen, would have been entitled under the common law to a "mixed jury" of half citizens and half non-citizens had he been tried before such juries were abolished in the middle of the 19th century. If he had been tried a few years later in Manitoba or Quebec, Riel would have been entitled to a distinctly Canadian mixed jury of half Francophones and half Anglophones. These mixed juries were also subsequently abolished as more direct means to protect language rights developed. Nevertheless, mixed juries raise what is today the often-unspoken question of who sits on juries and whether the composition of the jury matters. As I have argued elsewhere, the mixed jury should not be dismissed as a medieval relic or a pernicious capitulation to identity politics.

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11 William Blackstone, *Commentaries on the Laws of England*, vol. 3, 8th ed. (1778), 379.

12 R v. Riel, (1885) 10 App Cas 675, 55 L.J.P.C. 28.

13 As quoted in Kent Roach, *Canadian Justice Indigenous Injustice The Gerald Stanley and Colten Boushie Case* (Montreal: McGill-Queen's University Press, 2019), 30.

All members of the jury must agree on a verdict.[14] The different perspectives incorporated in a mixed jury are a starting point, not an endpoint. Indeed, in terrorism trials when there may be a lack of understanding, fear, and even hatred of "the other," mixed juries may foster true impartiality.

B. The 1837 Rebellion Trials

Claims that juries were not impartial have been heard throughout Canadian history, though there is no way to prove or disprove such allegations of bias given the secrecy of jury deliberations. William Lyon Mackenzie condemned one jury after the 1837 rebellions as, "a mock jury selected of the basest, most dependent tories... picked up by the sheriff at Hagerman's order."[15] At the same time, four of the eight Toronto trials that went to trial before a jury resulted in acquittals. The accused in those cases made extensive use of peremptory challenges to eliminate those that they perceived as partisan.[16] It is easy to accuse a jury of being packed of partiality, but far more difficult to establish or rebut such claims.

In response to concerns about jury packing, complex legislation was introduced in 1850 in Upper Canada designed to ensure that all those who were entitled to vote would be eligible for jury duty. The voters' list, of course, was underinclusive. It excluded women, Indigenous peoples, and those who did not own property. Nevertheless, the 1850 reforms demonstrated some concern that juries be representative and that claims of jury packing and bias could be corrosive to public confidence in the administration of justice.

C. The Fenian Trials

Despite the 1850 reforms, there were failed attempts to challenge panels of prospective jurors in Ontario trials of alleged Fenians or Irish separatists. The Irish-Canadian press reported on, "how carefully the Irish element appears to have been eliminated from the jury panel."[17] At the same time,

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14 Roach, *The Gerald Stanley and Colten Boushie Case*, 90–124.

15 Paul Romney and Barry Wright, "The Toronto Treason Trials March–May 1838," in *Rebellion and Invasion in the Canadas 1837–1839*, eds. F. Murray Greenwood and Barry Wright (Toronto: University of Toronto Press, 2002), 106.

16 Romney and Wright, "The Toronto Treason Trials," 107.

17 R. Blake Brown, "'Stars and Shamrocks will be Sown' The Fenian State Trials 1866–67," in *Political Trials and Security Measures 1840–1914*, eds. Barry Wright and Susan Binnie (Toronto: University of Toronto Press, 2009), 53.

it appears that Catholics did serve on some of the juries in some of the Fenian cases. Moreover, some of the alleged Fenian terrorists who were American citizens exercised their common law right as non-citizens to have juries composed of half citizens and half non-citizens.[18] In any event, these cases indicate that fears about religious discrimination, in this case against the Catholic Fenians and in the Riel cases against the Catholic Métis, have been a constant in Canada's history of political violence.

The most famous Fenian trial was the trial of Patrick Whelan for the 1868 assassination of D'Arcy McGee, a Cabinet Minister who opposed the Fenian cause of which Whelan was a part. Whelan was convicted by a jury that was selected after Whelan had exhausted all of the 20 peremptory challenges that were available to him because he was charged with a capital offence. The Crown used peremptory challenges to keep people with Irish names – who might be perceived as sympathetic to the Irish-nationalist Fenian movement – off the jury.[19]

Although there were (and still are) an unlimited number of challenges for cause, i.e., challenges on the basis that a prospective juror cannot be impartial, one of Whelan's peremptory challenges was deemed to have been used to challenge a prospective juror who apparently had said before trial: "If I was on Whelan's jury, I'd hang him."[20] Another juror, who had said before the trial that it "looked like [Whelan] was guilty," was allowed to serve when he told the court that he had not "made up my mind one way or another."[21] Today, there are concerns that challenges for cause are not up to the task of ensuring impartiality in an age of 24-hours-a-day news and social media. Truth be told, such concerns have long existed.

There were other problems with Whelan's trial. Prime Minister John A. Macdonald sat on the bench with the trial judge for four days of the trial. The trial judge gave the jury a direction that was favourable to the

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18 Brown, "Fenian State Trials," 54.

19 The accused used peremptory challenges to keep people with French names off the jury perhaps because the only witness who testified that he saw Whelan shoot McGee was French-Canadian. T.P. Slattery QC, '*They Got to Find Me Guilty Yet*' (Toronto: Doubleday and Company, 1972), 58.

20 Michael A. Johnston, "Whelan Still Waiting," *Criminal Law Quarterly* 66, no. 19 (2018): 21.

21 Johnston, "Whlean Still Waiting," 22.

prosecution. It focused on Whelan's political opposition to McGee[22] and an alleged jailhouse confession, as well as circumstantial evidence that placed Whelan near the site of the assassination with a pistol. Upon being found guilty, Whelan said that Roman Catholics such as himself "are looked at as traitors, always traitors." He declared that he was not a Fenian and, moreover, that he was innocent of McGee's murder.[23] After several unsuccessful appeals on the jury selection issue, with strong dissents concluding that Whelan had been deprived of a challenge of cause,[24] Whelan was publicly executed in Ottawa in front of a crowd of 5000 people.

D. Red Scare Trials

Terrorism-type trials involved not only politically motivated violence as in the Whelan trial but also allegations of apprehended political violence. A jury composed mainly of farmers[25] convicted union leader R.B. Russell, one of the leaders of the Winnipeg General Strike, of seditious conspiracy in 1919. At trial, Russell wanted to have 12, as opposed to four, peremptory challenges. He was prepared to accept the risk of increased punishment in exchange for eight more peremptory challenges. The trial judge ruled against him.[26] Russell argued on appeal that he should have had more than four peremptory challenges in selecting the jury and that he was prejudiced by the introduction of some of the evidence against his co-accused. The Manitoba Court of Appeal dismissed the appeal with a number of judges

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22 The Crown in its closing argument told the jury "At one time the prisoner was reading a speech by D'arcy McGhee denouncing Fenianism. This excited him greatly, and he said he would 'go up and blow McGhee's bloody brains out.'" The trial judge told the jury that such "violent language could lead to the belief that he [Whelan] intended to assassinate McGhee." See Slattery, *Guilty Yet*, 257, 276.

23 Slattery, *Guilty Yet*, 280, 285–86. The trial judge when sentencing Whelan replied: "In this country Irishman are well treated. In this province your sect is equal to any other, and only across the river, you will find it actually superior...."At the time, the accused were not competent witnesses, but they were allowed to speak after the jury's verdict.

24 The trial judge in Whelan's case sat on both levels of appeals and voted to uphold his own judgment in part on the basis that he would have denied the challenge for cause in any event. R v. Whelan, [1869] O.J. 64 at 275, affirmed in [1868] O.J. 1 at 78–79. Sir John A. Macdonald refused to consent to a delay in the execution that might have allowed an appeal to the Privy Council in England.

25 Kenneth McNaught, "Political Trials and the Canadian Political Tradition," in *Courts and Trials: A Multidisciplinary Approach*, ed. M.L. Friedland (Toronto: University of Toronto Press, 1975), 149–50.

26 Jack Walker Q.C., "Prologue: The Great Canadian Sedition Trials (2nd Ed.)" *Manitoba Law Journal* 42, no. 5 (2019): 71

calling the Winnipeg General Strike "a wide-spread system of terrorism" with citizens "subjected… to terror."[27]

In a subsequent sedition trial in 1919, seven co-accused argued that the Crown's ability to make unlimited stand asides of prospective jurors allowed it to pack the jury. The accused offered to simply take the first 12 jurors randomly selected. Both the Crown and the trial judge rejected the offer after having consulted with the Court of Appeal. A junior prosecutor in 1919 who subsequently became President of the Exchequer Court, Joseph T. Thorson, recalled that the Crown had a "dossier" prepared by the Mounted Police on all prospective jurors. He was "shocked at the fact that it… [was] possible to pack a jury, strictly in accordance with the law, in such a way that there is no possibility of an acquittal for the accused, and I believe that this was the situation in the case of the trial of the strike leaders."[28]

Later during the Red Scare, Tim Buck and eight others were convicted of being members of an unlawful association. The jury only deliberated for two hours, and the accused were sentenced to five years imprisonment.[29] The judge told the jury that while section 98 of the *Criminal Code*, which prohibited groups that would bring about "governmental, industrial or economic change" by "force or violence" was criticized by the accused as a "harsh law" and "whether it is harsh or not, it is the law… it is the duty of every loyal Canadian citizen to peacefully submit to the law."[30] An alternative "workers jury" found Buck not guilty even though Buck and his co-accused had challenged many on his real jury and obtained a jury of "trade workers and farmers."[31]

E. FLQ Trials

Pierre Vallières was convicted by a jury of manslaughter and sentenced to life imprisonment for his alleged involvement in a 1966 FLQ bombing. Much of his trial focused on his radical writings and the prosecutor improperly warned the jury: "[g]entlemen, free the accused [Vallières] and

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27 R v. Russell (1920), 51 D.L.R. 1 at 11, 29, 33 C.C.C. 1 (Man CA).

28 Walker, "Canadian Sedition Trials," 177.

29 Reg Whitaker, Gregory S. Kealey, and Andrew Parnaby, *Secret Service: Political Policing in Canada from the Fenians to Fortress America* (Toronto: University of Toronto Press, 2012), 121.

30 Dennis G. Molinaro, *An Exceptional Law: Section 98 and the Emergency State, 1919–1936* (Toronto: University of Toronto Press, 2017), 116.

31 Molinaro, *An Exceptional Law*, 94.

you will know what will happen." His conviction was overturned on appeal, in part because of the prosecutor's (apparently successful) appeal to the jury's "passion and prejudice."[32] Nevertheless, Vallières was convicted by jury on a retrial only to have that jury conviction overturned again by the Quebec Court of Appeal.[33] Some in Quebec, such as Dr. Henry Morgentaler who was acquitted multiple times by juries for violating Canada's restrictive abortion law, would have seen the jury as an important shield from the state. Vallières, the Marxist and author of *Nègres blancs d'Amérique*, would likely have seen the jury more as a sword. He certainly did better once his case was considered on appeal by independent and professional judges as opposed to lay jurors.

In his trial for the murder of Quebec Cabinet Minister Pierre Laporte during the October Crisis of 1970, Paul Rose was six times denied the right to use a peremptory challenge (ie. without giving reasons) after he unsuccessfully challenged the impartiality of prospective jurors on the basis that they were prejudiced against him by pre-trial publicity and his involvement in the FLQ. In a 3:2 decision, the Quebec Court of Appeal confirmed Rose's murder conviction even though the English common law had allowed the accused to use peremptory challenges after a failed challenge for cause that itself might prejudice a juror against the accused.[34]

F. Is Trial by Jury a Benefit for those Accused of Terrorism?

The above historical cases raise the question of whether trial by jury is always of benefit for unpopular accused.[35] The Canadian *Criminal Code* was amended in 1909 to allow the Attorney General to require trial by jury even in cases where the accused elected trial by judge alone.[36] The amendment was explained in Parliament as responding to the possibility that an accused might want a trial by a judge alone who was "unduly friendly to the accused."[37] Eighty years later, the Supreme Court of Canada rejected the

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32 R v. Vallieres, [1970] 4 C.C.C. 69 (QC QB).

33 R v. Vallieres, (1973) 15 C.C.C. (2d) 241 (QCCA).

34 R v. Rose (1973), 12 C.C.C. (2d) 273 (QCCA).

35 For other arguments, including those based on social science evidence that jurors may not be able to follow warnings from judges or understand the complexity of expert evidence, see Benjamin L. Berger, "Peine Forte et Dure: Compelled Jury Trials and Legal Rights in Canada," *Criminal Law Quarterly* 48, no. 2 (2003): 205–48.

36 An Act to amend the Criminal Code, S.C. 1909, c. 9, s. 2.

37 As quoted in J.C. Martin Q.C., *Martin's Criminal Code, 1955* (Toronto: Cartwright and Co., 1955), 785.

argument made by a woman who was accused of hiring someone to kill her husband that she had a right to a judge alone.[38]

Today, jury trials for murder and treason (but not terrorism) remain mandatory unless the Attorney General and the accused both consent to trial by judge alone. Canada's longest terrorism trial involving the 1985 Air India bombings was held before a judge sitting alone even though it involved murder counts. It resulted in the acquittal of both men charged with the murder of 331 people.[39] As will be seen in Part IV of this chapter, this led to opposition by some, including the families of the 331 victims of the Air India bombings, to trial by judge alone. The operative assumption here was that a jury would have been more likely to have convicted those accused of the deadliest act of terrorism in Canadian history.

The Supreme Court has affirmed the secrecy of jury deliberations[40] and held that it would not inquire when a juror complained that another juror had used racial slurs during deliberations. In contrast, the United States Supreme Court has allowed such an inquiry.[41] In general, the United States is less protective of its juries than Canada. The United States allows prospective jurors to be extensively screened by the parties before they are selected. It attempts to control the discriminatory use of peremptory challenges either by prosecutors or the accused. It also allows jurors to be interviewed by the press after they have reached their verdicts. The Canadian jury, including the one used in the Toronto 18 case, remains a particularly opaque black box.

III. The Toronto 18 Trials and Trial by Jury

Two of the Toronto 18 trials were conducted before a judge alone and resulted in convictions of one adult and one youth. The third and last trial resulted in Steven Chand and Asad Ansari being convicted by a jury and Fahim Ahmad pleading guilty during the middle of the trial.

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38 R v. Turpin, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8. For a similar conclusion in the United States, see *Singer v. U.S.*, 380 U.S. 24 (1965). But for powerful arguments that the jury can be a disadvantage, see Berger, "Compelled Jury Trials."

39 Canada, *Bombing of Air India Flight 182*.

40 R v. Pan, 2001 SCC 42 at para 17, [2001] 2 S.C.R. 344.

41 Peña-Rodríguez v. Colorado, 137 S. Ct. 855 (2017).

A. Jury Selection and Questions Asked of Prospective Jurors

In late March 2010, the *Toronto Star* reported that:

> [T]he court will begin the arduous task of vetting 1,168 prospective jurors. It's expected that it will take about a week and a half to sift out those who, for various reasons, cannot sit through the trial, which could last up to two months. Then lawyers will begin to whittle down the pool of prospective jurors with a list of 11 carefully crafted questions until they select 12. The selection process could last up to a month."[42]

In fact, the process of selecting the jury took only a week.[43]

B. Yes to Eight Questions about Pre-trial Publicity

The trial judge, Justice Fletcher Dawson, decided that 11 questions would be asked of the prospective jurors to determine if they would be impartial and decide the case only on the basis of the evidence that they heard. He allowed the following eight questions about exposure to the extensive pre-trial publicity in the case, including those surrounding the June 2006 arrests and press conference. This included reports of planned attacks and beheadings at Parliament, which were allegations that would feature in the Crown's case against Fahim Ahmad:

> On June 2, 2006, the accused in this case were arrested and charged with terrorism-related offences. They are part of a case that has been referred to in the media as the "Toronto 18."
>
> 1. Have you seen, heard or read anything about this case, on the television or the radio or in the newspapers?
>
> 2. Have you seen, heard or read anything about this case on the internet?
>
> 3. Have you talked about this case with anyone?
>
> 4. Have you heard anyone talk about this case?
>
> 5. (If applicable) Would you describe your memory of what you have seen, heard or read as strong, fair or poor?
>
> 6. (If applicable) As a result of anything you have seen, heard or read, have you formed an opinion about the guilt or innocence of the accused?

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42 Isabel Teotonio, "Last three Toronto 18 defendants head to trial: Month-long jury process will begin Monday as landmark terrorism case enters its final phase," *Toronto Star*, March 22, 2010.

43 "Nearly Four Years After Toronto 18 Arrests Last Trial in Terror Case Begins," *City News*, April 11, 2010, https://toronto.citynews.ca/2010/04/11/nearly-four-years-after-toronto-18-arrests-last-trial-in-terror-case-begins/.

> 7. (If applicable) Would you describe the opinion you have formed as strong?
>
> 8. Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence at trial and the instructions of the trial judge?[44]

These questions sought much preliminary information about what the prospective juror had heard from conventional media and "the internet" before asking the last question about whether the juror could set aside any opinions and decide the case only on the evidence at trial. As such, the questions seemed better designed to reveal the exposure of prospective jurors to prejudicial pre-trial publicity than relying on the last question, which demanded a simple and blunt yes/no response.[45]

The eight questions also provided the parties with information that they might use to bring peremptory challenges even if the two jurors appointed to judge the prospective jurors' responses to these questions accepted a prospective juror as impartial. The trial judge allowed these eight questions despite the traditional concerns that Canadian judges have displayed about protecting the privacy of prospective jurors. Canadian courts have traditionally avoided extensive questioning because of concerns about the privacy of prospective jurors.[46] The eight questions allowed in this case responded to the reality of the extensive and prejudicial pre-trial publicity in the case.[47]

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44 *Ahmad*, ONSC at para 53.

45 The Crown proposed a single question, namely: "There has been substantial media coverage of this case. Will you be able to set aside anything you have heard or seen about this case in the media and reach a verdict based solely on the evidence you hear in this court room and the instructions you receive from Justice Dawson?" See *Ahmad*, ONSC at para 12.

46 R v. Hubbert (1975), 29 C.C.C. (2d) 279 (Ont Sup Ct).

47 On an application for a publication ban, Justice Sprout recognized: "Simply put this case must be near the top of the list in terms of cases in which massive and sustained media coverage raises a concern that fair trial rights may be compromised. The allegations could not be more sensational involving attacks on politicians and on public buildings. The allegations are also of a type likely to evoke an emotional or prejudicial response given that the terrorist threat alleged would pose a general threat to members of the public going about their ordinary lives. There would be few people in Peel Region who would not themselves, or have family or friends who, ride the Toronto subway and frequent public buildings. Prospective jurors would recognize themselves as possible targets of the conduct alleged.... For a multitude of reasons this is an emotionally charged case. It stands to reason that strong emotions may cause or contribute to, and

In contrast to the above questions on pre-trial publicity, the trial judge would only allow more simplistic "yes/no" questions about whether prospective jurors would be able to decide the case fairly given that the accused were visible minorities and Muslim.

C. No to Multiple Choice Questions About Racial Prejudice

Jamaal James (who was a co-accused who would subsequently plead guilty and was the only Black accused) was, "not content with a question calling for a yes or no answer. He submit[ted] that a multiple-choice answer would be more effective in uncovering bias and would assist the triers in deciding whether the prospective juror is impartial." James proposed that the following be read to prospective jurors after a question about their ability to decide the case impartially and without racist bias was asked:

> "Which answer most accurately reflects your answer to that question?
>
> (a) I would not be able to judge this case fairly.
>
> (b) I might be able to judge this case fairly.
>
> (c) I would be able to judge this case fairly.
>
> (d) I do not know if I would be able to judge this case fairly."

Justice Dawson rejected this request despite James' reliance on a decision by Justice Durno that would have allowed such a question after Justice Durno had heard expert evidence that such questions were more effective in revealing racist bias.[48] Justice Dawson was concerned about "perverse

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I paraphrase Chief Justice Lamer, impressions that cannot be consciously dispelled." See R v. N.Y., 2008 CanLII 13374 at paras 37–39 (ON SC).

48 See *R v. Douse*, 2009 CanLII 34990 at para 195 (ON SC) where Justice Durno stated: "I accept there are problems with the question. First, it is a complex question with the potential juror having to ask themselves two questions. Second, the manner in which the question is often asked with the potential juror hearing the question for the first time when asked in the witness box, can lead to jurors who would be impartial being rejected because they think about their answer to a complex question. Third, the question calls for either a 'yes' or 'no' answer, with no variations available. Fourth, the challenge is determined on the basis of one word from the potential juror." He added: "the applicant submits that multiple-choice answers provide the triers with more and better information because the issues being addressed are complex and individuals' beliefs cannot always be defined by a 'yes' or 'no' answer. I agree. Giving the potential jurors several options for responding would allow them to more accurately provide their self-evaluation. It would give the triers a more accurate answer than the 'yes' or 'no.' While this variation would lengthen the challenge for cause procedure marginally,

results." For example, a juror who testified that they did not know whether they could judge the case fairly might still be accepted as impartial and sit on the jury. The judge also doubted that he would have authority under the *Criminal Code* to intervene in such an eventuality.[49] Finally, he also expressed concerns that the multiple-choice question would intrude on the privacy of the prospective jurors and take more time. He stressed that all of these reasons cumulatively influenced his decision not to allow the multiple-choice question.[50]

D. Yes to One Question about Racial Prejudice

In the end, prospective jurors were only asked one question about racial prejudice, namely: "All of the accused could be considered members of visible minorities. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged could be considered to be members of visible minorities?"[51] This question begged a simple yes or no response. It did not examine the potential interaction between the accused's colour, their religion, the pre-trial publicity, and the nature of the charges that they faced. In fairness to the trial judge, the courts have rejected challenges on the basis of the nature of the charges in cases dealing with drugs and sexual assault.[52] The issue here, however, is the possible interaction of racial and religious prejudice with both pre-trial publicity and the allegations of terrorism made at the trial.

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subject to a re-assessment after it was used in court, I do not see the increased time as a reason to maintain the one-word answers. I am also not persuaded at this time that this form will lead to applications to ask further questions to qualify the answers." See also Regina Schuller, Veronica Kazoleas, and Kerry Kawakami, "The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom," *Law and Human Behavior* 33, no. 4 (2009): 320 which found that the one blunt question was not effective in screening for racial bias but finding more open-ended or reflective questions made people more aware about how racial bias may affect their judgment.

49 *Ahmad*, ONSC at para 31. The decision about impartiality was, at the time, made by two triers otherwise qualified as jurors.

50 *Ahmad*, ONSC at para 33. In a subsequent terrorism trial, questions designed to reveal whether prospective jurors were "unsure" about the ability to put aside prejudices were also disallowed. See R v. Jaser, 2014 ONSC 7528 at para 17.

51 *Ahmad*, ONSC at para 51.

52 R v. Parks, 1993 CanLII 3383, 65 O.A.C. 122 (ONCA); R v. Find, 2001 SCC 32, [2001] 1 S.C.R. 863.

The trial judge's conclusion that the privacy of the jurors would be threatened if they were invited to provide a range of answers or that the jury selection process would be less efficient are not, in my view, convincing. The multiple questions would not have added substantially to the time spent on questioning. In addition, they would not have intruded into privacy. For example, they did not even ask why a prospective jury selected one answer compared to three alternative answers.

The strongest justification for not allowing the multiple-choice question may be the harm that might be caused should some of the jurors have admitted that they did not know whether they could judge the case fairly or that they might not be able to do so, but who nevertheless may have been accepted by the two triers as impartial and capable of sitting on the jury. The single question asked about racial prejudice would require a binary and perhaps simplistic "yes" or "no" answer.

E. No to Six Questions about Religious Prejudice

With respect to potential religious prejudice, Steven Chand proposed the following six questions to be asked of prospective jurors:

> From what you may, at any time, have seen, read or heard, have you formed an opinion that a Muslim would be more prone to acts of violence than those who follow other faiths?
>
> Would you describe this opinion as a strong one?
>
> Despite any opinion you may have formed, would you be able to set that opinion aside and decide the case only on the evidence at trial and according to the instructions of the trial judge?
>
> From what you may, at any time, have seen, read or heard, have you formed an opinion that a Muslim would be more prone to acts of terrorism than those who follow other faiths?
>
> Would you describe this opinion as a strong one?
>
> Despite any opinion you may have formed, would you be able to set that opinion aside and decide the case only on the evidence at trial and according to the instructions of the trial judge?

Like the multiple-choice questions on pre-trial publicity, these questions had an ability to enter into a conversation with prospective jurors that might reveal any bias they might have associating Muslims with violence and explore the strength of that bias. The questions also would have placed the parties in a more informed position to exercise peremptory challenges.

Chand's six proposed questions seem closely patterned on the questions that the trial judge allowed concerning pre-trial publicity. Nevertheless, Justice Dawson emphatically rejected them as "intrusive inquiries into the opinions and beliefs of prospective jurors that appear to be directed at finding out what kind of person they are for the purpose of deciding whether to exercise a peremptory."[53] The trial judge's objections may have been well-founded about another proposed question he rejected that would have asked prospective jurors whether they had attended a 9/11 memorial service.[54] But the judge's rejection of Chand's proposed questions discounted the reality of stereotypes associating Muslims with terrorism. In my view, there was a realistic possibility in Toronto in 2010 that at least some jurors might be more willing to conclude that a young Brown Muslim man had a terrorist intent as opposed to a young white man with no religious convictions.

Even accepting an assumption "that many Canadians believe that Islam is more violent than other religions", Justice Dawson concluded:

> [T]his does not establish a bias supporting a conclusion that some members of the jury panel may not be able to act impartially. As the Crown submits, and I agree, there is a difference between believing that terrorist offences are disproportionately committed by Muslims, and believing that all Muslims are prone to commit terrorist offences. While an informed prospective juror might reasonably believe that terrorism offences are disproportionately committed by a small subset of Muslims, that does not mean that they believe that the average Muslim is prone to commit a terrorist offence. An analogy might be drawn to asking jurors whether they believe that men are more likely to commit sexual assault than women. Most jurors would probably say yes. However, that does not mean that there is a reasonable prospect that they would exhibit partiality against all men charged with sexual assault.[55]

The trial judge's analogy to men accused of sexual assault failed to capture the cumulative effects of pre-trial publicity and the intersection of racial and religious bias that produced stereotypes associating Brown,

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53 *Ahmad*, ONSC at para 39.

54 As the trial judge concluded: "The fact that a prospective juror felt sympathy for the victims of those tragic events does not readily translate into a realistic prospect that they may not be impartial in judging the innocence or guilt of the accused in this unrelated case." Ibid at para 19. In another terrorism trial, a judge rejected a question to prospective jurors about his support of security certificate detainees on the basis that it did not relate to a realistic possibility of bias. See R v. Hersi, 2014 ONSC 1303 at para 28.

55 *Ahmad*, ONSC at para 41.

Muslim men with terrorism. It also avoided the issue that many jurors who would resist reasoning that men, because they are men, are likely to commit sexual assault would either be men themselves or have close family and friends who were men. It was less likely that jury members themselves would be Muslim or have close family or friends who were Muslim.

The trial judge also disputed the relevance of a 2005 opinion poll limited to 100 people in part because Brampton, where the trial was held, "is very multicultural"[56] with half of its residents being born outside of Canada. Brampton is indeed diverse, but some visible minorities would be ineligible for jury duty if they were not Canadian citizens. In 2016, a study suggested that only 7% of jurors in trials in Brampton were Black and 7% were Brown, even though visible minorities constituted 73% of Brampton's population.[57] The courts have been defensive when it comes to challenges to the representativeness of Ontario juries. They have rejected *Charter* challenges to the exclusion of permanent residents from juries[58] and the under-representation of visible minorities on suburban Toronto juries.[59]

F. Yes to Two Questions about Religious Prejudice

The one concession that the trial judge did make was to follow Ansari's counsel's request for a question that asked whether prospective jurors would be "affected by the fact that the men charged are Muslims who are alleged to have planned to target non-Muslim Canadians?" This question came closer to naming the type of bias that could have promoted an "us versus them" attitude among the jurors, though it stopped short of naming the bias as one associating Muslims with violence and terrorism. This question was appropriate, but it is not clear why it invaded the privacy of prospective

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56 *Ahmad*, ONSC at para 40.

57 Ebyan Abdigir et al., "How a broken jury list makes Ontario justice whiter, richer and less like your community," *Toronto Star*, February 16, 2018, https://www.thestar.com/news/investigations/2018/02/16/how-a-broken-jury-list-makes-ontario-justice-whiter-richer-and-less-like-your-community.html. Since that time, Ontario has changed to a more inclusive source list for jurors based on health cards. See Robert Cribb and Jim Rankin, "Ontario to expand pool for jury selection: Move to OHIP database from property ownership follows Star/Ryerson investigation," *Toronto Star*, April 19, 2019.

58 R v. Church of Scientology of Toronto (1997), 99 O.A.C. 321, 1997 CanLII 16226 (ONCA); R v. Laws (1998), 165 D.L.R. (4th) 301, 1998 CanLII 7157 (ONCA).

59 R v. Hoffman, 2019 ONSC 2462. For my additional arguments about the defensiveness of the judiciary with regards to jury representativeness, see Kent Roach, *Canadian Justice Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill Queens Press, 2019), 90–125.

jurors less than Chand's proposed questions. Given the extensive publicity surrounding the case, its racially and religiously charged atmosphere, and the fact that over 1,000 prospective jurors would be summoned to the Brampton Courthouse, it seems that public confidence could have been broadened had Chand's six proposed questions been asked even if more prospective jurors would have been rejected as a result.

The two questions asked of prospective jurors about possible religious prejudice and the last of the total 11 questions asked were:

> 10. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged are Muslim?
>
> 11. Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the men charged are Muslims who are alleged to have planned to target non-Muslim Canadians?[60]

These questions asked for simple "yes" or "no" responses from prospective jurors, though the last question had the potential for them to reflect whether they would have been unable to judge the evidence impartially if the victims of planned violence were "non-Muslim Canadians." The focus on non-Muslim potential victims begged the question that some of the potential victims may have been Muslim and suggested that prejudice was a matter of animosity between religions as opposed to stereotypes associating terrorism with Islam.

Unfortunately, there was no press reporting of how jury selection was done and no available transcript. I could also not find any press reports about the gender, racial, or presumed religious composition of the jury.[61] In a subsequent ruling holding that Asad Ansari had placed his character in issue and that religious and ideological evidence that Justice Dawson had originally ruled inadmissible could now be used by the Crown, the trial judge described the jury as "relatively youthful and very multicultural."[62]

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60 *Ahmad*, ONSC at para 51.

61 In Canadian law, a juror is a juror so long as they are Canadian citizens and otherwise qualified under s. 638 of the *Criminal Code*, including being competent in the language of the trial. The media, however, is not limited to the legal meaning. It could have, as it occurred in the subsequent Stanley/Boushie case, defined the jury on the basis of its perceived racial composition. On the differences between legal and media discourses, see Richard Nobles and David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000).

62 *Ahmad*, ONSC at para 10. For further discussion, see Emon and Mahmood in this volume.

The lack of media reporting on jury selection is troubling. It suggests complacency about the danger of racial and religious prejudice and pre-judgment in this emotive and highly publicized case. It is not possible to make any judgments about how the jury selection unfolded. For example, we do not know whether prospective jurors' answers to the above questions revealed widespread bias or pre-judgment of the case. We do not know how the prosecution used the 36 peremptory challenges available to it or how Ahmad, Chand, and Ansari exercised the 12 peremptory challenges that they each had and the degree to which this may have responded to the answers given by prospective jurors on the challenge for cause or attempts to make the jury representative. In the end, the process of jury selection remains as opaque as the jury's five days of deliberations even though the former was done in open court. This is consistent with an attitude that maximizes the privacy of jurors and complacency about the composition or preliminary views expressed by jurors. It seems to assume the less we know about our juries, the better.

G. The Accused in the Dock

The three accused lost a preliminary motion to be able to sit with their lawyers at the counsel table. The trial judge, Justice Dawson, indicated that: "While I am generally inclined to permit accused persons to sit outside the dock whenever possible, I am not convinced that prejudice accrues from being seated in the dock."[63] He stressed that this was a high-profile case, the accused were charged with terrorism, that two of them, Ahmad and Chand, had been convicted of institutional violations while detained for close to four years in pre-trial custody. In order to treat all the accused the same, all three, including Ansari who had been granted bail, would sit together in the prisoner's dock. The effect that this may have had on the jury is not known. There is, however, some social science evidence suggesting that juries are more likely to find accused who sit in the dock guilty.[64]

The trial took nine weeks. Press reports of the Crown prosecutor's opening submissions focused on Ahmad with the prosecutor telling the jury: "Fahim Ahmad began to talk about his plans to strike specific Canadian targets: Parliament, electrical grids, nuclear stations.... His plan

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63 R v. Ahmad et al., 2010 ONSC 1777 at para 20.

64 Meredith Rossner et al., "The Dock on Trial: Courtroom Design and the Presumption of Innocence," *Journal of Law and Society* 44, no. 3 (2017): 317–44. I thank Michael Johnston for bringing this study to my attention.

was to cripple Canadian infrastructure."[65] Ahmad seemed to be the focus of the trial, though he would later plead guilty, and the jury would never get to deliver a verdict about him.

Steven Chand's lawyer, Michael Moon, argued that his client "was no more than a potential recruit" who saw the Washago camp as focused on "winter survival tactics." He brought out that Chand would frequently leave the camp to smoke marijuana. He argued that Ahmad was "critical and mocking of Steven [Chand] for his peaceable and non-jihadi ways."[66] It was also reported that Chand would sometimes fall asleep at trial before the jury and that he "petulantly" replied "do I have to" after his lawyer told him to stay awake.[67]

Asad Ansari's lawyer, John Norris, argued that his client "was nothing but an extra in the video to fill out the numbers, to make the events look more impressive" and that he did not know the true purpose of the terrorist camp. He left before Ahmad's "Fall of Rome" speech calling for the destruction of Western society. At the same time, the jury "viewed video of the Washago camp, in which participants clad in camouflage clothing shot guns and hoisted a black flag of the style closely associated with international terrorist groups. The jury has heard weeks of evidence about how camp participants practiced military-style drills, from marches to obstacle courses, and listened to a send-off speech from ringleader Fahim Ahmad calling for the destruction of [W]estern society."[68]

The Crown also introduced evidence from a CD found in Ansari's bedroom that included photos of Osama bin Laden and masked militants holding automatic weapons and argued that this material was suggestive of Ansari's intentions.[69] In turn, Norris argued that his client was "an intelligent, curious young man who was interested in many things" and that "possessing such items is simply part of being a well-informed member of

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65 Allison Jones, "Criminal Toronto 18 trial opens," *The Guelph Mercury*, April 13, 2010.

66 Megan O'Toole, "Chand opposed extremism, lawyer says: 'Toronto 18' Case: Argues client was not part of 'inner circle,'" *National Post*, June 9, 2010.

67 Allison Jones, "Last of so-called Toronto 18 terror cases in the hands of the jury," *Canadian Press*, June 18, 2010.

68 Megan O'Toole, "Accused was 'nothing but an extra' in terror video: lawyer: Toronto 18 Case," *National Post*, June 8, 2010.

69 Megan O'Toole, "Toronto 18 accused 'scared of weapons,'" *National Post*, May 26, 2010, A6.

society."[70] Ansari also testified that 9/11 was a "watershed moment…after that where did I belong?" and that he "was adrift. I was lost. I had no direction in life." He testified that he considered both suicide and fighting for the insurgency in Iraq, but "quickly abandoned that idea."[71]

H. Ahmad's Guilty Plea

In May 2010, mid-way through the nine-week trial, Fahim Ahmad pled guilty to all charges. This was front-page news. It was also news to the jury who was told by the trial judge: "Mr Ahmad is no longer with us. Mr Ahmad last week decided to change his plea to guilty." The trial judge then explained that the guilty plea had "no impact on the guilt or innocence of the two men who remain on trial."[72] This may have been too much to expect from the jury. Ansari's lawyer, John Norris, unsuccessfully made this argument in an unsuccessful attempt to obtain a mistrial. The trial judge concluded that instructions to the jury not to use evidence against Ahmad against Ansari would be sufficient even though the evidence included 48 intercepts and Ansari was only a party in three of them.[73] This meant that the jury had the difficult job of separating the evidence against Ahmad, apparently including intercepts where he said they should go to Parliament to "cut off some heads" and "kill everybody,"[74] from the evidence against the remaining two accused.

I. Verdict

After five full 12-hour days of deliberations, the jury found Chand and Ansari guilty of participating in a terrorist group and also found Chand guilty of a fraud charge. The defence lawyers of both men expressed disappointment with the verdict. Chand's lawyer, Michael Moon, told the press: "Given the broad expanse of the law, anything could be caught up by it. You don't have to have done much to be caught for terrorism." Lead prosecutor Croft Michaelson said: "It was the result that we had always hoped for and expected." Mubin Shaikh, the informant who infiltrated the

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70 Allison Jones, "Accused Toronto 18 member didn't know of plot, did nothing criminal, lawyer says," *Canadian Press*, June 7, 2010.

71 Megan O'Toole, "'I was adrift, lost': Toronto 18 suspect," *National Post*, May, 2019.

72 Allison Jones, "Guilty plea in mid-trial from ringleader of so-called Toronto 18 terror group," *Canadian Press*, May 10, 2010.

73 R v. Ansari, 2010 CarswellOnt 11152 at para 2.

74 Jones, "Guilty plea."

terror cell, said he "completely disagreed" with the jury's finding in respect to Chand, whom he believed was innocent. "The jury did what they were called to do... I may disagree with the decision, but I accept the decision."[75]

J. The Different Culpability of the Three Accused

Several other chapters in this book examine the sentencing and parole of the Toronto 18.[76] The sentences received by the three men are relevant here because they demonstrate how the jury heard evidence about three accused with very different levels of involvement.

Fahim Ahmad was the leader and the most culpable. He pled guilty not only to participating in a terrorist group but also to importing firearms and instructing people to carry out activities for the purpose of a terrorist group. In sentencing him to 16 years imprisonment, the trial judge explained:

> Mr. Ahmad must bear considerable responsibility for embroiling other young men in his hateful pursuits. The wiretaps and other intercepts are replete with Mr. Ahmad fostering his views, instilling hatred and justifying terrorist acts in Canada on religious grounds. Mr. Ahmad is substantially responsible for virtually ruining the lives of a number of other young men who became involved in terrorist activities and now stand convicted of terrorism offences as a result of Mr. Ahmad's proselytizing.[77]

It is not known the extent to which the strong evidence against Ahmad – including his statements about storming Parliament – may have influenced the jury even after Ahmad had pled guilty during the trial.

Steven Chand attended the Washago training camp for its full 13-days duration. Chand also took a subsequent trip with the ringleaders to scout a location to hide in the far north of Ontario.[78] The trial judge sentenced Chand to nine years two months.[79]

The least culpable of the three accused was Asad Ansari, the only accused who was already on bail at the time of the trial. Ansari attended the camp from December 24 to December 29, 2005.[80] He was sentenced to six years and five months, which amounted to time served. It was one of the

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75 Megan O'Toole, "Final two 'Toronto 18' accused found guilty," *National Post*, June 23, 2010.

76 See Michael Nesbitt and Reem Zaia in this volume.

77 R v. Ahmad, 2010 ONSC 5874 at para 56.

78 R v. Chand, 2010 ONSC 6538 at para 36.

79 *Chand*, ONSC at para 95.

80 R v. Ansari, 2015 ONCA 575 at paras 20, 25–27.

lowest sentences received in a terrorism case not involving a youth.[81] The unanswered question was whether the jury struggled or was successful in separating the different evidence that they heard against the three accused.

K. Ansari's Appeal

Only Ansari appealed his conviction or finding of guilt. He argued that the trial judge had erred when he told the jury:

> If you were satisfied that while at the winter camp he offered his computer skills for the benefit of, at the direction of or in association with the terrorist group that would constitute participation in or contribution to the activities of the terrorist group under the first part of this question.[82]

The Ontario Court of Appeal held that the trial judge did not err because he could not have been expected, in the 2010 trial, to tell the jury about requirements that the Supreme Court would introduce in 2012 when upholding the broadly worded offence from a *Charter* challenge on the basis of overbreadth. Specifically, the jury in Ansari's trial was not told that participation should not include:

> Innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity", and "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.

These were activities that the Supreme Court of Canada effectively readout of the participation offence before it held in 2012 that it was not constitutionally overbroad.[83] One can only speculate whether the jury would have viewed Ansari's actions in a more benign light if they had been given such an instruction.

A critical issue at trial was whether the Crown had proven, beyond a reasonable doubt, the key subjective fault requirements that Ansari knowingly participated in a terrorist group and did so for the purpose of

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81 R v. Ansari, [2010] O.J. No. 6371. See generally Michael Nesbitt, Robert Oxoby, and Meagan Potier, "Terrorism Sentencing Decisions in Canada Since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases," *UBC Law Review* 52, no. 2 (2019): 561–64.

82 *Ansar*i, ONCA at para 168, leave to appeal denied 2016 CanLII 18915 (SCC).

83 R v. *Khawaja,* 2012 SCC 69 at para 53 as quoted in R v. Ansari, 2015 ONCA 575 at para 179, leave to appeal denied (SCC). Note that I represented the British Columbia Civil Liberties Association in *Khawaja*, and it argued (unsuccessfully) that the participation offence violated the *Charter*.

facilitating its ability to commit a terrorist act. It is likely that the jury disbelieved Ansari's testimony that he had no such knowledge about the group and intent to facilitate its ability to commit a terrorist act. [84] A jury's determinations of credibility are difficult to appeal in part because the jury does not give reasons for deciding why it believed or did not believe a witness, including the accused. If the case had been heard by judge alone, it is possible that the judge's reasons may have revealed appealable flaws, such as misapprehension of evidence,[85] or logical flaws in the reasoning process.[86] For example, a trial judge who said that he or she had relied upon some of the evidence relating to Ahmad's actions and words to convict Ansari might well result in an appeal court holding the verdict to be unreasonable. The same might occur if a trial judge had fixated on some of the prejudicial political and religious evidence that was entered against Ansari. It is much more difficult to hold that a jury's simply "guilty" verdict is deficient or unreasonable.

Writing for the Court of Appeal, Justice Watt stressed that the trial judge's decision to admit Ansari's undated departure letters to his family suggesting that might leave to fight for Allah was entitled to "substantial deference".[87] He concluded that the letters were relevant to Ansari's "state of mind (the intention to fight for Allah) which, in turn, tends to establish his motive for joining and his knowledge of the nature of the organization and the activities in which he participated and to which he contributed."[88] He added that the "departure letters engendered no palpable moral or reasoning prejudice. The letters revealed no extrinsic misconduct, only an intention to fight for Allah at some undefined location."[89] The Court of Appeal also held that the trial judge did not err in allowing the accused to be cross-examined on various political and religious materials that he possessed. By claiming that he was not a terrorist, Ansari had put his

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84 The Court of Appeal commented that the "the defence advanced at trial focussed principally on the fault element of the offence charged, in particular the elements of knowledge of the character of the group and the purpose underlying the appellant's camp attendance and computer assistance." See *Ansari*, ONCA at para 188.

85 R v. Lohrer, 2004 SCC 80.

86 R v. Beaudry, 2007 SCC 5; R v. Sinclair, 2011 SCC 40.

87 *Ansari*, ONCA at para 120.

88 *Ansari*, ONCA at para 116.

89 *Ansari*, ONCA at para 122.

character in issue and the trial judge had limited the amount of material introduced into trial.[90]

It is questionable whether the Court of Appeal's ruling fully accounted for the context of the Toronto 18 case and the post 9/11 attitudes towards Muslims and terrorism. The Court of Appeal's decision that the departure letters revealing that Ansari was willing "to die for Allah"[91] could be admitted raised concerns about whether the jury was sufficiently protected from giving undue weight to such evidence. The evidential value of the letters was limited. They were likely written a year before Ansari attended the Washago camp. Their prejudicial effect on the jury might have been great because it invoked stereotypes of Muslims willing to die for their religion and sometimes to kill innocent people while doing so. Despite this, the Court of Appeal confidently concluded that the acceptance of the letters as evidence would cause Ansari no "palpable moral or reasoning prejudice."[92]

Given the jury's lack of reasons and the secrecy of their deliberations, we do not know and probably will never know what, if any, weight the jury placed on the political and religious evidence or indeed why it concluded that the Crown had proven Ansari's guilt beyond a reasonable doubt. We only know that the jury deliberated for five long 12-hour days before reaching its unanimous verdict that both Ansari and Chand were guilty.

IV. THE FUTURE OF THE JURY IN CANADIAN TERRORISM PROSECUTIONS

A. The Difficult Choice of Trial by Jury or by Judge-Alone

Did Chand and Ansari make a mistake in electing trial by jury as opposed to trial by judge alone? A judge in a judge-alone trial would have been exposed to more potentially prejudicial evidence than the jury even if they had ruled the evidence inadmissible. At the same time, it is likely that a judge would have been less influenced by Ahmad's unexpected decision

90 *Ansari*, ONCA at paras 156, 160.
91 *Ansari*, ONCA at para 110.
92 *Ansari*, ONCA at para 122.

to plead guilty in the middle of the trial. Unlike jurors, judges know the many incentives that may lead a person to plead guilty.[93]

A judge trying the case alone might also have been less influenced by the religious and ideological evidence than a jury[94] and might have more easily divorced the evidence against Ahmad from the quite different evidence against Chand and especially Ansari. At the same time, Justice Dawson volunteered at sentencing that he shared what he assumed was the jury's view that Ansari's innocent explanations for his attendance at Washago were not credible. Given this statement it was possible that the trial judge would have convicted Ansari in a judge-alone trial.[95]

In any event, accused in terrorist prosecutions seem split about the comparative advantages of trial by jury or trial by judge alone. Michael Nesbitt's research has revealed that, as of early 2019, of the 19 individuals who have gone to trial to fight terrorism charges in Canada, nine were tried by judge alone and ten by a jury. Of these 19 individuals, five were acquitted. Three of these 19 accused have been acquitted by judge-alone trial and two, teenagers El Mahdi Jamali and Sabrine Djermane, were acquitted by a Montreal jury.[96]

It may be that some juries may recoil from branding people as terrorists even in the face of broadly defined offences such as participating in a terrorist group. One of the lawyers in the only jury acquittal of terrorism offences in Canada stated, "I think the jury knew that looking at… articles is not a crime. It is not a crime to be curious about what was going on in Syria."[97] At the same time, such a reaction would require the jury to have

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93 Judges have accepted that even innocent people may make rational decisions to plead guilty in the hope of receiving a less severe sentence. See R v. Hanemaayer, 2008 ONCA 580.

94 For an examination of this evidence, see Anver Emon and Aaqib Mahmood in this volume.

95 Justice Dawson stated: "Mr. Ansari testified at trial giving an innocent explanation for all of his activities. The jury obviously found that Mr. Ansari's testimony was not credible. I must say I reached the same conclusion. As I do not know the exact process by which the jury reached its verdict, or what findings of fact they made, I have made my own findings…" See *Ansari*, O.J. at para 13.

96 Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2 (2019): 111–12.

97 Paul Cherry, "Curiosity is not a Crime, Lawyers says of Acquittals," *Montreal Gazette*, December 20, 2017.

some degree of empathy towards those charged with terrorism and to withstand the pressures from outside, and from within, the jury room to convict.

At least one accused of terrorism who was acquitted in a judge alone trial was successful in severing his trial from that of two co-accused, thus avoiding a jury trial after one of his original co-accused elected trial by jury and was subsequently convicted by a jury. Justice Mackinnon concluded:

> The potential prejudice against the applicant in a joint trial is enormous. In my view, it cannot be cured by simple jury instructions... if carefully crafted jury instructions could cure every objection to severance, then there would never be need for an order of severance. In my view, the interests of justice, including the applicant Sher's right to a fair trial, require that he be tried separately.[98]

This meant that Dr. Khurran Syed Sher was tried by a judge alone. He was acquitted of a conspiracy to facilitate terrorism, even though the judge concluded that "violent jihad"[99] had been discussed at the one meeting between the accused and the two others with whom he was originally charged and who were subsequently convicted.

Canada relies on juries less than the United States.[100] In the United States, juries decide whether the entrapment defence applies and, so far, they have been resistant to the defence in terrorism cases. American juries often find no entrapment after they hear political and religious evidence that suggests that the accused may have been predisposed to commit acts of entrapment.[101]

Entrapment was also raised and rejected by judges in the two other Toronto 18 terrorism trials.[102] Entrapment was, however, successfully made out to a judge in the John Nuttall and Amanda Korody case after a jury had convicted them of terrorism offences in relation to planned pressure cooker

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98 R v. Sher, 2012 ONSC 1792 at para 19.

99 R v. Sher, 2014 ONSC 4790 at paras 3, 78. Justice Hackland concluded: "While I do not accept the accused's testimony that he was committed to non-violence, had no interest in violent Jihad and was utterly surprised by what was said to him at the July 20th meeting, I am still not persuaded beyond a reasonable doubt that he genuinely intended to join the ongoing conspiracy being perpetrated by Ahmed and Alizadeh."

100 If the accused does not elect, then trial by jury remains the default. For a terrorism trial in which the accused refused to recognize the jurisdiction and played no role in selecting the jury, see *R v. Dughmosh*, 2019 ONSC 1036.

101 "Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions," New York: Human Rights Watch Report, last modified July 21, 2014, https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions.

102 See Vincent Chiao in this volume.

bombs to be detonated during Canada Day celebrations at the British Columbia legislature in Victoria.[103] It is not a stretch to conclude that American juries are more resistant to entrapment claims from alleged terrorists than Canadian judges.

The jury that convicted Steven Chand and Asad Ansari struggled for five, 12-hour days before they reached their guilty verdicts. They were conscripted to give ten weeks of their lives to perform a difficult and even traumatic task. It would be improper to allege that they engaged in misconduct after they performed such a difficult task and when they cannot effectively defend themselves by revealing their deliberations. That said, their exercise of public power, like all such actions, can and should be questioned in a democracy. It especially should be questioned in terrorism prosecutions where the entire society can be fearful and see themselves as potential victims of terrorism, and the accused are often seen as unpopular "others."

B. The Jury is Here to Stay but Continues to Evolve

Some jurisdictions do not use juries and some, such as France, use a specialized professional judiciary to hear terrorism trials. The Air India Commission considered whether Canada should move in this direction. In the end, it concluded that trying terrorism cases with a panel of three trial judges would violate the *Charter* right of those facing five years imprisonment or more to a jury trial. The Commissioner of the Air India inquiry, Justice John Major, concluded: "terrorism prosecutions are already difficult enough without having to work with novel and unprecedented institutions such as a three judge trial panel" whose legitimacy may be questioned.[104] Because of its guarantee under subsection 11(f) of the *Charter*, the jury is a more or less permanent institution in Canada. This does not mean that it is not subject to change.

The Air India Commission rejected a recommendation by the families of the many victims in the Air India bombing that trial by jury be mandatory in terrorism trials, as it generally is in murder and treason trials. Part of this recommendation represented the families' dismay at the 2005 decision of a trial judge to acquit two men of involvement in the Air India bombing. That trial judge himself would later say: "I would have loved a jury trial to have

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103 R v. Nuttall, 2018 BCCA 479.

104 Canada, *Bombing of Air India Flight 182*, 328–29.

made the factual findings in that case" because "there's better acceptance of a verdict from a jury in the community, whether they convict or acquit."[105]

For his part, Justice Major concluded:

> There are good reasons why those accused of terrorism offences may want to elect trial by judge alone. The facts or allegations in a terrorism case may be both shocking and well-publicized. The trial may involve evidence, including that relating to the accused's motives, which could have a significant prejudicial effect on the jury.[106]

This suggests that Justice Major appreciated the reasons why the accused in two out of the three trials held in the Toronto 18 case elected trial by judge alone. One reason not stated by him, however, may also be a factor: the under-representation of racialized individuals on Canadian juries including the exclusion of permanent residents who are not citizens.

The Air India Commission left those charged with terrorism with the same difficult choice faced by the Toronto 18 of whether they would have trial by jury or trial by judge alone. It expressed concerns about juries having to struggle through long terrorism trials. It made many recommendations designed to make terrorism trials more efficient. It also recommended increased pay for jurors to ensure that juries represent "a broad cross-section of the public, not merely those individuals whose employers are willing or able to continue to pay them during prolonged jury duty."[107] It also recommended increasing the number of alternative jurors to four, for a total of 16 jurors,[108] though subsequent amendments to the *Criminal Code* only increased the number of alternate jurors to two, for a total of 14.[109]

C. The Bill C-75 Reforms

In 2019, Parliament made significant reforms to jury selection in light of concerns about what the victim's family and subsequently the media publicized as an all-white jury that acquitted a white farmer Gerald Stanley of both murder and manslaughter for killing a Cree man, Colten Boushie. In stark contrast to the Toronto 18 jury trial, the composition of the jury became national news. In contrast, I could find no reporting about the racial

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105 Canada, *Bombing of Air India Flight 182*, 318.
106 Canada, *Bombing of Air India Flight 182*, 330.
107 Canada, *Bombing of Air India Flight 182*, 319.
108 Canada, *Bombing of Air India Flight 182*, 323.
109 Criminal Code, s. 643 as amended by S.C. 2011, c. 16, s. 12.

composition of the Toronto 18 jury and am left simply with the trial judge's cryptic comment that it was "relatively youthful and very multi-cultural."[110]

The most controversial jury reform in Bill C-75 was to abolish the peremptory challenges that in most terrorism trials would allow both the prosecutor and the accused to challenge 12 prospective jurors without giving any reasons. Defence counsel objected to this change saying that they used peremptory challenges in cases where they still had concerns after an unsuccessful challenge for cause about the impartiality of a juror. They also argued that they used peremptory challenges to make the jury more representative, especially in large cities.

One problem, however, was that Canada failed to develop an effective system to challenge discriminatory use of peremptory challenges, either by the prosecutor or the defence.[111] Although terrorism from the extreme right has not generally been prosecuted as terrorism in Canada, one could easily imagine an accused with far-right motives using peremptory challenges to remove visible minorities, and perhaps women, from juries.

Another problem with peremptory challenges is that accused are bound to lose battles with the Crown where the Crown desires to keep visible minorities off the jury and the accused wants visible minorities on the jury.[112] This suggests that in most places in Canada, a far-right person accused might be successful in using peremptory challenges to remove visible minorities from the jury, but an accused from a racialized minority might have less success in using peremptory challenges to ensure that juries included racialized minorities. In any event, the Supreme Court has affirmed that Parliament's decision to abolish peremptory challenges did not violate the accused's *Charter* rights, with some judges suggesting that more intensive questioning of prospective jurors for bias and anti-bias instructions to the jury may be warranted.[113]

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110 R v. Ansari, 2010 CarswellOnt 11151 at para 10 (Ont Sup Ct). For further discussion, see Emon and Mahmood in this volume.

111 Roach, *The Gerald Stanley and Colten Boushie Case*, 117–22.

112 Christian A. Miller, "Peremptory Challenges During Jury Selection as Institutional Racism: An Investigation Within the Context of the Gerald Stanley Trial," *Criminal Law Quarterly* 67 (2019): 215.

113 R v. Chouhan, 2020 ONCA 40 aff'd in 2021 SCC 26 at paras 48–67, 119–21, 160–61. The author represented pro bono the David Asper Centre for Constitutional Rights which intervened in the Supreme Court of Canada in support of the abolition of peremptory challenges.

Ontario now uses more inclusive jury lists based on health care cards. At the time of the 2010 trial, Ontario still used lists based on property tax rolls.[114] At the same time, the *Criminal Code* still excludes permanent residents and those who would need a translation from English from serving on juries.[115] The trial judge will have new powers to stand aside prospective jurors not only on the traditional grounds that jury service will be a hardship but now also in order to promote public confidence in the administration of justice.[116] So far, however, they have not used these new powers to increase the representativeness of juries.[117]

Under the Bill C-75 reforms, Canadian trial judges will replace two laypeople otherwise qualified as jurors in deciding whether a prospective juror who is challenged for cause is impartial. It remains to be seen whether this change will encourage trial judges to allow more than the three questions that Justice Dawson allowed with respect to racial and religious prejudice. Another challenge is whether trial judges in terrorism trials will allow questions designed to reveal how racial and religious prejudice might interact.[118] Although Canadian judges have traditionally and instinctively recoiled at any suggestion that Canadian jury selection practices should follow American ones, increased questioning of prospective jurors in highly publicized terrorism trials would, in my view, be well-advised. One American judge has described how increased questioning of prospective

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114 Ontario has moved from a jury list based in large part on tax information to one based on health care lists. Juries Act, R.S.O. 1990, c. J3, s. 4.1 as amended by S.O. 2019, c. 7, Sched 35, s. 4. At the same time, a judge in Brampton rejected an equality challenge to the old system (the one used in the Toronto 18 case) for infringing the rights of Black and visible minority accused. Justice Woollcombe concluded that "[t]he problem with focusing on distinctive perspectives, derived from specific racial characteristics such as being 'black', is that this wrongly leads to a focus on what characteristics require representation, rather than on the process used. The applicant does not have a right to the inclusion of any set percentage of people on the jury source list who share his particular characteristics." See R v. Hoffman, 2019 ONSC 2462 at para 89.

115 Criminal Code, s. 638. This restriction has also been unsuccessfully challenged as violating the equality rights of visible minority accused, see *Church of Scientology*, O.A.C.; *Laws*, D.L.R. (4th).

116 Criminal Code, s. 633 as amended by S.C. 2019, c. 25, s. 629.

117 R v. Campbell, 2019 ONSC 6285 at para 35; R v. Josipovic, 2020 ONSC 6300 at para 29, concluding that use of new stand aside powers to make juries more representative was unworkable.

118 For my arguments that judges should allow more in-depth questions at challenges for cause, see Kent Roach, "Juries, Miscarriages of Justice and the Bill C-75 Reforms," *Canadian Bar Review* 92, no. 2 (2020): 315.

jurors revealed prejudice towards Muslims and influenced the composition of a jury that in a second trial acquitted a Muslim accused of terrorism.[119] Now that judges under the Bill C-75 reforms have to decide challenges for cause, it is hoped that they allow more questions to be asked of prospective jurors to better inform their judgments about impartiality.

V. CONCLUSION

Many of the recent changes to Canadian juries have been based on a concern about making juries more representative of all Canadian citizens and maintaining and broadening public confidence in their verdicts. Whether the changes will be successful given the deep, and sometimes subconscious, hold of stereotypes associating racialized accused and victims with crime and danger remains to be seen. The challenge seems particularly acute in high-profile terrorism cases where the accused are Muslim and visible minorities. In any event, those accused of terrorism offences in Canada will retain the difficult choice of deciding whether they prefer trial by jury or trial by judge alone. In the end, we will never know whether Steven Chand and Asad Ansari, and others accused of terrorism, would have been better off had they not opted for trial by jury.

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[119] A second jury was selected after the first jury hung with 11 jurors voting for conviction. Before the second trial, the judge allowed more questioning of prospective jurors and, in her words, "we tried much harder to tease out juror bias". She concluded that this increased question, including changes to attitudes in the country as more time elapsed since 9/11, may have influenced the jury's decision to acquit the accused at a second trial. See Hon. Marcia G. Cooke et al., "Trying Cases Related to Allegations of Terrorism: Judges' Roundtable," *Fordham Law Review* 77, no. 1 (2008): 19–20. On the limits of even more in-depth American *voir dire* questioning of prospective jurors, see Neil Vidmar, "When All of Us Are Victims: Juror Prejudice and 'Terrorist' Trials," *Chicago-Kent Law Review* 78 (2003): 1143–178.

Canada v. Asad Ansari: Avatars, Inexpertise, and Racial Bias in Canadian Anti-Terrorism Litigation

ANVER M. EMON AND AAQIB MAHMOOD [*]

ABSTRACT

This chapter examines the litigation against Asad Ansari, who was charged with terrorism offences as part of the Toronto 18. The authors examined the litigation files held in the archives of the Ontario Court of Appeals. Through close readings of trial transcripts and judicial decisions on evidentiary motions, the chapter illustrates that systemically embedded in the features of Canada's adversarial legal system and *Criminal Code* are legal dynamics that enable racialized, Orientalist readings of Islam and Muslims, and echo the medieval dynamics of religious inquisitions.

Keywords: Islam; Muslims; Islamists; Terrorism; Extremism; Expertise; Orientalism; Religious Inquisition; Anti-Terrorism; Systemic Bias

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I. INTRODUCTION

This chapter examines the case of Asad Ansari, who was 25 years old at the time of his trial, as part of the so-called Toronto 18. Through a close examination of certain aspects of his case, this chapter will show that rather than Asad Ansari[1] himself being on trial, it was two competing avatars of Ansari on trial, both of which took shape through the explicitly inexpert and implicitly racially structured litigation of Islam itself. This was not simply a feature of this case, but it is systemic to the prosecution of terrorism offences in Canada because of the *Criminal Code* requirement of proof of religious motive. This legislative provision created the condition in the Ansari trial of collapsing Islam, the religion, into the racialized body of the defendant, standing for trial before predominantly White officers of the court.

The absurdity of this absent expertise is pregnant in the facially neutral, but substantively suspect, procedural structure of the litigation via the form of evidentiary motions and the use of leading questions on cross-examination. This procedural structure was substantially suspect in the case of Ansari because utterly inexpert testimonies and biased perspectives were permitted by the very structure of Canada's adversarial system of justice. From the accused, Ansari, to the government prosecutors, and even to the government-paid confidential informants, none were disinterested in the outcome of the trial. Likewise, none were duly certified by the court as impartial experts on Islam, Jihad, or the regional conflicts in Iraq, Syria, or Afghanistan, despite all of them testifying about such matters as proxies for the defendant's state of mind. Nor, as the trial record suggests, did the

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[1] A note on sources: Asad Ansari's lawyers appealed the trial decision, which meant that all litigation submissions and trial transcripts were held by the Ontario Court of Appeal. The legal facta and related material are in four boxes held in storage by the Court. The authors accessed the materials in the records division of the Court, reviewing each document, factum, and transcript as they related to the motion to exclude. Citations to this litigation material reflects both standard citation practices as well as the organizational structure of the Court's archives. A second source of information about the trial was Asad Ansari, who graciously allowed Emon to interview him for this chapter. The authors express their gratitude to Ansari for his contribution. Moreover, we are grateful to the editors Kent Roach and Michael Nesbitt for their careful review and comments on earlier drafts, as well as their unfailing support for this research. Needless to say, any errors in this chapter are attributable to the authors and do not reflect upon anyone else.

presiding judge recognize the relevant parties were litigating matters outside their personal and institutional competency. Ansari's guilt was premised upon the fact that he read, reviewed, and thought about ideas that the security state considers radical and even threatening, particularly when held by racialized Muslims.[2] Because those ideas were embedded in propaganda from groups like al-Qaeda, the Taliban, and Iraqi insurgencies, ultimately the person of Ansari was collapsed into these hard to find and harder to defeat groups. Ansari's guilt, we argue, was then less about Ansari himself and more about the prosecution's racial and religious construction of an extremist avatar which, again, was demanded by the *Criminal Code*. Ultimately, we consider the jury's finding of Ansari's guilt highly suspect given the systemic features that discredit the quality of justice delivered.

A. Representing Avatars

Historically, the term avatar originates from Sanskrit and refers to manifestations of a deity in the world, either in superhuman, human, or animal form.[3] In the world of computer science, including computer gaming, an avatar is an electronic image that represents a player. Consumers in the online marketplace participate with avatars of their own, as do companies offering products to those consumers. Avatars allow users to present themselves as they see fit, making identity claims about who they are to a broader (often virtual) public. The virtue of avatars comes in the economics of fashioning that identity. "In real life it is difficult, costly, or impossible to modify one's physical attributes. However, avatars can be instantly redesigned online by means of graphic technology."[4] For the purposes of this chapter, "avatar" serves as a heuristic to capture how the

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2 Canada's National Strategy on Countering Radicalization to Violence, while attempting to treat all forms of radicalization equally, cannot help but prioritize Muslim extremist groups as posing particular concern. See generally, Canada Centre for Community Engagement and Prevention of Violence, *National Strategy on Countering Radicalization to Violence* (Ottawa: Government of Canada, 2018), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/ntnl-strtg-cntrng-rdclztn-vlnc-en.pdf.

3 Jean-François Bélisle and H. Onur Bodur, "Avatars as Information: Perception of Consumers Based on their Avatars in Virtual Worlds," *Psychology and Marketing* 27, no. 8 (2010): 741–65.

4 Bélisle and Bodur, "Avatars as Information," 744.

defence and prosecution contested whether and to what extent Ansari represented danger and threat.

Whereas in the consumer context avatars are "controlled sources of identity claims," in the adversarial context of determining the special purpose requirement of the terrorism charge, Ansari was not able to stand before the Court as himself, but rather as a representation, in the form of an avatar, that drew upon extant narratives of the good Muslim and the bad and dangerous Muslim, and a legislative scheme that infused religion with extremism and violence. The use of avatar herein is apropos to Ansari's personal journey into the world of computers and computer science. Moreover, it is analytically useful for centring Ansari's positionality as a racialized Muslim male whose identity was fundamentally negotiated and renegotiated through the course of the trial. His identity was never solely a function of his autonomous liberty but was instead "constructed across different, often intersecting and antagonistic discourses, practices, and positions" in multiple ways by an ambiguous legislative framework and courtroom theatre.[5]

B. Legal Coding for a Dangerous Muslim

Recall that Ansari was prosecuted as part of the so-called Toronto 18, which, throughout the litigation, was reflected as the thin edge of a nebulous global Jihadist wedge in Canada.[6] The Toronto 18 was a group comprised of Muslim defendants charged under Canada's then-new and untested anti-terrorism legislation.[7] Subsection 83.01(1) of the *Criminal Code of Canada* defines terrorist activity, in relevant part, as follows:

> (b) an act or omission, in or outside Canada,
>
> (i) that is committed

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5 Zahra Ali, *Women and Gender in Iraq: Between Nation-Building and Fragmentation* (Cambridge: Cambridge University Press, 2018), 38 (addressing the philosophical contributions of Stuart Hall's approach to racialization as a site of multiplicity, intersectionality, and positionality).

6 Isabel Teotonio, "Terror trial ends, threat of extremism still growing," *Toronto Star,* June 24, 2010.

7 There was one prior prosecution under this Act, namely *R v. Khawaja.* At trial, Justice Rutherford held that s. 83.01(1)(b)(i)(A) infringed the *Charter of Rights and Freedoms* for its chilling effect on the expression of beliefs and opinions. See R v. Khawaja, [2006] O.J. No. 4245 (Ont Sup Ct). The trial proceeded with this provision treated as if severed from the legislation. The Supreme Court of Canada reversed the lower court's holding in *R v. Khawaja*, 2012 SCC 69.

> (A) in whole or in part for a political, *religious* or ideological purpose, objective or cause, and
>
> (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada...[8]

In the case of Ansari, this motive requirement was directly connected to the underlying charge under section 83.18, namely participating in a terrorist group for the purpose of enhancing its ability to facilitate or carry out a terrorist activity. When read together, the prosecution had to show that Ansari's motive or purpose in facilitating or carrying out terrorist activity was to serve the interests of an extremist Islamist group (i.e., al-Qaeda). As the litigation showed, a few core members may very well have had this motive. But the looseness of the motive requirement — in which religion poses a conceptual nexus to violence and extremism — coupled with systemic features of courtroom litigation, required the prosecution to construct an avatar of Ansari as an extremist antagonistic to the well-being of the Canadian state.

As this chapter argues, the legislative provision created the conditions by which the prosecution and even the judge construed Ansari's avatar by reference to the racial and religious positionality of Ansari and those in the courtroom. The motive clause in the *Criminal Code's* definition of terrorist activity — "for a political, religious or ideological purpose" — posed evidentiary hurdles for the prosecution. The prosecution's approach to meeting its evidentiary onus was fraught with an inexpertise about politics and religion, an inexpertise overcome by a presumptive nexus between religion (specifically Islam), violence, and extremism. Through an examination of excluded evidence and leading questions, the government prosecutors ultimately (and inexpertly) litigated Islamic history and regional conflicts in order to cast Ansari as an avatar of the Muslim extremist.

The legislation and the litigation proceedings raise considerable doubts about the quality of justice meted out to Ansari for two fundamental reasons, discussed below.

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[8] Criminal Code, R.S.C. 1985, c. C-46, s. 83.01(1).

C. Orientalist Coding of the 'Muslim Mind'

Because most of the evidence in Ansari's case about his purpose or motive was circumstantial, any litigation strategy to show Ansari's terrorist purpose inevitably had to construct him into an extremist avatar on the basis of either mere possession of such material or viewing/reading such material. The legislative framework effectively required the prosecution to presume that because a text or video says X, the person watching it must therefore believe X. If a propaganda video states that Muslims must fight Jihad against the American infidel, and a local Muslim has a copy of that video on his phone, this litigation approach requires a jury to assume from that circumstantial evidence that the Muslim must therefore harbour such views or hold fast to them as a matter of ideology. This approach, however, has a long history, extending from medieval heresy inquisitions to what Edward Said coined in 1979 as an Orientalist gaze.[9]

In the Ansari case, these presumptions made possible the general failure to recognize that the matters being litigated required expertise (see below). We also see it in the way the prosecution reduced Ansari's state of mind and character to the pixels of open-access propaganda videos saved on DVDs in his possession. The Muslim involved is assumed to think and believe what sacred or sacralized texts (or in this case videos and online websites in one's possession) represent are the "true Islam."[10] To fulfill the legislation's purpose/motive element, the prosecution required the jury to, at best, infer Ansari's terrorist purpose or motive from his mere possession or reading/viewing of material the prosecution considered damning. Not unlike medieval inquisitions on heresy, Ansari's possession and viewing of such material became central to a finding of purpose, despite his testimony to the contrary and the fact that the material is openly and notoriously accessible. Focusing on this fraught evidentiary conundrum for both prosecution and defence lawyers, this chapter will show that in the Ansari case, the legal system — in the persons of the prosecutors, defence lawyers, and judge, and as demanded by the *Criminal Code* — were able to recast Ansari into an avatar of extremism on flimsy grounds at best, racially and religiously biased ones at worst.

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9 Edward Said, *Orientalism* (New York: Vintage, 1979).

10 Anver M. Emon, "The 'Islamic' Deployed: The Study of Islam in Four Registers," *Middle East Law and Governance* 11, no. 3 (2019): 347–03.

D. Inexpertise and the Introduction of Bias

Neither the Court, the prosecution, nor the defendant were competent to address the complex questions of Islamic studies, political economy, and regional politics that were all but demanded by the criminal system and the *Code*. Admitting such inexpert analysis invited the bias that we identify as implicit in the prosecution's litigation strategy on purpose and motive. To show how inexpertise in litigating complex issues of religious history and geopolitics operated (and thereby taints the case itself), we will examine, among other features of the case, the litigation dynamics around a peculiar procedural motion, namely the motion to exclude evidence obtained from a search of Ansari's home. Early in the case, lawyers for Ansari motioned the Court to exclude evidence obtained through a search, on grounds that the search was considered more prejudicial than probative. Embedded in the procedural motion itself is a recognition that evidence might be so inflammatory as to bias the finders of fact in ways that contravene the very performance of justice.

This motion is a legal procedure to control for the systemic bias that this chapter will show could not help but permeate the case, and which ultimately tainted its final outcome. In Ansari's case, the Court first found in favour of the defence and excluded certain evidence obtained from a police search of Ansari's home. However, later in the case, after Ansari testified on direct examination about matters related to his understanding of Islamic history and geopolitics, the prosecution revisited the judge's decision and successfully got it reversed. The prosecution argued that in his direct testimony, Ansari put his character into question, which in turn prompted the government to introduce the earlier excluded evidence for purposes of effective character assessment for the benefit of the jury. Importantly, the government's argument implied that Ansari's testimony about his understanding of Islamic history and geopolitics (matters on which no one in the courtroom was qualified as an expert) was somehow connected to his character.

"Character" became the legal device by which the prosecution could argue about reintroducing excluded evidence; in this case, character was little more than a legal instrument by which the prosecution could introduce inexpert claims about Islamic history and geopolitics through the use of leading questions, and thereby import into the proceedings overt biases that we will identify below. Leading questions are a well-accepted part

of legal practice in an adversarial system of justice. But in the context of the Ansari case, the prosecution formulated their leading questions (during cross-examination) to make conclusory statements about matters over which no one in the Court had the requisite expertise to evaluate or assess. The Orientalist litigation strategy of both collapsing Ansari with a corpus of literature and allowing blatant inexpertise to operate in the form of leading questions was deployed by the prosecution to reconstruct Ansari into an avatar of the dangerous Muslim man, which was later supported by the Court's reliance on a makeshift expert who was not impartial in the case. Justice was not blind in Ansari's case. It was constructed by reference to an extremist avatar that the prosecution held in disrepute, based on 19th- and 20th-century European imperial ideals of Islam and Muslims, even before Ansari stepped into the courtroom.

II. TELLING THE STORY OF ASAD ANSARI

The reported story of Ansari does not really tell us much about the man himself. Indeed, his story would seem to begin and end with his arrest, bail, and prosecution as part of a terrorist conspiracy in Canada. As Canadian media outlets reported, 14 adults and four youth were arrested in June 2006, in a series of raids as alleged participants in a conspiracy to commit terrorist acts on Canadian soil in retaliation for Canada's military involvement in Afghanistan.[11] Among those men was Ansari. Only 21 years old when he was arrested, Ansari spent three years in prison awaiting trial before he was finally granted bail in August 2009.[12] Not until March 2010, at the age of 25, did his trial even begin in a Brampton, Ontario courtroom before both Judge Fletcher Dawson and the first Canadian jurors ever to sit in judgement of a terrorism charge.[13]

Ansari was tried with two co-defendants, Fahim Ahmad and Steven Chand. The prosecution was amply clear that Fahim Ahmad was the

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11 Isabel Teotonio, "Last three Toronto 18 defendants head to trial," *Toronto Star,* March 22, 2010.

12 "Accused homegrown terror suspect, 24, freed on bail after 3 years in custody," *Canadian Press*, August 28, 2009.

13 Thomas Walkom, "Citizens to rule on terror law," *Toronto Star,* April 13, 2010. Walkom clarifies that the other two terror trials in Canada were heard by judges alone. Ansari's case was unique in Canada because these jurors were the first ever to pronounce judgment in a case where the charges involved Canada's controversial anti-terrorism legislation.

ringleader. Ansari was never considered the leader of the conspiracy. As a review of news accounts suggests, Ansari was marginal at best. His alleged contribution to this conspiracy: his computer skills.[14] At all times, Ansari maintained his innocence. At all times, he claimed he had no knowledge of a conspiracy to commit any sort of infraction, let alone terrorism. He was never among Ahmad's trusted inner circle and had no knowledge of Ahmad's terrorist plans.[15] Yet at all times at both the trial and on appeal, even after Ahmad pled guilty midway through the trial,[16] Crown prosecutors[17] viewed Ansari as a "marginal member,"[18] but a member nonetheless, in a terrorist conspiracy aimed at "[c]rippling Canada's infrastructure and leaving its population devastated."[19] Despite Ansari's claim of innocence and the marginal role he allegedly played, a jury found him guilty in June 2010.[20]

The Toronto 18 prosecutions were a test of the Government of Canada's anti-terrorism legislation. But that legislation operated amid hysteric claims about sleeper cells taking aim in and from Canada. For instance, self-proclaimed terrorism expert Tom Quiggin exclaimed "[t]he warning lights are all blinking red… We know that extremism is an issue in Canada, we know that there are people who advocate violence as a means

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14 Megan O'Toole, "Terror cell 'wanted to cripple Canadian infrastructure,' court hears," *Canwest News Service,* April 12, 2010.

15 Megan O'Toole, "Accused kept in the dark about Toronto 18's alleged plot," *Canwest News Service*, May 18, 2010.

16 Isabel Teotonio, "Terror accused pleads guilty," *Toronto Star*, May 11, 2010.

17 The prosecutors in the case were Iona Jaffe, now a judge for the Ontario Court of Justice; Marco Mendicino, who was elected in 2015 as a Member of Parliament for the riding of Eglington—Lawrence (Ontario) and, at the time of writing, served as the Parliamentary Secretary to the Minister of Infrastructure and Communities; Cyde Bond, Amber Pashuk, Sarah Shaikh, and Jason Wakely, who, at the time of writing, served as general counsel at Public Prosecution Service of Canada; Croft Michaelson, who, at the time of writing, served as deputy general counsel and head of global investigations for BMO Financial Group.

18 Isabel Teotonio, "Bail for terror suspect comes with constraints," *The Toronto Star*, August 29, 2009.

19 Allison Jones, "Attacking Parliament, devastating Canada at heart of Toronto 18 plot, jury hears," *Canadian Press*, April 12, 2010. See also Megan O'Toole, "Toronto 18 proposed military hit," *National Post*, April 13, 2010; O'Toole "Terror cell."

20 "Toronto 18 member to be sentenced to time served," *Ottawa Citizen*, September 28, 2010.

of solving problems."[21] Shortly after the conclusion of Ansari's trail, the then-director of the *Canadian Security Intelligence Service*, Richard Fadden, stated that, "there has been an increase in second and third-generation Canadians who consider participating in violent [J]ihad at home or abroad."[22]

Of course, none of this super-charged anxiety about Muslim radicals in Canada can be divorced from the global response to the 9/11 attacks in the United States.[23] Nor ought we discount its effects on how a judge and 12 jurors in a Brampton courtroom would weigh and examine evidence about alleged participants in an alleged terrorist conspiracy in Canada. Indeed, in a justice system where questions of law and fact are decided by two different institutional bodies (e.g., judges and jurors), where evidence is weighed and analyzed in relation to broad and often ambiguous standards, where no one comes into a courtroom without bringing their unavoidably subjective positionality into the process, one cannot help but raise questions about how the narrative about Ansari was constructed, who constructed it, and on what basis. Were sufficient precautions taken by the judge and lawyers to limit or control against an imported bias or prejudice?[24] And if so, what were those mechanisms and how effective were they? As it turns out, the Ansari case offers an important example of how procedures to protect against bias are inherently limited, both by how "religion" is litigated in a secular courtroom and by who gets to speak for or about "religion" in the course of ordinary litigation practices.

A. Ansari and the Pessimistic Good Muslim Avatar

The media accounts depicted only a sliver of Ansari's life, drawing on testimony given during the course of the trial. But recounting his life story in a more narrative way than mere direct and cross-examination allow will show how rules of evidence cannot (and did not) fully account for facts that nonetheless bear upon questions of truth and accuracy. Working on the body of a racialized Muslim man, the formal rules in an adversarial structure

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21 Ian MacLeod, "'The warning lights are all blinking red,'" *Ottawa Citizen*, February 23, 2008.

22 Isabel Teotonio, "Terror trial ends, threat of extremism still growing," *Toronto Star*, June 24, 2010.

23 Marina Jimenez, "For Muslims, guilt by association," *Globe and Mail*, September 8, 2006.

24 On the importation of bias in sentencing, see Chapter 14 by Michael Nesbitt in this volume.

reorient the trial from an inquiry into Ansari to a contest between competing avatars. Based on a close reading of Ansari's testimony at trial, as well as interviews with Ansari himself, we have reconstructed a rough sketch of his life to the extent that it bears upon how he found himself in the company of individuals charged with terrorism offences, his level of involvement in their activities, and Ansari's state of mind at that time.[25]

Ansari was born on March 8, 1985, in Karachi, Pakistan. Ansari's father, a finance executive, moved the family to Saudi Arabia so that he could work in its financial sector. Ansari grew up in the gated compound life that is common among middle-class and elite expat families in Saudi Arabia. As human rights reports show, though, not all from the Indian subcontinent enjoy such a lifestyle. Despite being considered the cradle of Islam and Muslim solidarity as the site of the two holy mosques, Saudi Arabia is notoriously abusive of expatriate labourers from all around the Muslim world, including Pakistanis.[26] Ansari spent his early childhood in this insular, gated context and began his fascination with technology and computers. As a boy of nine or ten, he learned about computers from his father's friend and was immediately hooked. Ansari was programming by the age of ten, creating simple programs using QBasic, a then-common first programming language that any young upstart in the world of computers would have known at that time. As he expanded his interest in computers, Ansari explored the then-nascent world of computer networking, going so far as to study and create experimental viruses to see how they adapt and proliferate.

When he was 12 years old, Ansari's family moved to Mississauga, "[o]ne of the fastest growing areas in Canada… and part of the Greater Toronto Area's (GTA) 905 area-code that popularly serves as a shorthand for the primary sites of immigrant settlement."[27] Ansari's father was still employed in Saudi Arabia, flying back and forth for work while his wife and three

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25 The author thanks Asad Ansari for agreeing to be interviewed and sharing with them his background and life history.

26 "'Caught in a Web': Treatment of Pakistanis in the Saudi Criminal Justice System" Human Rights Watch, Justice Project Pakistan, last modified March 2018, New York, https://www.hrw.org/sites/default/files/report_pdf/saudiarabia0318_web.pdf.

27 Ihsan Ashutosh, "South Asians in Toronto: geographies of transnationalism, diaspora, and the settling of differences in the city," *South Asian Diaspora* 4, no. 1 (2012): 95–109.

children planted roots in their Mississauga neighbourhood.[28] Formally part of the Peel Region, Mississauga's population is predominantly of immigrant background. The 2016 StatsCan Census showed that 51.5% of Peel's population is made up of immigrants. A large percentage of Peel's recent immigrants — specifically 50.8% as of 2016 — are of South Asian heritage, with India and Pakistan being the top two countries from which recent immigrants hail.[29] On the cusp of his teenage years, Ansari found himself in a new country, new neighbourhood, and new school. As it turns out, his was not the only family to move into the neighbourhood around that time. So too did the families of Fahim Ahmad, Zachary Amara, and Saad Khalid — all of whom would find themselves on trial in 2006 as part of the Toronto 18. The four boys were part of families that immigrated to Canada and moved into the same apartment complex. The boys, all of similar ages, met at Edenwood Middle School, where they built up an almost filial relation through pick-up basketball games, shinny at the nearby hockey rink, or contests of fictive agility on video games. The boys found friendship and community together after being uprooted and displaced.

When they graduated middle school to enter high school, Ansari went to Gordon Graydon Memorial Secondary School, a specialized program that offered a superior International Business and Technology program, which appealed to Ansari's growing interest and expertise in computers. Ansari had never stopped studying computers. He became a local IT expert, helping his neighbours with their tech problems and assisting Mr. Traxler at Edenwood Middle School in the computer lab. At Gordon Graydon, Ansari was surrounded by computer aficionados, affectionately called geeks. This community and curriculum compensated for the fact that going to Gordon Graydon meant riding the bus each day away from his home, friends, and neighbourhood. But at the time, it was worth it because of the challenging program and the school's potential to help Ansari advance his growing interest and expertise in computer science.

Ansari's three friends stayed local, attending Meadowvale Secondary High School. Since Ansari still lived at home at that time, he remained connected to his long-time friends, however, travelling to a different school

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28 Ontario Superior Court, Trial Transcript from Asad Ansari in-ch by Mr. Norris, vol. 5, 254–55 (on file with authors) [Ansari in-ch by Mr. Norris].

29 "2016 Census Bulletin: Immigration and Ethnic Diversity," Peel Data Centre, last modified October 2017, https://www.peelregion.ca/planning-maps/CensusBulletins/2016-immigration-ethnic-diversity.pdf.

further away and not being in the same classes throughout the week affected his relationships with them. He would still serve as their local computer expert, assisting with basic IT support for his friends and their families. But on a day-to-day basis, he was a few steps removed from his old friends from the neighbourhood. After completing three years at Gordon Graydon, Ansari made a difficult choice and transferred to Meadowvale. The Graydon program was not what was promised. While Ansari enjoyed being surrounded by like-minded students, the school did not provide the necessary guidance or supervision to channel the talent it had among its student body. The value of the school's education no longer compensated for the arduous bus commute, which Ansari found to be increasingly intolerable. For his final year of high school at Meadowvale Secondary High School, Ansari once again found himself with his old friends from the neighbourhood.

Around this time, Ansari and his friends could not avoid the ubiquitous satellite images of the devastating 2003 U.S. "Shock and Awe" bombing campaign in Iraq. The violence in Iraq, coupled with the ambiguous (and subsequently false) grounds justifying the war itself, prompted debate among Ansari's circle of friends about America's born-again "crusade" against the Muslim world.[30] Despite the Chrétien government's refusal to participate in the U.S.-led war against Iraq, it participated in the conflict in Afghanistan. For many Muslims, the war on terror revealed the impoverished state of international institutions and international relations.[31] For the broader South Asian Muslim community, which lives as a religious minority in Canada, it was hard to silence the painful echoes of Partition in 1947, as they found a shared empathy with besieged Muslims in the new War on Terror.[32]

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30 Ewen MacAskill, "George Bush: 'God told me to end the tyranny in Iraq': President told Palestinians God also talked to him about Middle East Peace," *The Guardian*, October 7, 2005, https://www.theguardian.com/world/2005/oct/07/iraq.usa; Peter Ford, "Europe cringes at Bush 'crusade' against terrorists," *Christian Science Monitor,* September 19, 2001, https://www.csmonitor.com/2001/0919/p12s2-woeu.html.

31 Mahmood Mamdani, *Good Muslim, Bad Muslim: America, The Cold War and The Roots of Terror* (New York: Pantheon, 2004); Sherene Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

32 Alan Roland, "Trauma and Dissociation: 9/11 and the India-Pakistan Partition," *Contemporary Psychoanalysis* 46, no. 3 (2010): 380–94; Shazia Sadaf, "Human dignity, the 'War on Terror' and post-9/11 Pakistani fiction," *European Journal of English Studies* 22, no. 2 (2018): 115–27.

It was in this highly volatile political environment, with its heated conversations among friends and family, that Ansari applied to university as a member of Ontario's "double cohort" in 2003. This was the year Ontario changed its high school curriculum from five years to four years. The implication of this change was that in 2003, there were twice as many students graduating from high school and applying to post-secondary institutions, not all of which had the infrastructure to support the sudden influx of students. Unsurprisingly, Ontario universities became more competitive, both in terms of admissions and the overall experience in class and on campus.[33] It was in this environment that Ansari successfully applied for the highly competitive computer science program at Waterloo University, one of Canada's pre-eminent high-tech universities. Excelling academically, however, was not enough for Ansari to attend Waterloo. As he explained to the authors, his family began to experience financial difficulties that precluded him from living away from home, in campus residence. This meant that Ansari could not attend Waterloo; he could only attend universities within commuting distance from his Mississauga home. But by the time he learned this through conversations with his parents, he had already rejected his admission to the University of Toronto's (U of T) computer science program. By sheer happenstance, he had one more application under review at U of T's Management program. He was accepted into that program, which he began the next fall.

But Ansari had no interest in management. He applied to the program as a last resort — a "safety" option — in case his applications to computer science programs did not succeed. During his first year in the management program, Ansari was depressed, disconnected, and completely uninterested in what he was learning. Before the end of his first year in the program, Ansari dropped out. Depressed and without real direction academically or professionally, he found work in tech support at D-Link Networks, a company specializing in network connectivity. While he excelled at D-Link, he bumped up against a glass ceiling since he had no formal education in computer science. After approximately one year at D-Link, Ansari quit. That was 2005. Various intercepted calls between Ansari and his friends during this time period underscore the dark, deep-rooted depression that overtook

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[33] Tina Gladstone, "Double cohort graduating again," *Toronto Star*, March 29, 2007, https://www.thestar.com/yourtoronto/education/2007/03/29/double_cohort_graduating_again.html.

Ansari; he even confessed in one phone call that there was something wrong with him.[34] A year later, he would be arrested as part of the Toronto 18.

In this period of Ansari's life — miserable in a university program he did not want to be in; unhappy in a job that had no upward mobility, and thereafter unemployed and isolated with little to do but watch the world pass him by — the 24-hour news cycle reverberated with images of inhumanity in the Muslim world. In 2003, over 4 million Afghans were unable to reside in their homes and became refugees. All the while, Afghan poppy production was on the rise, dominating the global opium production market. In the United States, President George W. Bush unveiled a banner on the deck of the aircraft carrier *USS Abraham Lincoln* proclaiming, "Mission Accomplished" which, in retrospect, can only be seen as both hubristic and ironic. In 2004, the abuse and torture of prisoners at Abu Ghraib prison in Iraq went public, to be followed in 2005 with reports of prisoner abuse by U.S. forces in detention centres across Afghanistan. In 2006, violence raged on in Afghanistan between the Taliban and Afghan/coalition forces, leaving scores of people dead. At the end of that year, on December 30, 2006, Saddam Hussein was hung in a Baghdad execution chamber; an unauthorized video of the execution, showing Hussein surrounded by countrymen sneering at him all the while, was disseminated globally and to wide-spread consternation at the indignity of both capital punishment and how it was carried out in this instance.

In this violent global context in which Muslims were both victim and perpetrator, ideologues, and drug dealers, Ansari was alone, living at home, and unemployed.[35] When he visited the local mosque for prayers or community activities, global events were the topic of nearly every conversation he had. He read voraciously in this period. But as he explained, one book was particularly transformative — Amin Maalouf's *The Crusades Through Arab Eyes*.[36] For much of his life, Ansari had assumed the Crusades were little more than an extremely neat and delineated clash between the Christian West and Islamic East. But after reading this book, with its careful and complex history, Ansari recognized this oppositional binary was historically false. Muslim forces fought other Muslim forces,

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34 R v. N.Y., [2008] O.J. No. 3902 (Evidence, transcript of conversation between Asad Ansari and Fahim Ahmad), Terrorismcases.ca.

35 See also Ansari in-ch by Mr. Norris, 271.

36 Amin Maalouf, *The Crusades Through Arab Eyes* (London: Al-Saqi Books, 1984).

sometimes even alongside allies drawn from Christian troops. The Crusades were messy, just like the contemporary situations in Afghanistan and Iraq. Most of all, no side had clean hands. It was during this time that Ansari decided to adopt for himself the avatar of the Good Muslim — attending his mosque, keeping a beard, nodding when people asked if he were Muslim — so that he could, in a small way, showcase to his Canadian neighbours that not all Muslims were like those extremists seen on television. Ansari adopted this outward persona to build empathy amongst himself and non-Muslims to cultivate a more tolerant Canada. Interestingly, co-defendant Fahim Ahmad disagreed with Ansari's aim, which further isolated Ansari, pushing him further into depression and increasing pessimism.[37]

Ansari's pessimism was neither instantaneous nor momentary. As we have illustrated, it was the product of a process of thinking, talking, reading, and ultimately failing to thrive in his professional life, despite the long and involved investment he made over the years for his future. By the time he went to the infamous Washago camping trip, which was the centrepiece of the prosecution's case, the pessimism and apathy had set in. But if he was so pessimistic, why attend a camp that was designed, as the prosecution suggests, to train terrorists? As it turns out, like many Canadians, Ansari asserted that he simply enjoyed camping and the outdoors. Ansari shared with the authors that when his parents moved the family to Canada, they never took their children camping. While in middle and high school, Ansari learned about camping adventures from his Canadian classmates. But it was not until his late teens and early 20s that he began experimenting with camping in the Canadian outdoors himself. It was precisely at this time, while trying to pull himself out of depression, that Ansari was invited by some to join the Washago camping trip. Notably, Washago was the first time Ansari was invited to go camping in the winter. Unknown to him, though, were the hidden motives of the ringleaders to transform the Washago camp into something else.

Ansari's pessimism is worth dwelling on for one more reason. It was not harmless. As Ansari explained to us in an interview, its destructive potential was directed at himself through thoughts of suicide. In his direct testimony at trial, Ansari's lawyers asked him about a set of letters found in a binder

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37 R v. Ahmad, 2009 CanLII 84777 (ON SC), Ruling No. 15, Religious and Ideological Evidence, Appeal Book, vol. 1, Tab D, 295–99 (on file with authors) [ONSC, Ruling No. 15].

during the police search, all of which were a "farewell" to his family.[38] The farewell communique, whether in letter or video format, is a genre of communication associated with suicide bombers. But importantly, it also expresses the author's intent to die, to commit suicide. Studies that aspire to examine "prototypical suicide notes" often exclude farewell communiques from suicide bombers in their study.[39] As such, they implicitly overdetermine the terroristic intent behind this genre of farewell letters and leave little opportunity to view them as suicide letters reflecting both internal and external factors.[40] During his direct examination, Ansari described them as "drafts of suicide notes" that he wrote during "a very dark place" in his life when he felt like killing himself.[41] The draft letters were not completed, and they had never been shown to anyone. As letters, they offered Ansari one option among many — a "cloud of ideas" — such as drowning himself, which he had pondered in the period prior to his arrest. Not surprisingly, given the extant field of suicidology and its exclusion of farewell letters like this, the prosecution overdetermined these farewell letters as facially clear and convincing evidence of terrorist intent.[42] Through these farewell letters, Ansari, the depressive pessimist, became an avatar of the Muslim extremist for the prosecution.

III. Evidence and Avatars

Ansari's lawyers[43] filed a motion to exclude evidence obtained in searches conducted at Ansari's home. The motion to exclude is a procedural

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38 R v. Ansari, Ontario Superior Court (Transcript, Evidence of the Appellant, vol. 5) (on file with authors); Ansari in-ch by Mr. Norris, 268–71.

39 See, for instance, Betty Samraj and Jean Mark Gawron, "The Suicide Note as a Genre: Implications for Genre Theory," *Journal of English for Academic Purposes* 19 (2015): 88–101, which explicitly excludes farewell communiques; Antoon A. Leenaars and Susanne Wenckstern, "Altruistic Suicides: Are they the Same or Different from Other Suicides?" *Archives of Suicide Research* 8 (2004): 131–36, which notes the absence of meaningful studies on farewell letters in the study of suicide more broadly.

40 Shuki J. Cohen, "Mapping the Minds of Suicide Bombers using Linguistic Methods: The Corpus of Palestinian Suicide Bombers' Farewell Letters (CoPSBFL)," *Studies in Conflict and Terrorism* 39, no. 7/8 (2016): 749–80.

41 Ansari in-ch by Mr. Norris, 269.

42 Ansari in-ch by Mr. Norris, 270–71.

43 Representing Ansari were lawyers Breese Davies, now a judge on the Ontario Superior Court, and John Norris, now a Federal Court judge.

device by which lawyers for the accused claim that certain prosecutorial evidence, if introduced into trial, may unduly prejudice the jury against the accused in disproportion to the probative quality of the evidence. A well-recognized principle of evidence law, the balance, in this case, was fundamentally affected by the religious or political motive requirement of the terrorism offence. As Kent Roach has convincingly argued, and which *R v. Asad Ansari* incontrovertibly shows, "[t]he requirement for proof of political or religious motive will make the politics and religion of suspects a fundamental issue in terrorism trials... Terrorism trials in Canada will be political and religious trials."[44] In the Ansari litigation, the defence argued that certain evidence obtained from a search of Ansari's bedroom ought not to be used in litigation because its prejudicial effect outweighed its probative value.

The Court made a set of decisions excluding evidence obtained from Ansari's home. The decisions reflected concerns that such evidence might be so provocative as to prejudice a jury against Ansari. As Justice Dawson remarked, the evidence fell into one of six categories:

- Evidence related to the bomb plot and the manufacture of explosives (excluded)
- Computers and related items, including audio, video, and data storage devices (admissible)
- Mobile communications (admissible)
- Training-camp related material (admissible)
- Travel documents (excluded)
- Documents related to maps, firearms, Jihadist training, and media related to Jihad (admissible)[45]

In both Motions 15 and 18, Justice Dawson excluded from trial evidence related to bomb-making and travel-related documents. Additionally, some evidence was modified so that certain prejudicial aspects were blocked out in order to make the evidence admissible and not so prejudicial. In other cases, they were fully excluded, as in the case of the "High School Essay", an essay that Ansari wrote 2.5 years prior to his arrest, and which Ansari's former teacher shared with the police upon learning of

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44 Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queens University Press, 2003), 27.

45 ONSC, Ruling No. 15.

Ansari's arrest.[46] In the letter, Ansari referred to Osama bin Laden. When he initially excluded the letter from evidence, Justice Dawson wrote, "[t]here is the potential for considerable moral prejudice that cannot be easily cured with a limiting instruction… On balance, I conclude the danger the jury will misuse this evidence outweighs any probative value it has. The essay is inadmissible."[47] Later, when the prosecution moved to reintroduce the letter, Dawson J maintained its exclusion out of concern that it might be "misconstrued or taken out of context."[48]

While the high school essay was excluded, the farewell letters were admitted. The letters' central theme was that:

> [T]he author cares very deeply for his family, but that he is leaving them to fight for the sake of Allah, and that whether he lives or dies while doing so is up to Allah. No foreign destination is mentioned. There is no indication the author will be leaving Canada to pursue the fight he is to engage in. The context of the letters supports the conclusion that the word fight means violence, and that the word is not being used metaphorically.[49]

Though the letters were not dated, they were in a notebook by Ansari's bedside table. Justice Dawson held that one could infer, based on all the evidence in the record, that these letters "were drafted in temporal proximity to the events that will be revealed by the other evidence in the case."[50]

A. Inexpertise and the Making of a Muslim Extremist Avatar

The legal drama around the excluded evidence climaxed with Ansari's direct testimony. Lawyer John Norris (as he then was) questioned Ansari on direct examination. On the farewell letters, the direct examination proceeded as follows:

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46 R v. Ahmad, 2009 CanLII 84780 (ON SC), Ruling No. 18, Admissibility of the High School Essay and the "Departure Letters" (on file with authors) [ONSC, Ruling No. 18].

47 ONSC, Ruling No. 18, 5.

48 R v. Ansari, Ontario Superior Court (Application to Re-Open Political and Ideological Evidence Motions), 50 (on file with authors).

49 ONSC, Ruling No. 18, 6.

50 ONSC, Ruling No. 18, 7.

Q. [Norris] Can you tell us what those writings are?

A. [Ansari] Pretty much they're drafts of suicide notes. That's what they are. They're drafts. They're — I attempted to write them and then they're — they're abandoned...

Q. First of all, why did you write these draft suicide notes?

A. Like I said, I feel very strongly about education and I feel very strongly about doing something with my life, and I was at a point in my life where I was literally doing nothing. And I haven't read these before because it takes me back to a very dark place in — in my life, and I really felt like killing myself at that time.

Q. How long did you have those feelings?

A. I can't tell you.

Q. Now, obviously you didn't kill yourself. How did you overcome those feelings?

A. Sheer will, I guess, will power.

Q. Did you ever show those letters to anyone?

A. No, I didn't.

Q. In the letters there are references to dying for the sake of Allah. What did you mean by that?

A. I had many ideas at the time about what I was going to do with myself. Suicide in Islam is actually considered — it's impermissible... So I — I mean I had — it was like a cloud and I had various ideas about what I was going to do. I was going to drown myself in a lake.

Q. So what would the letters have — if that was in your mind when you wrote these letters, how would the letters be connected to that?

A. They wouldn't. It would leave an impression of me going off and fighting for the sake of Allah, and I guess that's sort of a misunderstood concept. That doesn't mean terrorism. I — I recall that around that time Iraq had been invaded, and like a lot of Muslims I had a very strong opinion on that and I'd given thought to maybe doing something with my life, going and fighting with the Iraqi insurgency. I very quickly abandoned that idea because it wasn't an organized insurgency. It was basically bloodshed and people were just terrorizing other people, and there was a lot of violence, like Sunni Shiite violence. So I quickly abandoned the idea. So that could've been one of my thoughts that I transferred onto this.

Q. Do you recall having ideas like that at that time?

A. Yes, I did. Just like I had ideas about drowning myself, hanging myself. It was a lot of — a cloud of ideas. I—I hadn't settled on anything.

Q. Did the —the writings—the writing of those letters and the sorts of thoughts that you were having at the time about ways in which you might die—or kill yourself, did any of that have anything to do with acts of terrorism?

A. No, they did not. They had nothing to do with acts of terrorism.[51]

In this exchange, Ansari and his lawyer Norris offer an account of the farewell letters that center on his suicidal thoughts and various ways of taking his own life. He knew that suicide is prohibited in Islam; if his family knew that he took his own life contrary to Islamic principles, they may have been forever tormented. Being deeply connected with the Muslim community as well, his family would be prohibited from giving their son an Islamic funeral if suicide was found to be the cause of death. The farewell letters were not meant to explain any extremist Jihadi impulse but rather to cover up his anticipated suicide to give his family a sense of closure after his passing. Projecting Ansari as the good Muslim avatar, the letters assured his readers (in this case his mother, father, and sister) that were he deemed missing, they should not worry for his body or soul. Rather than constituting his terrorist intent in the real world of legal prosecution, the farewell letters reflect Ansari's avatar of himself; a fictional image of himself that others might see as noble, even if misguided. The depressed Ansari drafted these letters to create an avatar that his family could latch onto as a final memory of a son who had gone missing. The prosecution, unsurprisingly, rejected this reading of the farewell letters. Instead, the prosecution insisted these letters represented Ansari's state of mind, or in other words, the avatar of the Muslim extremist. Ironically, both defence and prosecution construed the letters as gesturing to an avatar. But in no case did either avatar actually reflect Ansari's mindset.

Of course, Ansari never committed suicide. He never went missing. Neither his suicidal self nor his avatar came to fruition. Instead, he went on living and interacting with his childhood friends. He even went camping with them. But the prosecution, with the aid of the government's confidential informant (CI), Mubin Shaikh, argued that this was no mere camping trip. The campground, Shaikh and the prosecution argued, was a terrorist training camp — and thus fed the prosecution's construction of Ansari as a Muslim extremist avatar. Ansari's attendance at one particular camp — the Washago camp — became a focal point in the litigation, as it was not entirely clear who was directing the alleged training — the alleged terrorist conspirators or the government's confident informant, Mubin Shaikh. Whether something was a "hike" or a "march," a military training exercise or just a fun activity — it all depended on who did the characterizing.

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[51] Ansari in-ch by Mr. Norris, 269–70.

B. Contesting Avatars: The Paid 'Native' Informant

In this context, the testimony of Mubin Shaikh is of particular interest. Shaikh has become a well-known figure in anti-terrorism circles since his work on the Toronto 18 case. A child of parents from India, Shaikh attended an austere Qur'an school when he was young. In high school, he joined the Royal Canadian Army Cadets, attaining the rank of Cadet Warrant Officer. He explains that a house party he threw got him into serious trouble with his family, after which he turned to religion to reorient himself in relation to his society and family. It was in that context that he joined the Tablighi Jama'at, a religious missionary movement, while living in India and Pakistan. While in Quetta, Pakistan, he came across the Taliban and was "bit by the [J]ihadi bug." After fathering a child, he began to question his Jihadist views and turned his life in a new direction.[52]

In this post-Taliban period, we find Shaikh working as a CI for Canada's security agencies. And for all intents and purposes, Shaikh became for the Court the paid, government CI who leveraged his own identity as "bad Muslim turned good" to create an avatar of both expertise and loyalty to the state.[53] On direct examination, Shaikh was asked why he told Zakariya Amara and Fahim Ahmad, during an initial conversation, where he had travelled: "I wanted to show that I've been around. I've travelled to places where — I mean, basically, if you want to — if you want to be somebody in terms of learning the religion, we'll say, the Middle East, travel to the Middle East is an important factor in that regard."[54] Shaikh invokes in this passage the virtue of *rihla* or travels as constitutive of his standing as a person of knowledge. The *rihla* has a long history in the Islamic intellectual tradition. The *rihla* was made famous by Ibn Battuta, but it had long been characterized as a precious credential of the Muslim scholar.[55]

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52 Julia Schaumer, "The Road to Radicalization: An Interview with Former Undercover Operative Mubin Shaikh," NATO Association of Canada, September 28, 2018, http://natoassociation.ca/the-road-to-radicalization-interview-with-former-undercover-operative-mubin-shaikh/.

53 Sunaina Maira, "'Good' and 'Bad' Muslim Citizens: Feminists, Terrorists, and U.S. Orientalisms," *Feminist Studies* 35, no. 3 (2009): 631–46.

54 Ontario Superior Court, Trial Transcript from R v. Ahmed in-ch by Mr. Neander, 33 (on file with authors) [Ahmed in-ch by Mr. Neander].

55 Kenneth Garden, "The *rihla* and Self-Reinvention of Abu Bakr Ibn al-'Arabi," *Journal of the American Oriental Society* 135, no. 1 (2015): 1–17; Zareena Grewal, *Islam is a Foreign Country: American Muslims and the Global Crisis of Authority* (New York: New York University Press, 2013).

Consequently, while Shaikh used his travels to manipulate the suspects to trust him as a religious scholar, he seems to have done the same to the Court.

The Court looked to Shaikh for his insight on the Toronto 18, and by implication, the religion of Islam. Shaikh was allowed to explain and expound upon Islamic legal doctrine as an expert, despite being on the stand in the capacity of a paid government CI. In other words, Shaikh did not testify in his capacity as an expert on Islam, or Jihad, the Taliban, or the geopolitics of Islamist extremist groups. Rather, he was always treated as the government's CI. But when he testified, he could not help but speak (and be treated) as an expert on the religious and political contexts that the prosecution needed to show informed Ansari's alleged motives. In Shaikh's testimony, government prosecutor Neander continued asking about his conversations with Amara and Ahmed, specifically their discussion of Jihad:

> Q. [Neander]: Okay, tell us about the questioning?
>
> A. [Shaikh]: He asked me a question, "Is Jihad fard ayn or fard kifayah?"
>
> Q. Okay, maybe you can...
>
> A. Fard is F-A-R-D —F-A-R-D A-Y-N. And I guess you could be fard kifayah, F-A-R-D K-I-F-A-Y-A-H. Basically means an individual obligation versus a communal obligation. So, I mean, like prayer is an individual obligation whereas funeral prayers, for example, if some members of the community perform it the rest are absolved of its obligation. So he asked me, "Is [J]ihad fard ayn or is it fard kifayah?" meaning I took that to mean do you yourself believe and practice [J]ihad or do you yourself believe other people should do it?[56]

This particular exchange concerns a long-standing historical issue in Islamic legal thought about the nature of obligation and the circumstances under which the status of an obligation changes. Shaikh represents the historical tradition as if an expert on the matter, despite not accounting for the historical nuances of the legal tradition.[57] This was not the only time Shaikh was invited on direct examination to explain and expound on historical issues from the Islamic tradition, as if an expert.

At no time was Shaikh a properly qualified expert bound by duties of impartiality. Up until the time of the trial, he was always a paid government

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[56] Ahmed in-ch by Mr. Neander, 34–35.

[57] Rudolph Peters, *Jihad: A History in Documents* (Princeton: Markus Weiner Publishers, 2015); Khaled Abou El Fadl, "Islamic Law, Jihad and Violence," *UCLA Journal of Islamic and Near Eastern Law* 16, no. 1 (2017): 1–28.

operative. Nevertheless, he claimed religious authority and expertise about himself, going so far as casting his compensation from the government in religious terms. Though in this very instance, he revealed his expertise as little more than popular, rather than profound. On cross-examination, defence counsel asked Shaikh about how he negotiated his compensation from the government:

> Q. [Edney] Now, I understand that the RCMP initially offered you the sum of $70,000 for your services. Do you recall that?
>
> A. [Shaikh] I met with a member of Source Witness Protection to begin negotiations for a reward amount. He began with 70,000 and my response was, well, since I'm doing it for religious purposes seven is viewed as a religious number and so I said 77,000. And he did ask me if there was an amount lower than that which reflected religious views and because there was none I stuck with 77.
>
> Q. Did you say to him that you believed the number seven is believed to be important in the Islamic world?
>
> A. Yes.
>
> Q. And then you therefore requested an increase to 77,000?
>
> A. Yes, 70 is 7-0 and so 77.
>
> Q. So it's against the Islamic faith to accept $70,000?
>
> A. No, it's not that it's against the Islamic faith, it's just — you know, I wanted to maintain that religious flavour.
>
> Q. Weren't you just manipulating the teachings of Islam to get an increase to $77,000?
>
> A. No, because if — I could have done a much better job than 77 that's for sure.[58]

As it turned out, Shaikh did a much better job by the time his work was done. After the arrests, Shaikh asked that his payout be topped up to $300,000, "which the RCMP agreed to because there were concerns that he would not testify at a pre-trial hearing."[59] By 2008, he began requesting a higher payout, totalling up to $2.7 million.

His curious reference to the number seven, though, ought to have raised judicial concerns about the quality of his "expertise" on issues related to Islam and Jihad, to which he testified as if an expert. Across many traditions, the number seven has significance. Christians and Jews might find

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58 Ontario Superior Court, Trial Transcript from Shaikh cr-ex by Mr. Edney, 115 (on file with authors).

59 Isabel Teotonio, "Toronto 18 informant motivated by money," *Toronto Star*, April 22, 2010.

inspiration for the number seven from Genesis 2:1-3, which states that God spent six days creating the world, and on the seventh day rested. Likewise, the Ten Commandments explain that six days shall be spent in labour, and the seventh will be the Shabbat. For Jews, one sits *shiva* for seven days when mourning. Certainly, the Islamic tradition is not without some recognition of the number seven: there are seven verses in the first chapter of the Qur'an; during the annual pilgrimage to Mecca, Muslims circumambulate the Ka'ba seven times. Whether one indulges such numerology or not, Shaikh seemed quite capable of ignoring any religious flavour when he got his $300,000 compensation package.

This financial peculiarity was not taken to undermine the quality or veracity of his testimony. Nor did his addiction to cocaine. As reported, Shaikh admitted during cross-examination that during his work as a CI, he began doing "a couple of lines" as of May 2006, and later became addicted to the point of requiring a fix nearly every 20 minutes; as Shaikh testified, "[i]t was out of control."[60] In cross-examination, Edney raised concerns that the addiction ought to undercut the reliability of his testimony: "By December of 2006... you were now an addict and a father of five children, and someone whose evidence we're relying upon in the course of this trial, yes?"[61]

Shaikh could not deny his usage, but he maintained his competency as a witness. His drug use only began toward the very end of the investigation, mere days before the arrest of the suspects. His usage spiked thereafter with the intense scrutiny and public attention he received.

Shaikh's financial interests in the investigation, as well as his drug use, apparently did not damage his character or his version of events. On the contrary, his testimony, even on mundane aspects, seemed to control the tenor and tone of all that came after. We can observe the shadow of Shaikh in the way Ansari answered questions about the Washago camp. In his direct testimony, Ansari described aspects of the camp as follows:

> A. ...And I don't know who built it [the obstacle course]. All I know is that someone came up with—someone came up with the idea, that, hey, do you want to go run the obstacle course? And we're like, "what obstacle course?" And then we ran it and Qayyum Jamal and I got sort of lost because there was a clearly

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60 Allison Jones, "Accused's lawyer focuses on key witness' drug abuse," *Waterloo Region Record*, April 23, 2010.

61 Jones, "key witness' drug abuse."

defined trail at the beginning but then sort of got murky at the end. And then Mr. [Mubin] Shaikh came back for us, to lead us to the camp site.

Q. While you were running the course did anybody shoot anything at you?

A. Yes, Mr. Shaikh was shooting paintballs at our head. And we actually told him not to because we didn't have our paintball markers on?

Q. Sorry, paintball?

A. Sorry, paintball masks on. And when they get frozen, the paintballs, they could be pretty dangerous if you're not wearing your proper gear.

Q. Were you able to complete the obstacle course?

A. No, we weren't. Well, at least I and Qayyum Jamal were not able to complete.

Q. Did you try to run it some other time or...

A. No.

Q. Or any other time?

A. No, I did not.

Q. On the video we've seen an incident where a number of people rise up at the top of a hill, and someone seems to be carrying a banner. Were you present when that incident occurred?

A. No, I was not.

Q. Do you remember seeing a banner at the camp?

A. Yes, I do.

Q. Can you describe that for us?

A. Well, it was a black banner like we saw in the video with the Islamic creed on it.

Q. What is the Islamic creed? Do you know?

A. The Islamic creed roughly translates to, "There is no God [sic] but God, and Mohammad is his last messenger." And I saw the flag at the camp.

Q. The — do you recall what colour the flag was?

A. It was a black flag. I think it had a white frill around it but I can't be sure.

Q. Did that colour have any significance in your mind?

A. Yes, it did, the color of the cube at the Kabba [sic] in Mecca.[62] The stone you could call it. The cube that Muslims circumambulate around is sheathed in a black cloth. So black is one of those colours that has a prominent place in Islam.

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62 The reference here is to the Ka'ba in Mecca, Saudi Arabia. In the Islamic creed, the Ka'ba is considered the "House of God." Muslims around the world perform their

Q. Mr. Shaikh has suggested that the black banner or flag had jihadist connotations in his mind. Did it have any such meaning for you?

A. No, it did not.

Q. Did you know who the flag or banner belonged to?

A. I had no idea.

Q. Mr. Shaikh has described certain marches occurring at the camp. Do you recall whether you ever went on a march?

A. Yes, I did. I guess I want to qualify that I like to call them hikes. We — I went on a hike.

Q. Can you describe that for us?

A. It's pretty much to kill time, to have something to do. We would go on hikes, explore the area. It's actually quite pleasant, quite beautiful there…

Q. Mr. Shaikh describes marching drills and training of that nature. Did you ever see that take place there?

A. A marching drill, no, but we would hike in formation because not everyone knew the trail and there was no way, like if I gotten lost I'd have no way to get back to the camp site where I had shelter and food and fire…So a couple of people knew the trails, so we would march in formation so that we wouldn't — or hike in formation so that we wouldn't get lost. And that was it.

Q. Okay. Was there someone who appeared to be in charge of the camp?

A. There was a distinction that I drew in my mind and that was between the people who knew what they were doing in terms of winter camping and the people who did not. So for example, I would defer to Mr. Shaikh or Mr. Ahmed, or even Mr. Amara when it comes, to you know, certain tasks.[63]

In his direct testimony, Ansari characterized the farewell letters as suicide notes and described the Washago campground as a chance to enjoy the outdoors. He talked about hikes whereas Shaikh described marches. Ansari understood the black banner in pietistic terms that invoked the annual pilgrimage to Mecca, Saudi Arabia, which Muslims undertake each year, and with which he would have been intimately familiar given his time living in Saudi Arabia. But with Shaikh's testimony helping to frame the litigation, the prosecution considered themselves well suited to go after Ansari's character.

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daily prayers by facing in the direction of the Ka'ba. The annual pilgrimage (*hajj*) that Muslims make is to the Ka'ba.

63 Ansari in-ch by Mr. Norris, 327–29.

C. Questioning Avatars: Inexpertise and Leading Questions

The prosecution chose to define the black banner, used by al-Qaeda, as a singularly distinct sign of radicalism, and were especially preoccupied with emphasizing this radical image for the jurors. The Islamic State of Iraq and Syria (ISIS) is infamously associated with such a black banner, though ISIS came along well after the Toronto 18 trial. Importantly, neither the defence nor prosecution seemed to realize that the black flag has a much longer history associated with the early years of Islam. Historical sources indicate that when the Prophet Muhammad would lead a caravan or military contingent, his banner was black. Moreover, messianic traditions from the Prophet suggest that as his people suffered, salvation would come from the East by those carrying a black banner. Indeed, such traditions created the spiritual and messianic backdrop to the Abbasid revolution in the 8th century, which overthrew the Umayyad dynasty. Assuming the mantle of the caliphate, the Abbasids adopted the black banner to symbolize their regime.[64] Today, various sects of Islam have their own variation of the Islamic black flag to evoke its spiritual, nonviolent, historical meaning. For example, the Ahmadiyya Muslim community in Canada, an Islamic denomination that has its roots in South Asia, proudly displays its black flag adjacent to Canada's at its annual convention. No complaint is made of it, which is underscored by the notable attendees, including conservative and liberal Prime Ministers of Canada hosted over the years.

With no avowed historical expertise, and armed with the avatar of the Muslim extremist, the prosecutor cross-examined Ansari on his perceptions, feelings, and claims about the black flag, the Washago camp, and his farewell letters. For instance, the prosecution began the line of inquiry by first playing before the jury a video entitled "Return of the Crusaders". The video is propaganda that excoriates the U.S. and U.K. as little more than modern-day crusaders against the Muslim world, in light of the 2003 invasion of Iraq. Throughout the video, passages of the Qur'an are put on the screen, as images of injured Iraqi men, women, and children flash by. According to the prosecution, the video's principal purpose is "unmistakable" to show that Muslims are being persecuted worldwide and

64 Khalil 'Athamina, "The Black Banners and the Socio-Political Significance of Flags and Slogans in Medieval Islam," *Arabica* 36, no. 3 (1989): 307–26. For a more journalistic account, see William McCants, "How ISIS Got Its Flag: The centuries-old apocalyptic prophecies behind a new symbol of global jihad," *The Atlantic,* September 22, 2015, https://www.theatlantic.com.

that those watching the video must fight to save them from their oppressors.[65] The Qur'anic passages offer an interpretive lens to criticize Western aggression and advocate for Jihad. The video itself is publicly available.[66] But the jury and Court do not see all of this video in one sitting. Rather, the prosecutor purposefully structures and stages how the video is displayed. The first 11 seconds start with the *basmala* in Arabic and then depict — against a black background — the Islamic creed or declaration of faith (i.e., *shahada*). In the cross-examination, Mr. Wakely, the prosecutor, paused the video, after which the following exchange occurred:

> MR. WAKELY: For the record we paused the video at eleven seconds.
>
> MR. WAKELY: Q. Mr. Ansari, do you recognize the white Arabic script that's displayed on that video?
>
> A. I believe that's the Islamic creed.
>
> Q. That's the Islamic creed. Does it appear to be similar to the Islamic creed that was depicted on the black flag that was at the Washago camp?
>
> A. That's correct, straight out of the Koran.[67]

By recasting the Washago camp flag by reference to the same Arabic phrase depicted in a Jihad video, the prosecution framed the cross-examination using the avatar of the Muslim extremist. That avatar — however unrelated to anything Ansari did, wrote, or produced — allowed the prosecutor to challenge Ansari's claim in the above-quoted testimony that the black flag reminded him of the Ka'ba. With Shaikh's testimony in the background, but without any historical expertise and only a presentist appreciation of social media and online propaganda, the prosecution presumed the black flag at the Washago camp was a statement of solidarity with extremist groups.

The exchange over the black flag is only one example of how inexpertise informed the prosecution's Muslim extremist avatar, which in turn structured the finding of facts in this case. On various occasions, Ansari played the role of both defendant and expert on modern Islamic politics, often trying to explain to the prosecution (and the jury) what "Muslims"

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65 Ontario Superior Court, Trial Transcript from Asad Ansari cr-ex by Mr. Wakely, 8 (on file with authors) [Ansari cr-ex by Mr. Wakely].

66 *Return of the Crusaders*, video, accessed August 20, 2019, https://archive.org/details/returnofthecrusaders.

67 Ansari cr-ex by Mr. Wakely, 5–6.

think, and the different strains of Jihadist ideology. The fact that Ansari had to do this suggests that the defendant, in this case, was not Ansari the individual but rather Islam and its adherents. For instance, when confronted with the Jihad videos in his archive, Ansari had to both (a) explain the different strains of Jihadi ideology around the world; and (b) expressly reject their message as delusional in the context of his prosecution:

> Global Jihadists believe that this whole entire world is for God and for Islam. That's a delusional idea. It's retarded because it would not allow — it would mean a constant state of war all the time. And then there are the defensive Jihadist who would say, you know, if I'm attacked then I have a right to defend myself.[68]

The prosecutor, who was not an expert in religion or politics, used the conclusory nature of leading questions in cross-examinations to posit (implicitly at least) his faux expertise on the matters being litigated. Because lawyers are allowed to use leading questions in cross-examinations, the prosecutor could — before a jury of lay, non-expert members of the public — hint at, gesture to, or otherwise impute intention, motive, and purpose through conclusory characterizations of the evidence and what it implied about Ansari. The prosecution's leading questions effectively litigated what Islam is and is not, all in the service of the purpose/objective requirement of subsection 83.01(1) of the *Criminal Code*. For instance, prosecutor Wakely asked Ansari about why he labelled the DVDs with Jihadist videos "Islamic videos." The use of leading questions allowed Wakely to assume, as true, Ansari's identity as a Muslim extremist avatar:

> I'm going to suggest to you that you labelled them Islamic videos because the videos that are contained on this disk... they represent the version of — they represented your religious and political beliefs as of late 2005... [T]he videos represented your concept of true Islam?[69]

This leading question conflates Orientalist ideals of Muslims as little more than what their texts (or in this case digital texts and videos) state. This is hardly a surprising prosecutorial strategy; the legislation makes it inevitable that possession, labelling, and viewing of such material becomes evidence of what a viewer necessarily believes as a matter of ideology. The prosecutor's presumption that a Muslim defendant could have a singular, definitive idea of religion ignores the myriad ways people make religious

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68 Ansari cr-ex by Mr. Wakely, 12.

69 See fn 17. Indeed, throughout the cross-examination, Wakely kept prodding Ansari on the distinction between global Jihad and defensive Jihad, without any foundation made about their expertise in the field of Islamic studies or of Jihad, in particular.

meaning for themselves.[70] Moreover, it collapses the idea of Jihad and the performance of extremist violence in the body of a racialized Muslim man, a trope long manufactured by prejudice that links violence with racialized men.[71]

All Ansari could do was simply suggest that there is no single 'true' Islam: "There's a broad spectrum of religious and political beliefs in those videos. So I can articulate my religious and political beliefs if you want but I can't say that those are — those videos are my religious and political beliefs."[72] But even if Ansari did articulate his beliefs, the law's systemic bias, which cornered Ansari into its systemically preferred avatar, could make no room for such explanation. When Ansari insisted that he was telling the truth, Wakely exceeded his role as prosecutor by retorting, "I certainly don't accept that but we'll return to that later." The Court had to remind Wakely that he was a prosecutor, not the jury. As Dawson J stated, "[t]he question's what the jury accepts."[73]

Exchanges like this between Ansari and the prosecution helped set the stage for the prosecution's motion to introduce the evidence that had previously been excluded. Early in his cross-examination of Ansari, when the prosecution addressed the DVDs labelled as "Islamic videos," Ansari was quick to reject any connection between the videos and his religious and political beliefs. Pointing out the flimsy evidentiary basis to prove religious or political purpose, Ansari retorted: "had I labelled them terrorist videos you would come to me today and say, well, look they're labelled terrorist videos, you must think that." Missing the irony in Ansari's critique, Wakely curtly responded: "Well, you wouldn't have done that, right, because that would be incriminating? You've taken numerous steps throughout this investigation to avoid incriminating yourself?"[74] Wakely's claim makes sense only as part of a litigation strategy by which the government constructs

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70 See, for instance, William Montgomery Watt, *The Formative Period of Islamic Thought* (Oxford: Oneworld Publications, 1998).

71 Calvin John Smiley and David Fakunle, "From 'brute' to 'thug:' The demonization and criminalization of unarmed Black male victims in America," *Journal of Human Behavior in the Social Environment* 26, no. 3/4 (2016): 350–66.

72 Ansari cr-ex by Mr. Wakely, 17–18.

73 Ansari cr-ex by Mr. Wakely, 19.

74 Ansari cr-ex by Mr. Wakely, 18.

Ansari in the garb of the dangerous and untrustworthy Muslim extremist avatar.

D. Judicially Enabling the Extremist Muslim Avatar

Ultimately, the prosecution's strategy worked. Early in the government's cross-examination of Ansari, the prosecution asked the judge to reconsider his earlier exclusion of evidence. Justice Dawson ultimately ruled in favour of the prosecution. A close examination of the Court's reasoning illuminates the racial and religious biases that constructed Ansari — in the absence of expert testimony — as a Muslim extremist avatar.

Justice Dawson began by recognizing that where an accused testifies, certain evidence that was not admissible for the prosecution may become admissible to challenge the accused's veracity – for example, where character is put at issue by the accused. The prosecution argued that the excluded evidence became necessary — and was now admissible — to prove the falsity of Ansari's claims and to call into question Ansari's character, which the government alleged Ansari put at issue during his direct testimony. Whether Ansari testified as to his character became a finer legal point disputed by legal counsel on all sides.

This prosecutorial strategy required the judge to determine whether and to what extent the excluded evidence was now admissible and whether the jury ought to review it, despite its potential prejudice. Justice Dawson's unsolicited remarks about "the flavour and atmosphere of the trial" speak to the systemic bias and inexpertise that operated throughout the trial. It is worth quoting him at length:

> In his evidence in-chief, Mr. Ansari has presented himself as a Muslim youth with political, religious, and ideological views that the jury will likely conclude, based on Mr. Ansari's evidence and the effects of 911 [sic] on Muslim youth and common sense, are well within the normal range within the Muslim community. The jury is relatively youthful and very multi-cultural. Mr. Ansari has been able to convey that impression so far by virtue of my previous protective rulings. I must say that overall, armed with the knowledge that I have about the nature and quantity of material related to religious extremism and violent Jihad that was found on Mr. Ansari's computer drives and storage media, I fear that the jury is being deprived of information they need to properly assess Mr. Ansari and the rest of the evidence... Here my previous rulings have had the effect of limiting the context that is available to the jury.[75]

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[75] R v. Ansari, Ontario Superior Court (Ruling on Admissibility of Excluded Evidence, 272–74 [emphasis added] (on file with authors).

Fundamentally the judge, who was not the finder of fact or a qualified expert on religion and politics, had to assess the probative quality of excluded evidence because of the structural demands of the criminal law itself. But the above passage also reveals that, like the prosecution, Justice Dawson harboured a shared view that collapsed (digital) texts with the mind and body of Ansari. The Court was sufficiently inclined to suspect Ansari's testimony about himself given the library of materials he had in his possession and which were excluded from the jury as fact finder. However modern, enlightened and reasoned the Canadian legal system aspires to be, the judge's decision to admit once excluded evidence ultimately harkened back to medieval forms of inquisition, where a person's books "were taken to reveal his true religious attitudes."[76] Moreover, that evidentiary archive is always and at all times framed by the avatar of the Muslim extremist. This is particularly clear in Justice Dawson's assessment of Ansari's testimony about the farewell letters. Justice Dawson wrote:

> Mr. Ansari explained in some detail why he was despondent. Suicide is impermissible in Islam and Mr. Ansari testified that he drafted the departure letters as a means of covering up his contemplated suicide to his family. He added at another point in his testimony that dying for Allah did not necessarily refer to terrorism. This is one of a number of comments that made their way into Mr. Ansari's evidence at various points that subtly contribute to my concerns about a misleading impression.[77]

Justice Dawson refused to view the farewell letters within the genre of suicide notes, which explains his doubts about Ansari's veracity. He only viewed those letters through the analytic lens of political and religious violence (e.g., the Muslim extremist avatar), rather than the psychology of depression and suicide (e.g., the pessimistic good Muslim avatar). Ansari's testimony about the letters could not defeat the framing presumption around those letters, despite the fact that such framing presumptions only make sense in light of a particular approach to psychology, depression, and the study of suicide. Without qualified expertise to frame these letters viz.

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[76] See Beatrice Gruendler, *The Rise of the Arabic Book* (Cambridge, MA: Harvard University Press, 2020), who illustrates the role of book collections in trials of religious heresy in medieval Islamic history. For similar examples in late medieval and early modern Europe, see the celebrated study by Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Baltimore: Johns Hopkins University Press, 2013).

religious studies, political science, and psychology, and the systemic requirement that the law interrogate religion to determine an individual's associated ideology, judges and juries in cases like this are required to make findings on material on which they are unlikely to be experts and are not, through the trial process, properly brought up to speed.

Even the jury poses a problem of inexpertise precisely because the Court relied on them to evaluate potentially prejudicial evidence without examining it with the relevant expertise. Ansari's trial occurred in a Brampton, Ontario, courtroom. There are limited records of jury identity in Canadian court proceedings. However, the demography of Brampton gives important context to Justice Dawson's remark about the jury and its likely composition as "relatively youthful and very multicultural." According to 2016 StatsCan census data, Brampton had at that time a population of approximately 593,638. Like Ansari's Mississauga hometown, Brampton had become a haven for recently arrived Canadians. Since 2006, immigrants made up nearly 50% of Brampton's population, as compared to under 30% for all of Ontario and 20% nationwide. Over half of Brampton's immigrant population in 2016 heralded from Asia, with India and Pakistan being the top two countries of origin. Punjabi, Urdu, and Gujrati are the top three unofficial languages spoken by Brampton's immigrant population. This demographic data is significant. To the extent the Ansari jury was drawn from those living within a reasonable commuting distance of the Brampton courthouse, the jury members may have heralded from parts of the world that overlap with Ansari's former homes in Pakistan and Saudi Arabia, peremptory challenges notwithstanding. In a courtroom where the government's lawyers were mostly White, where the defence lawyers were White, where the judge was White, the only racialized individuals in the Court were Ansari, and those jurors on the Brampton jury who had a high likelihood of being South Asian, and possibly Muslim.

Given a presumption of a shared experiential background between the jury and the defendant, it is reasonable for the Court, in the person of Justice Dawson, to recognize that this multicultural jury might find Ansari's testimony completely consistent with what prevailed in the Muslim community. But if that were so, then the pessimistic good Muslim avatar would prevail, thereby enabling the jury to acquit Ansari. Facing the motion by the government prosecutors seeking to introduce excluded evidence, Justice Dawson remained concerned that Ansari misled the jury.

The Court's concern about the jury certainly invokes a long-standing theme in legal theory and history. Justice Dawson's concern about the jury being misled, his "fear that the jury is being deprived of information" reflects a debate in legal academia and practice about the competency of juries, and more recent debate on diverse representation on juries. Writing in 1970, Howard S. Erlanger described the issue as "whether uninitiated laymen are even able to comprehend the evidence and the instructions...."[78]

It is worth reiterating here that the Ansari case was the very first terrorism trial by jury in Canadian history. All other Toronto 18 trials were bench trials. As such, we read the Court's unsolicited remarks about the jury's age and racial background alongside the competing avatars litigated in the case. Doing so lends the avatars a racial dimension, which is exacerbated when we recognize Canada's systemic racialization of terrorism across its security institutions. For example, a review of Canada's designated terrorist entity list illustrates the predominance of racialized Muslim groups as presumptively terrorist.[79] Moreover, in its multilateral commitment to combating terrorism financing, Canada's whole-of-government strategy rests on associating 100% of terrorism financing risk in Canada with racial minorities and 80% of it with racialized Muslim-identified organizations.[80]

The systemic effect of subsection 81.01(1) of the *Criminal Code* demands that the courts litigate religion in terrorism trials. Canada's whole-of-government strategy against terrorism systemically associates Muslims and Islam with terrorism. Religious freedom doctrines consider religious meaning a function of subjective and sincere experience.[81] Common law charity doctrine views advancing religion as a public good.[82] But in the realm of terrorism, religion and religious ideology are viewed as a threat and violent, which precludes relying on the subjective perspective of the defendant. When, for systemic reasons, the religion at issue is almost always

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78 Howard S. Erlanger, "Jury Research in America: Its Past and Future," *Law & Society Review* 4, no. 3 (1970): 345–70.

79 For an up-to-date list of Canada's designated terrorist entities, see Public Safety Canada, *Currently Listed Entities* (Ottawa: PSC, last modified June 21, 2019), https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx.

80 Canada, Department of Finance, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance, 2015), https://www.canada.ca/content/dam/fin/migration/pub/mltf-rpcfat/mltf-rpcfat-eng.pdf.

81 See, for example, Syndicat Northcrest v. Amselem, 2004 SCC 47.

82 See, for example, Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A.C. 531.

Islam, the racialized Muslim defendant is readily read by reference to the ever-present image of the Muslim extremist avatar. The predominantly non-Muslim officers of the Court, committed to viewing Ansari in the guise of the Muslim extremist avatar, could not help but insist that the jury decide on the defendant by reference to his archive and what it represented, rather than be left to their own (multicultural) experiences to decipher what he said and how he presented himself.

Alternatively, it might be argued that the jury, precisely because they were young and multicultural, was in the position to evaluate the excluded evidence and control against bias. In this sense, the Court's reference to the jury as young and multicultural is a testament to the importance of diversity. Certainly, we can and ought to applaud diversity on juries. In a study on jury diversity, James Binnall notes that in the U.S., convicted felons are disqualified from jury service. But he asks whether felons as jurors would perform so fundamentally differently from non-felons, as is often claimed by those who insist that felons do not have the "requisite character to serve as jurors and harbour an inherent bias prompting sympathy for criminal defendants."[83] Binnall's empirical study shows that "diversity can enhance deliberations by improving the performance of both majority members of the group and by improving the performance of minority group members."[84] Other studies on diversity, which examined juries across racial and gender distinctions, made the same finding.[85] But the question this raises, and which can only be gestured at here, is whether and to what extent the officers of the Court, operating under a system that centred Islam and Muslims in terrorism cases, converted the young and multicultural jury of Brampton, Ontario into an avatar of expertise. The judge's curious remark about the jury, coupled with his suspicion of Ansari's veracity, allowed him to admit once-excluded evidence for a lay jury to decipher without the benefit of qualified experts to address any of it.

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83 James M. Binnall, "Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-jurors' Potential Impact on Deliberations," *Psychology, Crime & Law* 25, no. 4 (2019): 345–63.

84 Binnall, "Jury Diversity in the Age of Mass Incarceration," 358.

85 See, for instance, S.R. Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations," *Journal of Personal and Social Psychology* 90, no. 4 (2006): 597–612.

IV. Conclusion

This chapter will not change whether Ansari was found guilty or innocent. That decision took place years ago in a Brampton, Ontario courtroom, and it was upheld on appeal. The Ontario Court of Appeal upheld Justice Dawson's decision to admit the evidence and stressed that any prejudice caused by the jury hearing the religious and ideological nature of the evidence was "scarcely remarkable" and that by testifying, Ansari had placed his character in issue.[86]

Nevertheless, what this chapter shows is that the Canadian legal system is structured such that certain biases consistently inform the litigation strategy and judicial discretion. The first bias is systemic and rests squarely in subsection 81.01(1) of the *Criminal Code*. By adding a political or religious motive element to the terrorism offence, this section all but opens the door to facile understandings of Islam and Muslims. This systemic bias made the second bias about expertise possible. Neither the judge nor the lawyers for either the prosecution or defence deemed expertise salient in a trial in which claims were being made about Islamic doctrines and regional conflicts. While this is systemic to Canada's anti-terrorism provision, it is neither unique nor unprecedented. In the fields of policy, law, and governance, there is no shortage of "Islam-talk" despite an absence of scholarly training.[87] In such contexts, Islam and Muslims are treated as if a constant — if not caricature — to rationalize, justify, normalize, and thereby neutralize, otherwise coercive policies, programs, and institutions of the state. Increasingly, though not surprisingly, those who invoke the spectre of Islam need not have expertise about the subject of Islam,[88] as sociologist

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86 R v. Ansari, 2015 ONCA 575 at para 122.

87 See, for instance, Anver M. Emon, "Sharia and the Rule of Law," in *Shari'a: Law and Modern Muslim Ethics*, ed. Robert Hefner (Bloomington: Indiana University Press, 2016), 37–64.

88 For instance, political theorist Michael Walzer at the Institute for Advanced Study excoriates the left for its refusal or inability to critique Islamist groups for the violence they perpetuate. He prescribes: "We should insist particularly on the difference between writings of *zealots* like Hassan al-Banna and Sayyid Qutb in Egypt or Maulana Maududi in India and the work of the great rationalist philosophers of the Muslim past and the liberal reforms of more recent times." Walzer's distinction between zealots and "great rationalist philosophers" reflects his own construction of the "Islamic" in the service of, in this case, the Left. The construction is ironic, at best, given that since al-Ghazali (d. 1111), there has been considerable debate about whether and to what extent philosophy

Christopher Bail has shown through a big-data analysis.[89] For almost two decades, self-styled policy experts — e.g., Sebastian Gorka and Thomas Quiggin — make representations about "Islam" on ideological grounds rather than with disciplinary rigour.

These biases, which are in both the law itself and the conduct of the trial, made *R v. Ansari* about Islam as much as Ansari the defendant. Moreover, the Islam that was litigated was understood in light of long-standing Orientalist tropes about Muslims and medieval inquisitorial models of how people make religious meaning for themselves. The Islam on trial was not just any Islam. It was the caricature of extremist Islam, which meant that Ansari had to become an avatar of the Muslim extremist if the prosecution was to succeed. From litigation about black flags to online propaganda videos to testimony about conflicts in Afghanistan and Iraq — the entire litigation used external factors to telescope into the mind of a troubled, stymied, and depressed young man. And those external factors, about which no one in the Court was a certified expert, were brought in through the adversarial system's use of motions, evidentiary balancing, and leading questions.

The leading question is perhaps the most revealing systemic device by which bias became operationalized. As a rhetorical device, leading questions are by definition conclusory. They put an onus on the witness to challenge both the premise of the question and its often-explicit conclusion. Consequently, when the prosecution asked Ansari leading questions about Islamic history (e.g., the black flag), Jihadist movements in the Muslim world, or competing doctrines of Jihad, Ansari was put in the position of having to answer questions of a scholarly nature while also maintaining his innocence. But since no one considered the questions themselves to require expertise, Ansari's explanations could be easily disqualified or ignored as strategic manipulation by an "obviously intelligent" defendant having to

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(Arabic *falsafa*) is or should be constitutive of what counts as "orthodoxy" in Islam. Walzer's mistake, though, is utterly productive of a certain politics of knowledge and research. While Islamic Sunni orthodoxy pushed rationalist philosophy to the margins, Walzer seeks no less than a complete inversion of that orthodoxy in a manner that mirrors what counts as reason to a North American scholar of political theory and philosophy. See Michael Walzer, "Islamism and the Left," *Dissent*, 2015, https://www.dissentmagazine.org/article/islamism-and-the-left.

89 Christopher Bail, *Terrified: How Anti-Muslim Fringe Organizations Became Mainstream* (Princeton: Princeton University Press, 2015).

rebut a non-expert paid government informant (e.g., Shaikh), all the while trying to assert his innocence to avoid a conviction.

It is not easy, even among scholars of Islam, to understand the nuances and particularities surrounding complex icons such as black flags, competing ideas of Jihad, and the implications of the extensive history of Islam on how Muslims today see themselves in the world. The surprising absence of a discussion between judges and lawyers in *R v. Ansari* on the need for expertise to separate litigation of Islam from litigation of Ansari only highlights how Canada's legal profession assumes too much of the supposedly blind justice it proclaims to deliver.

Policing Entrapment

VINCENT CHIAO [*]

ABSTRACT

Entrapment has been a prominent, if rarely successful, defence in terrorism prosecutions. In this chapter, I sketch an egalitarian case for entrapment. On this account, the primary moral significance of entrapment is to prevent the police from generating crimes that would not otherwise have been perpetrated. In a context in which most people are, as Richard McAdams puts it, "probabilistic offenders," the power of the authorities to control the nature, frequency, and timing of an inducement to crime is the power to make criminals out of ordinary, but fallible, people. Entrapment is a means of constraining this power. In this regard, entrapment stands to undercover policing roughly as abuse of process stands to prosecutorial discretion: as a constraint on how officials choose which individuals to investigate, prosecute and punish. However, since judgments as to when this line is crossed are likely to be contestable, and since what is at issue is typically extraordinary state power used to ensnare particular individuals, I argue that courts should do more to encourage Parliament to regulate undercover policing *ex ante* rather than rely solely on an entrapment defence applied *ex post*, for instance by strictly applying an "authorized by law" condition in prosecutions based on undercover investigations.

Keywords: Entrapment, Prosecution, Abuse of Process, Terrorism, Undercover Policing

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I. INTRODUCTION

Consider two cases. In the first, the accused becomes a target of police interest due to his association with another individual whom the police, acting on information from the nation's spy agency, have under surveillance. This individual is believed to be planning to detonate explosives in a major metropolitan area. The accused's conversations with the individual reveal that the accused is aware of these plans. In the course of their investigation, the accused initiates contact with an undercover informant and conveys to the informant his support for detonating truck bombs. He asks the informant for assistance in procuring needed components for the truck bombs. Although the accused later insists that he only agreed to participate in the plot to protect the informant, the evidence establishes that the accused repeatedly asked the informant about the chemicals, discussed his plans to profit financially from the crime, discussed technical details about the bomb, ordered and paid for several tonnes of the chemical precursor, and arranged details of the delivery, including an elaborate plot to disguise the chemicals from prying eyes.

In contrast, in the second case, the police are tipped off that an individual has been espousing violent Jihadist views and are informed by the nation's spy agency that this person has attempted to purchase potassium nitrate, a precursor for manufacturing explosives. As in the first case, the accused in the second case proposes a terroristic plan to an undercover police agent, this time involving pressure cooker bombs rather than truck bombs. However, during the investigation, the accused discusses far more bizarre plans, including seizing a nuclear submarine. Unlike in the previous case, the undercover agent assiduously steers the accused toward the more realistic plan, making suggestions as to both target and timing. The authorities know that the accused has recently been assessed by a psychiatric nurse who reports her belief that he is developmentally delayed. He is also known to have suffered head trauma earlier in his life. In addition, both he and his partner (and co-accused) are known to have substance abuse problems and to have spent time homeless in the recent past. The authorities are aware that they were unemployed, on public assistance, and socially isolated. The undercover agent goes so far as to provide the accused with spiritual guidance and actively steers him away from more moderate views.

Supposing the accused in both cases are arrested and prosecuted, what should their prospects be if they seek to argue entrapment at trial? Since Canadian courts have grappled with both cases, we can answer that question clearly: the entrapment defence in the first case, *Abdelhaleem*, was rejected, whereas the entrapment defence succeeded in the second case, *Nuttall*.[1] Ultimately, the British Columbia Court of Appeal upheld the trial judge's ruling in *Nuttall* that the police "manufactured the crime… and were the primary actors in its commission."[2] The risk that Nuttall and his co-accused would have offended, absent police involvement, while perhaps not zero, was nevertheless minimal. Their crimes were brought about only by virtue of the police exploiting known vulnerabilities and applying persistent pressure upon them, corralling them from the fantastical and focusing their attention on more realistic plots. In contrast, in the first case, *Abdelhaleem* (one of the accused in the Toronto 18 investigation and trials), the Superior Court found little evidence of the police pressuring the accused, nor did they exploit any vulnerability on his part.[3] The police "did no more than supply an opportunity to commit the crime."[4] Abdelhaleem's actions suggested an independent willingness to participate, even without undue pressure or exploitation on the part of the police. Thus, he could not legitimately complain about being punished, particularly given that the devastating nature of the plot — detonating truck bombs at three separate locations in Toronto — was clear. The distinction between *Nuttall* and *Abdelhaleem*, in short, was centred on the degree to which responsibility for the criminal act could be assigned to the police rather than the accused.

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1 R v. Abdelhaleem, [2010] O.J. No. 5693 (Ont Sup Ct); R v. Nuttall, 2018 BCCA 479.

2 *Nuttall*, BCCA at para 440.

3 Although the police informant attended the accused's hospital room shortly after he underwent heart surgery, the trial judge accepted the informant's evidence that it was the accused who pressured the informant during the hospital visit rather than the other way around. In any case, given the nature of the plan, the trial judge noted that "this is not a situation where it can be said that the conduct of the police or their agent would have induced the average person in the position of the accused." See *Abdelhaleem*, O.J. at paras 76, 78.

4 *Abdelhaleem*, O.J. at para 82. See also R v. N.Y., 2012 ONCA 745 at paras 127–34 (dismissing as meritless an entrapment argument because the confidential informant did nothing that would have induced an average person to commit a terrorist offence, was not unusually persistent, did not exploit any vulnerability of the accused, and generally had little contact with or influence over the accused).

A. Why Entrapment is Relevant in Terrorism Cases

Entrapment is, at first glance, one of those old chestnuts of legal scholarship: a topic much beloved by law professors and students but of little significance in actual legal settings. This impression might be bolstered if we focus, consistent with the theme of this volume, on entrapment in the context of terrorism prosecutions. Thus far, *Nuttall* appears to be the only terrorism case in North America in which an accused prevailed on entrapment grounds.[5] This may suggest that entrapment is largely a dead letter in terrorism cases such as the Toronto 18, legally speaking. Yet that conclusion might be too hasty for three reasons.

First, given the nature of terrorism offences, investigations are commonly reliant on undercover operations and informants, as well as significant planning on the part of the authorities. Since entrapment serves as a form of judicial regulation of undercover operations, it will likely be significant so long as terrorism investigations remain significant.[6] The political morality of undercover policing thus rightly remains an issue of public concern, even when the legal claim fails. For instance, consider *United States v. Cromitie*, a 2009 prosecution of a plot to bomb synagogues and fire surface-to-air missiles at military planes. This case involved 11 months of efforts by a government agent to persuade the accused to commit the charged offences, including inducements of $250,000 in cash, a business valued at $70,000, a BMW, and an all-expenses-paid two-week vacation for the accused and his family.[7] The accused in this case was described as "impoverished," supporting himself by committing petty drug offences and working the night shift at Wal-Mart.[8] The plan to fire Stinger missiles at military planes was entirely planned by the government, and the government provided the accused with fake bombs and instructions on

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5 Entrapment defences prevail more frequently in other, more routine, contexts, such as retail drug busts. See e.g., R v. Ahmad, 2020 SCC 11.

6 According to one scholar, the United States has prosecuted over 500 terrorism cases in the decade after 9/11, and the FBI claims to have over 3000 confidential operatives engaged on terrorism-related files, in some cases paying informants $100,000 for information. See T. Ward Frampton, "Predisposition and Positivism: The Forgotten Foundations of the Entrapment Doctrine," *Journal of Criminal Law & Criminology* 103, no. 1 (2013): 111–12.

7 United States v. Cromitie, 727 F.3d 194, 210–11 (2nd Cir 2013).

8 *Cromitie*, F.3d at para 200.

their use; the defence also argued that the government's undercover agent emotionally and religiously manipulated the accused.[9]

On appeal, a divided Second Circuit panel affirmed Cromitie's conviction. Given the parallels between *Cromitie* and *Nuttall*, it is perhaps questionable whether Canadian courts would have come to a similar conclusion. Indeed, it is questionable whether other American courts would have reached the same conclusion. Had the case arisen under the Seventh Circuit's *Hollingsworth* test for predisposition — requiring that the government prove that the accused would likely have been induced to commit the crime even absent the actions of the government — the accused would very likely have prevailed on entrapment, as the accused was highly unlikely to have been in a position to bomb synagogues or shoot down airplanes.[10] Whatever the prevailing legal standard, however, the actions of the FBI in investigating and prosecuting Cromitie, as with the actions of the RCMP in investigating and prosecuting Nuttall, are worthy of careful scrutiny.

Second, precisely because terrorism investigations tend to be elaborate, costly, and planned in advance, it may be misleading to gauge the significance of entrapment law through decided cases. Entrapment's significance may rather lie in how the police internalize judicial expectations about undercover operations in the design of terrorism investigations at the outset.

Finally, given the publicity and significance attached to many terrorism trials, there is a heightened interest in avoiding a stay of proceedings, particularly when the stay concerns issues collateral to guilt. By the same token, however, it is precisely in contexts such as these that courts might be thought to have a special obligation to uphold liberal values of equality and due process.

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9 *Cromitie*, F.3d at paras 219–20.

10 United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir 1994) (*en banc*). Indeed, in *Cromitie*, the trial judge was convinced "beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition." See *Cromitie*, 727 F.3d 194 at para 210.

B. Beyond the Debate about Subjective versus Objective Entrapment

Academic commentary on the entrapment defence has largely centred on the distinction between its so-called "subjective" and "objective" versions. On the subjective version, prevalent in much of the United States, including in federal law, the central issue is whether accused persons are predisposed to commit the criminal act for which they are being prosecuted. On the objective version, prevalent in the rest of the common law world, as well as in a significant minority of American states and the Model Penal Code, the central issue is the permissibility of the techniques used by the authorities in encouraging the accused to commit the criminal act.[11]

In Canadian law, entrapment takes one of two versions. In the first version, an accused was entrapped if the police provide that person with an "opportunity" to commit an offence while either (1) lacking reasonable suspicion connecting them to criminal activity or (2) outside of a "bona fide inquiry." A "bona fide inquiry" may include, the Supreme Court has held, suspicionless sting operations so long as they are geographically targeted based on reasonably held beliefs about the prevalence of crime in that geographic area.[12] The second version provides that even if the police do have reasonable suspicion connecting an individual to criminal activity or are acting pursuant to a bona fide inquiry, an accused may nevertheless be entrapped if the police "induce" that person into committing the crime.[13]

However, I will not be focusing on the distinction between these two legal conceptions of entrapment, nor on the distinction between "subjective" and "objective" theories of entrapment.[14] While there are

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11 See Paul Marcus, *The Entrapment Defense*, 5th ed. (Lexis Nexis 2016), §1.05A, §12.01. Alaska (§11.81.450), Arkansas (§5-2-209), California (People v. Barraza, 591 P.2d 947 (Cal. 1979)), Colorado (§18-1-709), Florida (§777.201), Georgia (§16-3-25), Hawaii (§702-237), Michigan (People v. Turner, 210 N.W.2d 336, 342 (Mich. 1973)), New York (Penal Law §40.05), North Dakota (§12.1-05-11), Pennsylvania (18 P.S.A. §313), Texas (Penal Code §8.06) and Utah (§76-2-303) use versions of the objective test. See also Model Penal Code, §2.13 [*MPC*]. In addition, New Hampshire (§626:5), New Mexico (Baca v. State, 742 P.2d 1043 (New Mexico 1987)) and New Jersey (§2C:2-12) have adopted "hybrid" entrapment defenses combining elements of both the subjective and objective tests. *Id.* §1.05C.

12 R v. Barnes, [1991] 1 S.C.R. 449, 3 C.R. (4th) 1. The Supreme Court recently reaffirmed the basic parameters of this branch of entrapment in *Ahmad*, SCC.

13 R v. Mack, [1988] 2 S.C.R. 903 at 957–63, 67 C.R. (3d) 1.

14 There is a significant literature on that topic already. See, e.g., Andrew Altman and Steven Lee, "Legal Entrapment," *Philosophy & Public Affairs* 12, no.1 (1983): 51–69; B.

important differences between the two varieties, those differences should not obscure that both versions are variations of a shared theme, namely the concern to ensure that official investigative activity does not bring about the very crime that it is meant to target.[15] The accused's predisposition is one proxy for this, as is the question of whether the police effectively "induced" a crime, especially when targeting people whom they had no prior reason to suspect were connected to criminal activity. Whether we focus on the state of the accused or the conduct of the police, in either case, the underlying question is whether the police activity contributed to bringing about the crime. For example, although *Nuttall* involved an objective form of entrapment, the Court's concerns were quite similar to those raised by the United States Supreme Court in *Jacobsen*, a foundational case for the subjective version of entrapment. In *Jacobsen*, the U.S. Supreme Court pointed to the elaborate, lengthy, and persistent efforts to cause the accused to purchase child pornography as grounds for deeming the accused entrapped.[16] Similarly, the Model Penal Code, which adopts an objective approach, focuses on whether officials have "create[d] a substantial risk that... an offense will be committed by persons other than those who are ready to commit it."[17]

Grant Stitt and Gene G. James, "Entrapment and the Entrapment Defense: Dilemmas for a Democratic Society," *Law & Philosophy* 3 (1984): 111–31; Gideon Yaffe, "'The *Government* Beguiled Me': The Entrapment Defense and the Problem of Private Entrapment," *Journal of Ethics and Social Philosophy* 1, no. 1 (2005): 2–50.

15 See Jonathan C Carlson, "The Act Requirement and the Foundations of the Entrapment Defense," *Virginia Law Review* 73 (1987): 1011–108.

16 United States v. Jacobsen, 503 U.S. 540 (1992), 542–43. This is not to say that the two tests are extensionally equivalent. *Nuttall* shows why not: the accused in that case were predisposed to commit a terrorist act but were highly unlikely to do so. See *Nuttall*, BCCA at para 439. They would not have had the benefit of entrapment if predisposition was the sole proxy for police contribution to crime. The claim is just that both versions of entrapment are ways of gauging the state's causal responsibility for "manufacturing" or "inducing" criminal acts.

17 *MPC*, §2.13. See also Kate Hofmeyr, "The Problem of Private Entrapment," *Criminal Law Review* (April 2006): 319–36 (noting that, although the House of Lords purported to reject "predisposition" in its treatment of entrapment, "the more one analyses the distinction [between providing an unexceptional opportunity and causing a crime]... the more the causal requirement seems to pivot on issues of predisposition"); Gerald Dworkin, "The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime," *Law & Philosophy* 4 (1985): 17–39; Andrew Carlon, "Entrapment, Punishment, and the Sadistic State," *Virginia Law Review* 93, no. 4 (2007): 1081–134.

Rather than focusing on the distinction between subjective and objective versions of entrapment, I will instead consider, first, an egalitarian case for entrapment's underlying concern with preventing the authorities from inducing crime. I will then turn, in the third part of the chapter, to a brief discussion of the role of courts in using the entrapment defence to regulate undercover policing. The fourth and final section proposes imposing a requirement that undercover police operations rest on powers explicitly delegated to the police by positive law, rather than leaving it to *ad hoc* regulation by the courts in litigation.

II. AN EGALITARIAN CASE FOR ENTRAPMENT

Although the rhetoric surrounding the entrapment defence, particularly in its objective version, can give the impression that the main point of the defence is to censure police for engaging in conduct that offends the sensibilities of the court, the primary moral significance of entrapment lies elsewhere.[18] A rule allowing courts to exclude unconstitutionally obtained evidence, after all, already provides a venue for courts to vent their frustration at what they regard as police misconduct, at least so long as they can plausibly tie the grounds for their frustration to a suitably serious *Charter* violation.

The primary moral significance of entrapment, I suggest, is in preventing the police from generating crimes that would not otherwise have been perpetrated. On this view, at the heart of entrapment is a causal question: would the accused have committed the offence (or a sufficiently similar offence) even had they not been offered the inducement, encouraged, or otherwise afforded the opportunity by the police? This view of entrapment rests on the assumption that prosecution of crimes is only valuable as a means to some further end. If prosecution were intrinsically valuable, then perhaps it would be less clearly objectionable for the police to give up crimes in order to have them prosecuted. But if the value of criminal prosecution lies (for instance) in preventing crime, and if the target would not have offended but for the inducement, then the most straightforward way to prevent that offence is to not offer the inducement in the first place. Conversely, if there is reason to believe that the accused would likely have offended anyway, then the fact that the particular occasion

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[18] See e.g., *Nuttall*, BCCA at para 440 (condemning the police for violating "the concepts of fairness and justice"); *Mack*, S.C.R. at 904.

of offending, in this case, was provided by the authorities provides no defence. This explains why the justification of "randomly testing [...] virtue," as the Supreme Court put it in *Mack*, depends on the tightness of fit between the group of individuals ensnared by undercover stings and the group of individuals who would have offended anyway.[19]

In an insightful paper, Richard McAdams observes that low base rates in criminal offending can make a tight fit very difficult to achieve.[20] If very few people are likely to offend on their own (i.e., without the disguised inducement), then even if it is the case that random sting operations rarely implicate people who would otherwise have offended, nevertheless, in the aggregate, the latter group can dwarf the former. To use McAdams' example, suppose that the false positive rate for a given type of undercover operation is 5% and that there are no false negatives. Offhand, this would seem to be impressively accurate. However, if the base rate of offending is low, then the majority of people ensnared by this type of operation will nevertheless be people who would not otherwise have offended. Suppose, for instance, that only one out of every 1000 individuals would offend without the inducement. If the police target each person in this group, then they will indeed find that one person who was predisposed to offend. But they will ensnare 50 individuals who were <u>not</u> predisposed (5% of 1000), meaning that the vast majority of people ensnared by the operation would be people that would not have otherwise offended.[21] For this reason, it is hard to conceive of a plausible scenario in which random virtue testing for terrorism — e.g., by focusing on a mosque or political meeting — would be sufficiently sensitive to exclude the non-predisposed.[22]

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19 *Mack*, S.C.R. at 904.

20 Richard H McAdams, "The Political Economy of Entrapment," *Journal of Criminal Law and Criminology* 96, no. 1 (2005): 137–38.

21 This problem is by no means limited to the context of undercover policing. Low base rates in criminal offending bedevil all predictive exercises in criminal justice, an issue that has gained new salience in the debates over algorithmic risk assessment in criminal justice. For an overview, see Sandra Mayson, "Bias In, Bias Out," *Yale Law Journal* 128 (2019).

22 On this point, see Kent Roach, "Entrapment and Equality in Terrorism Prosecutions: A Comparative Evaluation of North American and European Approaches," *Mississippi Law Journal* 80, no. 4 (2011): 1474 (warning of the potential for "random virtue testing" to be uncritically applied in discriminatory ways). Roach focuses on the intensity of terrorism investigations, as well as their proximity to protected religious and political

Conversely, if the base rate is sufficiently high, then an undercover operation of this kind is more readily defended. Suppose that a quarter of the targeted population is prone to offend, regardless of inducement. In that case, the undercover operation would (again, assuming a population of 1000 individuals) capture all 250 predisposed individuals, along with 50 non-predisposed individuals. Of course, whether that is an acceptable trade-off is arguable and is likely to vary with context. But the point is that random virtue testing operations are more easily defended provided the base rate is high enough. It is important to note, however, that my example — in which a quarter of the targeted population is prone to offending — is probably quite exaggerated. In *Barnes*, the Supreme Court took the view that suspicionless buy-bust operations are permissible when they are narrowly tailored to geographic areas in which the police reasonably suspect crime. The main question here is whether the tailoring is sufficient to push up the base rate of offending to a point where the error costs are defensible. This will depend, of course, on an assessment of the error rate of the investigative technique in question. (My example, in which it returns no false negatives and false positives a mere 5% of the time, may be overly optimistic in most actual settings).

Whether a given person was "induced" to commit a crime, or would have offended regardless, depends, of course, on the nature of the inducement. The inference that the accused was not induced to commit the offence is stronger if the inducement in question is reasonably common, whereas it is weaker if the police offer a significantly above market rate inducement or one that is highly unusual (or are unusually persistent, etc.). The same goes for occasions in which the police exploit the accused in a vulnerable moment.[23] In those cases, as McAdams notes, it will often be more plausible that most of the people ensnared by the inducement were unlikely to have offended in more typical scenarios.[24] Unsurprisingly, courts have been alive to these concerns. For instance, in *R v. N.Y.*, the Court of Appeal for Ontario relied on the fact that the undercover informant had not exploited any vulnerability on the part of the accused, been unusually persistent, threatened him, or otherwise engaged in conduct that would

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speech. In addition, for the reason given in the text, I suspect that blanket operations of this sort are likely to be substantially over-inclusive.

23 McAdams, "The Political Economy of Entrapment," 174–75.

24 McAdams, "The Political Economy of Entrapment," 158.

have induced an average person to engage in activities in support of terrorism.[25]

Although McAdams regards this as a problem of "unproductive" or "wasteful" policing, it is not difficult to regard it equally as a problem of fairness. Indeed, McAdams provides the key insight when he observes that most people are likely to be, as he puts it, "probabilistic offenders." By this, McAdams means that a person's likelihood of criminal offending is neither certain nor completely ruled out: even if someone is generally unlikely to offend in most common scenarios, they may offend in other, less common scenarios.[26] These include, for instance, an unusually tempting (above market rate) inducement, a scenario of persistent or repeated temptation, or temptations that present themselves at particular moments of vulnerability.[27]

Investigatory techniques that are prone to ensnare people who are unlikely to offend without the intervention of the authorities are arguably unfair for two distinct reasons. First, even if these techniques provide some social benefit in preventing and/or deterring crimes (after all, probabilistic offenders offend with a non-zero probability), that benefit is not likely to be great given the low probability with which they commit such offences. From that individual's point of view, their conviction and punishment provide a very modest social benefit to others but come at the cost of a very serious personal sacrifice on their part. It is difficult to see how an entrapped individual could regard such a deal as fair. Hence, entrapment serves to prevent conviction under circumstances in which the undercover operation imposes unreasonable burdens on an accused because it forces them to accept significant personal costs for relatively little social gain.[28]

Second, in a context in which most people are probabilistic offenders, the power of the authorities to control the nature, frequency, and timing of

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25 *N.Y.*, ONCA at para 132.

26 "It is," as the Fourth Circuit once put it, "simply naïve to suppose that public officials, or other defendants, can be neatly divided between the pure of heart and those with a 'criminal' outlook." See U.S. v. Hunt, 749 F.2d 1078, 1085 (4th Cir 1984).

27 As McAdams puts it, undercover operations "give the police the power to control the fortuity of legal compliance: the power to make scarce criminal opportunities plentiful, the power to control the timing of criminal opportunities, and the power to repeatedly offer opportunities so as to maximize the probability of finding the target at the time when she is most willing to offend." See McAdams, "The Political Economy of Entrapment," 153. See also Marcus, *The Entrapment Defense*, §3.03.

28 For reasons noted above, whether entrapment is a true "defence" varies by jurisdiction.

an inducement to crime is the power to make criminals out of ordinary but fallible people. The authorities would, in principle, have the power to enforce the law in a potentially quite arbitrary manner, whether in the sense of randomly making criminals out of ordinary people or in the sense of targeting enforcement efforts against disfavored individuals in ways that they, like most of us, would be ill-placed to withstand. The entrapment defence is a means of constraining this power. In this regard, entrapment stands to undercover policing roughly as abuse of process stands to prosecutorial discretion: as a limit to constrain how officials choose which individuals to investigate, prosecute, and punish.[29]

This account provides an answer to the objection that inducing someone to commit a crime and then punishing that person for doing so might be an effective way of preventing crime (e.g., by "sending a message"). Ensnaring people in criminal acts and then punishing them for their crimes is permissible when there is reason to believe that the accused would likely have offended anyway. How do we know whether an accused would likely have offended anyway? The varieties of entrapment provide some guidance: we can ask whether the accused was "predisposed" to commit that type of crime or we can ask whether the authorities used means that are sufficiently uncommon, persistent, or exploitative that even ordinarily law-abiding people would be prone to give in. In cases where an inducement is not especially tempting, persistent, or exploitative, there is a stronger inference that the accused would likely have offended even absent the police intervention, as the proffered inducement is of a nature that is prone to arise in any event. In those cases, the accused has little ground to complain that she is being scapegoated. However, in cases where the inducement is unusually tempting or persistent, then the accused has a stronger claim that the authorities have arbitrarily decided to make an example out of her, even though she was otherwise quite unlikely to have offended.

III. JUDICIAL REGULATION OF UNDERCOVER POLICE CONDUCT

In the last section, I sketched, albeit in quite general terms, an egalitarian rationale for a defence of entrapment. The central idea is to restrict the power of the authorities to induce crime in order to

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[29] McAdams, "The Political Economy of Entrapment," 156–58.

subsequently prosecute it to contexts in which it is reasonably clear that an accused would have offended in a similar way regardless. Determining when this is the case is difficult and inevitably involves some degree of speculation. I have suggested that both the subjective and objective versions of entrapment are attempts to address this question. I do not suggest that either version adequately addresses the concerns one might have about how we could know what someone would have done under different circumstances.[30] Rather than explore this thorny epistemological question further, I now turn to consider a different question, namely whether entrapment is best left to the courts to develop on a common-law basis rather than delegated to legislatures to define.

This might seem like a departure from traditional questions about the parameters of entrapment but concerns about the responsibilities of the court in responding to police overreach, on the one hand, have a long history in the law of entrapment. Throughout its history, the entrapment defence has been responsive to institutional and political developments outside the courts. Entrapment is a doctrine originally devised by American courts as a response to a new institutional problem, namely the use of controversial modes of undercover policing in the early decades of the 20th century. This was a problem that arose after American police forces began to professionalize. Prior to the emergence of the modern law of entrapment in the United States in the waning decades of the 19th-century, state courts had relied on traditional private law doctrines of consent or contract, according to which a victim who cooperated with authorities in an effort to ensnare the defendant had "consented" to the crime.[31]

What precipitated the shift to a more modern law of entrapment? Legal historians have pointed to the growing power of law enforcement, particularly during the Prohibition era, as a catalyst for judicial innovation in developing the modern law of entrapment.[32] By the end of the 1920s,

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30 Luke Hunt has recently criticized subjective forms of the entrapment defence on this basis. See Luke Hunt, *The Retrieval of Liberalism in Policing* (New York: Oxford University Press, 2018), chap. 5.1.

31 Rebecca Roiphe, "The Serpent Beguiled Me: A History of the Entrapment Defense," *Seton Hall Law Review* 33, no. 2 (2003): 271.

32 Roiphe, "The Serpent Beguiled Me," 283–84. See also Kenneth Murchison, *Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition* (Duke University Press, 1994), 41–44. As Murchison puts it, "[t]he entrapment defense is one of the enduring doctrinal legacies of the prohibition era."

"the question of entrapment had shifted almost entirely from a formal analysis of the elements of the crime and the evaluation of consent with old contract principles to a new focus on the malleability of human nature in light of the powerful state."[33] Others have pointed to the influence of the Italian positivist school of criminological thought — with its focus on identifying predisposed criminal types — in American legal thought during the early decades of the 20th-century.[34] Entrapment had become established law in all U.S. federal courts by the early 1930s.[35] Moreover, by that point, state courts had already been tinkering for 50 years with an expanded conception of entrapment that focused on whether "the government manipulated the defendant into committing a crime he would not otherwise have consummated," rather than whether the ostensible victim had constructively "consented" to the crime.[36] The challenges arising out of terrorism prosecutions, then, are but the newest form of a long-standing interplay between courts and the police.[37]

Entrapment was unknown outside the United States until fairly recently, in part because in many other jurisdictions undercover police operations were far less common and, indeed, generally prohibited. If a state official induced a criminal act, that did not weaken the case for convicting the accused but rather strengthened the case for prosecuting the official as well.[38] Some have suggested that the reason other common law jurisdictions did not recognize entrapment until half a century after the first American federal case is that "most liberal democracies were so skeptical of undercover

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33 Roiphe, "The Serpent Beguiled Me," 278–79.

34 See Frampton, "Predisposition and Positivism."

35 Murchison, *Federal Criminal Law Doctrines*, 31.

36 Roiphe, "The Serpent Beguiled Me," 278.

37 59% of cases in the United States involving ISIS are known to have involved government informants or undercover agents; the figure is even higher (71%) in "domestic plot" cases. See "Case By Case: ISIS Prosecutions in the United States," *Center on National Security at Fordham Law*, (2014–16): 18, https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf.

38 Jacqueline Ross, "Tradeoffs in Undercover Investigations: A Comparative Perspective," *University of Chicago Law Review* 69, no. 3 (2002): 1501–541; Dru Stevenson, "Entrapment and Terrorism," *Boston College Law Review* 49 (2008): 125–215. Entrapment in this respect parallels exclusion of evidence, in that while misconduct shows why the police should be sanctioned, it does not show why the accused should be rewarded. Indeed, Australian courts treat exclusion as the appropriate remedy for a successful entrapment claim. See Ridgeway v. R, (1995) 184 CLR 19.

operations — particularly the idea that police may commit criminal acts as part of such operations — that there was not much need for a defense."[39] It is not that police outside the United States had no experience with undercover operations; far from it.[40] Rather, given their first-hand experiences with Nazi and communist police states, European police agencies displayed greater reticence in undercover policing than their counterparts in the United States.[41] Other scholars have made the opposite argument, namely that countries that were slower to recognize an entrapment defence had a comparatively much more robust pattern of police surveillance.[42] Some European countries, for instance, have been reported to authorize wiretaps at 20 to 30 times (or more) the rate in the United States.[43] Similar claims have been made about Canada.[44]

I have emphasized the courts' role in developing the law of entrapment to underscore that the law of entrapment, particularly in its early 20th-century American origins, arose out of a need to solve a practical moral problem rather than as the unfolding of some fully formed philosophy. This suggests, in turn, that some of the traditional doctrinal concerns about entrapment — subjective versus objective, acquittal versus stay, negation of culpability or branch of abuse of process — may not necessarily reflect deeply held or principled commitments as much as path-dependent contingencies concerning the preoccupations of the courts that first began developing the defence.

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39 McAdams, "The Political Economy of Entrapment," 110.

40 "From the 16th century onward, the emerging nation-states in Europe made extensive use of undercover techniques to protect their political, military and economic interests." See Cyrille Fijnaut and Gary T. Marx, "Introduction: The Normalization of Undercover Policing in the West: Historical and Contemporary Perspectives," in Fijnaut and Marx, eds. *Undercover: Police Surveillance in Comparative Perspective* (Kluwer Law International, 1995): 2.

41 Fijnaut and Marx, "Normalization of Undercover Policing," 15.

42 See Ross, "Tradeoffs in Undercover Investigations," 1510–512.

43 See H-J Albrecht, C. Dorsch, and C. Krüpe, "Rechtswirklichkeit und Effizenz der Überwachung der Telekommunikation nach den §§ 100a, 100b StPO und anderer verdeckter Ermittlungsmaßnahmen," (Freiburg i. Br.: edition iuscrim, 2003): 104–05 (esp. abb. 34), http://hdl.handle.net/11858/00-001M-0000-002E-4DB5-9.

44 Jean-Paul Brodeur, "Undercover Policing in Canada: A Study of its Consequences," in Fijnaut and Marx, "Introduction," 71–10. The more recent Albrecht study, however, indicates roughly comparable rates of wiretap activity in the United States and Canada.

Consider the question of whether entrapment should amount to a substantive defence negating culpability, or whether it should instead amount to a showing of abusive practices by the authorities, leading the courts to stay proceedings in the name of ensuring the integrity of their process. This question, largely tracking the distinction between subjective and objective strains of entrapment, has engendered some degree of controversy among both courts and legal scholars. Although the United States Supreme Court treated entrapment as a substantive defence leading to an acquittal in *Sorrells*, more recent treatments in England, Australia, and Canada have rejected that approach, instead treating entrapment as grounds for a stay of proceedings.[45] Some legal scholars have argued that a stay is the appropriate remedy, on the grounds that treating entrapment as negating culpability raises the problem of "private entrapment": presumably the identity of the entrapper – government agent or private actor – does not bear upon culpability.[46] Hence, a denial of culpability interpretation creates a *prima facie* inconsistency with the settled norm that entrapment is not available to an accused who claims they were "entrapped" by a private party. Others have defended a culpability-based approach. Gideon Yaffe, for instance, has provided a characteristically subtle and penetrating defence of the subjective approach, arguing that a subjective approach is consistent with denying an entrapment defence when the would-be entrapper is a private actor.[47]

Without taking a position on either side of this dispute, it is worth considering why American federal courts conceptualized entrapment as a denial of culpability in the first place. The United States Supreme Court first acknowledged the existence of entrapment as a defence in *Sorrells*, a case in which the defendant was prosecuted for selling whiskey to undercover government agents in violation of the *Volstead Act*. The majority construed

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45 Sorrells v. United States, 287 U.S. 435 (1932) (acquittal on the merits) (US); R v. Looseley, [2001] UKHL 53 at para 16 (stay of proceedings or exclusion of evidence) (U.K.); Ridgeway v. R, (1995) 184 C.L.R. 19 at paras 30, 31 (exclusion of evidence, potentially leading to a stay) (Australia); Mack, S.C.R. 903 (stay of proceedings).

46 Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009), 263; Ho Hock Lai, "State Entrapment," *Legal Studies* 31, no. 1 (March 2011): 84; Kate Hofmeyr, "The Problem of Private Entrapment," *Criminal Law Review* (April 2006): 326–28. Compare Andrew Carlon, "Entrapment, Punishment and the Sadistic State," *Virginia Law Review* 93, no. 4 (June 2007): 1115–116 (acquittal prevents the intended wrong, namely punishment of the entrapped).

47 Yaffe, "'The *Government* Beguiled Me.'"

the *Volstead Act* to have implicitly excluded abusive forms of investigation and enforcement, applying the principle that statutes should be interpreted "so as to avoid absurd or glaringly unjust results."[48] Consequently, an entrapped person is entitled to an acquittal since the statute simply does not reach the facts of their case. Since then, American federal law has treated entrapment as a denial of culpability.

Justice Hughes' stated reason for interpreting the *Volstead Act* this way was because he regarded the alternative as unduly trenching upon the legislative power. As Hughes saw it, it would exceed the judicial mandate to hold that the *Volstead Act* did indeed reach the facts of Sorrells' case but then decline to enforce it because doing so seemed unfair.[49] To do so would amount to a kind of judicial "nullification" of the statute. "Judicial nullification of statutes, admittedly valid and applicable, has," Hughes claimed, "happily, no place in our system."[50] If the legislature truly wanted courts to apply the *Volstead Act* to people who had been unfairly targeted, they were free to make that clear in subsequent legislation.[51] In other words, the majority in *Sorrells* did not decide to treat entrapment as a substantive defence to the *Volstead Act* because it adhered to a theory of legal culpability according to which an entrapped person acted faultlessly. Rather, it did so to avoid a direct challenge to Congress's authority, a challenge the Court was eager to avoid given its view of the respective roles of Congress and the Supreme Court in a constitutional democracy. The *Sorrells* majority avoided this challenge by treating entrapment as a matter of statutory construction rather than as a freestanding judicial doctrine regulating police powers.

Of course, this does not prove that the question of whether entrapment should be treated as a denial of culpability or as an abuse of process is of no independent interest. However, at least when taken at face value, *Sorrells* suggests that the reason that the United States Supreme Court initially adopted a subjective approach to entrapment has more to do with concerns about the legitimacy of judicial "nullification" of otherwise plainly

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48 *Sorrells*, US.

49 "Where defendant has been duly indicted for an offense found to be within the statute, and the proper authorities seek to proceed with the prosecution, the court cannot refuse to try the case in the constitutional method because it desires to let the defendant go free." See *Sorrells*, US.

50 *Sorrells*, US.

51 *Sorrells*, US.

applicable statutes than it does with any particular theory of culpability.[52] In the common law world, entrapment is a defence first developed by American courts, and many American courts continue to adhere to a version of the defence that other courts have since rejected. Yet, taking *Sorrells* at face value suggests that this may not be because of a principled difference of opinion about culpability, so much as a reflection of the history in American courts of disagreement as to the appropriate relationship between the courts and the legislature in a constitutional democracy.[53]

IV. THE CASE FOR REGULATING UNDERCOVER INVESTIGATIONS THROUGH LEGISLATION

Looking back at the early entrapment cases discussed in the last section suggests that instead of focusing narrowly on whether a stay or an acquittal is a more fitting response to overzealous policing, we might do well instead to consider the broader question of the institutional competence of courts to patrol law enforcement efforts, on the one hand, and their authority to create novel defences on a common-law basis, on the other.[54] In this respect, entrapment is perhaps usefully compared to search and seizure law. As in the context of entrapment, search and seizure law is clearly animated by a concern to regulate the investigative activities of the authorities and prevent overreach. Yet, unlike the modern law of entrapment, the jurisprudence of search and seizure has a built-in concern with democratic legitimacy via the

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52 *Sorrells* was decided in 1932, just a few years before the Supreme Court began its campaign of wholesale opposition to Roosevelt's New Deal, and only five years before Roosevelt responded with his notorious court packing plan. However, as Frampton points out, the Supreme Court in 1932 — including judges in the *Sorrells* majority — were hardly averse to aggressive assertions of judicial power. See Frampton, "Predisposition and Positivism, 132–33.

53 See Carlson, "The Act Requirement," 1033–36 (noting that the Justices in *Sorrells* were more concerned with disputing the Court's power to devise a defence of entrapment than with its precise content). Compare the Supreme Court of Canada's construction of s. 8(3) of the *Criminal Code* to permit the courts to develop novel defences on a common law basis, despite the fact that the plain language of s. 8(3) does not suggest any such power. See R v. Amato, [1982] 2 S.C.R. 418, 140 D.L.R. (3d) 405.

54 A perhaps more material distinction between the two standards is whether the evidence that would be used to mount an entrapment defence — for instance, of the defendant's character and prior record — might potentially jeopardize other defence strategies. See Stevenson, "Entrapment and Terrorism," 137.

principle that search powers must be authorized by law. To be sure, the Supreme Court has not always been consistent in upholding that principle, but for my purposes here, the point I wish to draw attention to is that it is possible for the courts to regulate investigative activities without injecting their own view about fair play into the jurisprudence, at least in the first instance.

The way in which this concern with democratic legitimacy is manifested in Canadian law is in the first part of the *Collins* framework. Against a default rule requiring all searches to be backed by judicial pre-authorization, the Crown must show that a warrantless search was authorized by law.[55]

This is a threshold question: if the Crown cannot point to some form of legal authorization for the search, the search is unlawful. The significance of *Collins*, step one, can hardly be exaggerated. It signifies, first, that the police are not exercising inherent search powers, to be developed and utilized at their pleasure, but rather exercise only those powers assigned to them by positive law. Secondly, it signifies that the primary source of legal authorization for police search powers is Parliament, rather than the courts. In asking whether a search was authorized by law, the courts are asking whether the Crown can point to an express delegation of power by Parliament.

As I have noted, the Supreme Court has been far from unwavering in its dedication to this principle. Perhaps most notoriously, the Supreme Court has relied upon the so-called ancillary powers doctrine to authorize modes of street policing — including the contentious issue of investigative detentions — in a common law, post-hoc manner.[56] However one feels about the merits of the Supreme Court's jurisprudence on investigative detention, it is, I think, a loss to the democratic credentials of the police that such a contentious form of street policing received legal imprimatur without significant Parliamentary input. Whatever the substantive merits of stop-and-frisk policing, authorization for that kind of police power should have come via an express delegation of power by Parliament. Parliament may be better placed to consider the evidence, and it is certainly better placed to

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55 R v. Collins, [1987] 1 S.C.R. 265 at 276–78, 38 D.L.R. (4th) 508.

56 R v. Mann, 2004 SCC 52. The Supreme Court has sometimes taken the lead in making law in the s. 8 context as well. See, e.g., R v. Chehil, 2013 SCC 49 (sniffer dogs); R v. Fearon, 2014 SCC 77 (searches of cell phones incident to arrest); R v. Golden, 2001 SCC 83 (strip searches).

hear from a wide range of constituents and to be held politically accountable for unpopular decisions.

Nevertheless, the important point for my purposes is that there is a structural commitment in the section 8 jurisprudence to the principle that search powers require legal authorization and, hence, political legitimation. In contrast, there is no similar requirement with respect to undercover operations by the police. Entrapment operates entirely after the fact. Once an entrapment claim is before the court, the court simply proceeds on its own steam to evaluate the fairness of the investigation by appeal to substantive standards developed by the courts themselves.

It is not obvious why if the police have no inherent powers to search and require express delegation of power by Parliament to be active in that domain, they should have inherent powers to lure, encourage, or incite people into committing criminal offences. Offhand, it does not seem as if the latter context is more innocuous than the former or necessarily less prone to abuse. They are, to be sure, less likely to affect as many people as broad search powers, particularly in light of technological developments that enable population-level searches. But for those who are affected by undercover policing, the impact is likely to be much more significant than in the case of searches. Arguably, the significance of controlling the police power to induce even ordinarily law-abiding people to commit criminal offences is more easily explained than that of protecting an increasingly amorphous interest in a "reasonable expectation of privacy." This is not, of course, to say that police should under no circumstances have powers to lure, encourage, or incite people into committing criminal offences. It is only to question whether those powers might require prior legal authorization.[57]

Consequently, one might envision a parallel "authorized by law" requirement for both the search and undercover operations contexts.[58] If a case presents a potential issue of entrapment, a reviewing court might be empowered to investigate the legal basis for the power asserted by the police in undertaking the operation in question. The most obvious way in which

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[57] Compare Teixeira de Castro v. Portugal, 28 Eur. Ct. H.R. 101 (1999) (finding a violation of Article 6 § 1 in part because the undercover agents were not acting under the orders and supervision of a judge).

[58] It would be awkward to house such a requirement under either s. 8 or s. 9, given that most entrapment-type scenarios involve neither searches nor detentions. The best bet might be a general-purpose requirement, under s. 7, that police activity designed to facilitate prosecution be backed by express authorizing legislation.

Parliament could delegate powers of this kind is through *Criminal Code* amendment. Alternately, and perhaps more realistically, Parliament could delegate broader regulatory authority to the police and require police to devise their own rules, operations manuals, and similar agency-specific regulations, with such rules subject to judicial review for reasonableness.[59]

To be clear, the proposal is not that each and every undercover operation must be backed by judicial pre-authorization, although that might be appropriate for more elaborate or high-stakes operations. Rather, the proposal concerns the delegation of general police power; for instance, a statutory power to engage in random virtue testing under certain conditions or a power to offer inducements of a certain kind with respect to certain types of offences (and, perhaps, certain types of suspects). Judicial pre-authorization via an investigative warrant could well be appropriate when the police seek to make unusually tempting or persistent efforts to encourage someone to offend, especially in cases where a target may have unusual difficulty in conforming to law.[60] That said, evaluating the merits of such a proposal is, in the first instance, a matter for Parliament to decide.

Holding an investigation unlawful because it was not authorized by law would not rely upon a court's own view as to the fairness of the investigation. Rather, it would serve to ensure that Parliament does not shirk its responsibility to make law. Otherwise put, the point is not that legal authorization by Parliament ensures greater protections for suspects. The point is to provide undercover police operations greater political legitimacy. If the government is aware that police investigations, particularly into high salience, difficult-to-monitor crimes such as terrorism, will be regarded as unlawful unless backed by an express delegation of power — even if the investigations seem otherwise reasonable and fair — then it will be aware that it cannot punt controversial questions about the fairness of undercover operations in those types of cases to the courts. With a vigorously enforced "authorized by law" requirement, Parliament would be forced to legislate or face political repercussions for failing to provide the police with legal

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59 For instance, the FBI's use of undercover operations is subject to Department of Justice guidelines. See U.S., Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (Washington, D.C.: U.S. Department of Justice, 2005): chap. 2, https://oig.justice.gov. Those guidelines, however, appear to lack meaningful enforcement mechanisms. See Stevenson, "Entrapment and Terrorism," 163.

60 McAdams, "The Political Economy of Entrapment," 179–84.

methods for responding to the issues du jour. In short, the point of *Collins*, step one, is to encourage democratic deliberation of difficult and controversial questions about the appropriate extent of police powers, as well as to prioritize legislation over judicial seat-of-the-pants policymaking.

There is some precedent for this suggestion. When the Supreme Court of Canada has applied step one of *Collins* rigorously to invalidate otherwise reasonable searches, Parliament has reacted by enacting authorizing legislation. Consider *Wong*, in which the Supreme Court was fairly literal minded in refusing to regard a video search as authorized by law, even though the *Criminal Code* at the time did contemplate audio searches. It would not have been a great stretch on the part of the Supreme Court to read the existing language in the *Criminal Code* "purposively," so as to implicitly cover video searches as well.[61] The justices resisted that temptation and instead insisted that any such searches would require Parliament to explicitly authorize video warrants, which Parliament promptly did.[62] A similar story unfolded in *Stillman*: after the Supreme Court refused the warrantless extraction of bodily samples from the accused, Parliament subsequently enacted section 487.05, authorizing police to obtain a warrant to obtain samples, a power that did not exist at the time of the original search.[63] What cases like *Wong* and *Stillman* show is not that the police had acted unreasonably, but that their actions were of doubtful democratic legitimacy because Parliament had failed to explicitly authorize them to exercise the relevant search powers.

The purpose of imposing an "authorized by law" requirement on police activities that are designed to lure, encourage, or opportune people into committing criminal acts is to force deliberation and policymaking by an institution that is more democratically accountable and in a better position to consult widely than courts. Democratic resolution, I would argue, is particularly important when it comes to novel and controversial questions of political morality, such as the appropriate means for preventing and prosecuting acts of terrorism. This is not to say that, in extraordinary cases, the courts might not regard authorizing legislation as nevertheless unlawful under prevailing *Charter* norms (paralleling *Collins*, step two), but it would

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61 R v. Wong, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1.

62 The *Criminal Code* now specifically contemplates video warrants. See Criminal Code, R.S.C. 1985, c. C-46, s. 487.01(4).

63 R v. Stillman, [1997] 1 S.C.R. 607, 144 D.L.R. (4th) 193.

mean that the development of entrapment law would be a matter for legislative, rather than judicial, initiative in the first instance.[64]

A secondary benefit from putting the onus onto legislatures to define the parameters of acceptable undercover operations is that legislatures may choose to authorize different types of policing measures for different types of offences, as opposed to a general-purpose defence of entrapment as defined by courts.[65] Some crimes, such as terrorism, may plausibly permit more aggressive forms of undercover policing and opportuning because of their seriousness or because there are few truly "probabilistic" offenders.[66] As Kent Roach has noted, "[i]t is likely and probably justifiable that the courts will give the State more leeway in terrorism cases in terms of proactively participating in ongoing stings."[67] Crimes that few would engage in at any price (child sex offences, to take another example) may raise fewer concerns about targeting, precisely because there are fewer probabilistic offenders to begin with. In contrast, other crimes may hold broad appeal, meaning that many people are probabilistic offenders (McAdams mentions stealing from one's employer and various types of victimless crime). In crimes of that type, the potential for abuse is greater, as broad police powers to inveigle and opportune would be more prone to ensnaring people who would, under ordinary circumstances, not commit the offence.

A potentially sticky issue is to define the threshold question in a way that avoids drawing parallels to the threshold question in the section 8 jurisprudence, namely whether someone enjoys a "reasonable expectations of privacy." The section 8 cases have not inspired much confidence in terms of either clarity of analysis or predictability of outcome on this question. To avoid a similar fate, it would be desirable to frame the threshold question

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64 One might object that legislatures cannot be trusted to give police appropriately limited powers to engage in undercover operations. There are, of course, no guarantees that even a fair process of public deliberation will always yield the outcomes that we might wish, but in a social world in which reasonable disagreement is permanent and ubiquitous, there are no such guarantees in any case.

65 See McAdams, "The Political Economy of Entrapment," 168–73.

66 See Stevenson, "Entrapment and Terrorism." How persuasive arguments of this kind are may depend, in part, upon how broadly "terrorism" is defined. Perhaps the more inchoate the conduct, the less compelling the inference. See Jon Sherman, "A Person Otherwise Innocent: Policing Entrapment in Preventative, Undercover Counterterrorism Investigations," *University of Pennsylvania Journal of Constitutional Law* 11 (2009): 1475–510.

67 Roach, "Entrapment and Equality in Terrorism Prosecutions," 1488.

in terms that do not draw upon evocative but contested concepts such as "privacy." The main function of the threshold question is simply to determine when police activity in inducing criminal acts is sufficiently serious as to warrant prior legal authorization. There may be grounds for optimism here, as — unlike in the section 8 context, in which private individuals regularly observe and interact with each other in ways that engage privacy interests — private individuals only rarely have cause to induce others to engage in criminal acts.[68] Consequently, it should be less controversial to frame a relatively straightforward threshold question as to whether the police conduct in question was designed to lure, encourage, or opportune people into committing criminal acts, as there should be fewer difficult questions concerning how to distinguish police conduct from the behaviour of private individuals.

The proposal to place the onus on Parliament to define the terms of acceptable police conduct in inducing criminal acts stands in contrast with Luke Hunt's proposal to instead treat entrapment as an instance of a broader prerogative power on the part of the executive, most notably as deployed in the national security context. Hunt, drawing inspiration from Locke's account of the prerogative power, points out that the police, as a branch of the executive, sometimes reasonably depart from existing legal rules in the face of *bona fide* emergencies, whether that be the threat of terrorist acts or violent crimes targeting vulnerable individuals.[69] Rather than try to whitewash this power by declaring it "legal," Hunt suggests imposing (presumably, by means of judicial oversight) a series of constraints on the executive's prerogative to break the law. First, the executive must act for a public purpose; second, the situation must be one of genuine emergency, such that the legislature does not have time to make law; third, the actions must not "be an affront to liberal personhood"; and fourth, the emergency must involve both an acute threat of death or physical injury and be otherwise unavoidable.[70]

I note two points of comparison. First, whereas my approach seeks to keep the legislature in the driver's seat by ensuring that they make law authorizing specific types of policing that might otherwise raise issues of

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68 On the difficulties in distinguishing between police surveillance and ordinary expectations of privacy, see Jed Rubenfeld, "The End of Privacy," *Stanford Law Review* 61 (2008): 101–61.

69 Hunt, *The Retrieval of Liberalism in Policing*, 198.

70 Hunt, *The Retrieval of Liberalism in Policing*, 197.

entrapment, Hunt's approach, in keeping with his focus on emergencies, hands the reins over to the executive. Second, by focusing on judicial review of executive action under the prerogative power, Hunt's approach adopts an essentially *ex post* perspective. In contrast, the approach taken here, while it does not seek to prohibit the courts from making law in this arena, nevertheless seeks to foster the rule of law by inducing Parliament to provide guidelines to the police *ex ante*.[71] The mundane predictability that even serious types of crimes — including acts of terrorism — will occur suggests that we should be loath to allow executive actors, including the police, to defend the legitimacy of their undercover operations on the basis of emergency powers. This is not to say that genuine emergencies will never occur, of course, but rather that democratic values counsel in favour of prior authorization, through positive law, of police activities designed to lure, encourage, or opportune people into committing criminal acts.

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[71] Hunt's focus on the executive's prerogative power is broadly consistent with American responses to terrorism over the last two decades, which, as Roach has noted, is dominated by sweeping assertions of extra-legal authority by the executive. See Kent Roach, *The 9/11 Effect: Comparative Counter Terrorism* (Cambridge, U.K.: Cambridge University Press, 2011), 161–238.

The Dangers of *Charter*-Proofing the Toronto 18's Prosecution

KENT ROACH *

ABSTRACT

This chapter examines the many failed *Charter* challenges brought by the Toronto 18. Although the *Charter of Rights and Freedoms* was added to Canada's Constitution in 1982 as a response to national security excess, it failed to benefit the Toronto 18 and make the prosecution longer. *Charter* challenges to mandatory publication bans that some of the Toronto 18 argued prevented them from responding to prejudicial pre-trial publicity failed. *Charter* challenges to bail conditions and harsh conditions of pre-trial detention – including solitary confinement and prosecutorial use of a direct indictment to pre-empt a preliminary inquiry – also were unsuccessful. Although the courts found that the police had violated various *Charter* rights in several cases, they never excluded evidence obtained as a remedy. The Toronto 18 had *Charter* rights, but not *Charter* remedies. The Supreme Court reversed a trial judge's decision, not allowing him to decide national security secrecy claims and what evidence could not be disclosed to the accused. Finally, the courts upheld broad terrorism offences as consistent with the *Charter*. Although the many failed *Charter* challenges can be seen as producing due process excess and delay, it is argued that the conclusion that the prosecution were consistent with the *Charter* or "*Charter*-proof" can blind the public to troubling and problematic aspects of the prosecution and of our broad terrorism laws. It also confirms that even in the *Charter* era, the executive and the legislature play the dominant roles in the national security context.

Keywords: *Canadian Charter of Rights and Freedoms*; Toronto 18; Terrorism Prosecution; Publication Ban; Conditions of Detention; Freedom of

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Expression; Principles of Fundamental Justice; Direct Indictment; National Security Confidentiality; *Charter* Remedies

I. INTRODUCTION

Charter claims figured prominently in much of the seemingly endless litigation surrounding the Toronto 18 prosecution. The accused claimed that many of their *Charter* rights had been violated. They argued that prosecutors had violated their rights through the use of direct indictments to pre-empt preliminary inquiries. Conditions of solitary confinement violated the *Charter*. Broad terrorism offences and definitions in the *Anti-Terrorism Act* (*ATA*) enacted after 2001 violated various *Charter* rights. Restrictions on the ability of the trial judge to see classified information and decide whether it should be disclosed to the accused violated their fair trial rights. The press and a few of the accused argued that freedom of expression was violated by mandatory publication bans on evidence heard at their bail hearings, especially in light of a prejudicial and widely publicized press conference held by the police shortly after the arrests. All of this litigation was unsuccessful. Most claims of *Charter* violations were rejected by trial judges. The Supreme Court of Canada overturned the only two *Charter* victories in the lower courts.[1] The *Charter* did not make any difference in the Toronto 18 prosecutions, except to make the process longer.

For some, the many failed *Charter* claims in the Toronto 18 prosecution may reflect the attention that was devoted to complying with *Charter* norms when the *ATA*, 2001 was drafted and enacted in the fevered weeks after 9/11.[2] For others, it may be a sign of a Canadian indulgence in due process that "seems never due to end."[3] There is some truth in both of these

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1 Toronto Star Newspapers Ltd v. Canada, 2010 SCC 21; R v. Ahmad, 2011 SCC 6.

2 Irwin Cotler, "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, eds. Ronald Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001).

3 Edward Morgan, "A Thousand and One Rights," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, eds. Ronald Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001), 412. For example, one unsuccessful *Charter* challenge was made to the provision of electronic disclosure of what would otherwise have been a million pages of written disclosure. See R v. Mohammed, 2007 CanLII 5151 (ON SC).

perspectives. The *ATA*, 2001 was carefully drafted with the minimum standards of the *Charter* in mind. It has almost universally been upheld when challenged under the *Charter*.[4] By comparative standards, *Charter* due process standards are robust. This may help explain why Canada struggles more and prosecutes terrorism offences less than the United States, the United Kingdom, or Australia.

My view about the failed *Charter* challenges in the Toronto 18 prosecution, however, differs. The "*Charter*-proofing" requirement still sets a rather low bar that is tied up in the willingness of courts to interpret and enforce the *Charter*. As I warned in 2001,[5] *Charter* proofing can obscure more basic questions about the fairness and utility of broad anti-terrorism laws, especially as applied to often-vilified accused who are members of unpopular religious or political minorities.

My concern is not so much that the Courts were consistently wrong in concluding that the *Charter* rights of the Toronto 18 had not been violated, but rather that such conclusions may blind the public to many troubling and problematic aspects of the prosecution and of our broad terrorism laws. Like other contributions in this collection,[6] I am concerned that the application of anti-terrorism laws to the Toronto 18 may be more problematic than their *Charter*-compliant and neutral text.

The *Charter* focuses attention on the powers of the courts, but the legislature and the executive play more dominant roles in the national security context. Prosecutors decided when and what charges would be laid and when seven of the 18 originally charged would receive a prosecutorial stay of proceedings.[7] To be clear, judicial stays of proceedings or exclusion of evidence obtained in violation of the *Charter* are possible, but the Courts

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4 Re Section 83.28 of the Criminal Code, 2004 SCC 42; R v. Khawaja, 2012 SCC 69.

5 Kent Roach, "The Dangers of a *Charter*-Proof and Crime-Based Response to Terrorism," in *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill*, eds. Ronald Daniels, Patrick Macklem, and Kent Roach (Toronto: University of Toronto Press, 2001).

6 See, for example, the chapters on sentencing and corrections by Michael Nesbitt and Reem Zaia, respectively.

7 On the prosecutorial role, see Croft Michaelson in this volume. See also Kent Roach, "The Prosecutorial Role in National Security Cases," in *The Oxford Handbook of Prosecutors and Prosecutions*, eds. Ronald Wright et al. (Oxford: Oxford University Press, 2021), 545–64. On the dominant role of prosecutors as *de facto* legislators and sentencers, see William Stuntz, "The Pathological Politics of Criminal Law," *Michigan Law Review* 100, no. 3 (2001): 506.

refused to order such drastic remedies when requested to do so by the Toronto 18.

Parliament played a dominant role in defining terrorism offences and establishing the basic rules of the game with respect to publication bans and trial procedures. The Courts resisted attempts by the accused and the media to reform Canada's broad publication ban laws. They did so even though the Toronto 18 argued that the result left the public with a limited, distorted, and even hyped view of the facts presented by state officials at a press conference held the day after the June 2, 2006 arrests.

The Courts also upheld very broad terrorism offences that have troubling implications when applied to those at the periphery of terrorist plots. The Supreme Court of Canada ultimately left in place bifurcated trial procedures that, by requiring those accused of terrorism offences to litigate in both the provincial superior courts and the Federal Court, threaten both the efficiency and fairness of Canadian terrorism trials.

The *Charter* makes grand promises of fairness, equality, and a refusal to convict the innocent. These values are indeed fundamental to a democratic form of counterterrorism that is normatively superior to the willingness of terrorists to use indiscriminate violence. But the mere existence of the *Charter* does not guarantee these precious values. Hence, we should examine the many failed *Charter* challenges brought by the Toronto 18 with an open and critical mind that is afforded by over a decade of perspective.

A. Outline

In this chapter, I will examine the *Charter* litigation in the Toronto 18 cases from an interdisciplinary perspective that draws on history and political science as well as law. I will also make extensive use of the media accounts of the trial process.

In the second part of the chapter, I will relate the 1982 enactment of the *Canadian Charter of Rights and Freedoms* to past abuses of the state's national security powers. The *Charter* has provided a more robust foundation for due process challenges than the American Bill of Rights or the U.K.'s *Human Rights Act*, 1998. This has helped make Canadian terrorism laws, on paper at least, more restrained than their American or British counterparts. Compliance with the *Charter* was one of the chief legitimating strategies used by a Liberal government that quickly enacted terrorism laws in response to 9/11. To be sure, attention to the *Charter* prevented some excesses, but the "*Charter*-proof" status of the anti-terrorism

laws and prosecutions in the Toronto 18 case should not dull our ability to critically evaluate the prosecution.

One exception to the robustness of the *Charter* is with respect to freedom of expression and freedom of the press. For better or worse, Canada lacks even a rhetorical commitment to freedom of speech as an overriding value. All *Charter* rights are explicitly subject to reasonable limits. Canada has accepted a number of limits on speech that American courts have resisted. The third part of the chapter will examine failed *Charter* challenges of publication bans brought by some of the Toronto 18 and by the media. Some of the accused argued that the publication ban should be lifted so that they could counteract the adverse effects of a press conference held by the police shortly after the arrests in June 2006 that did much to shape public attitudes about the case. The Supreme Court upheld mandatory publication bans despite their commitments to the proportionality analysis, which often values the importance of discretion in exceptional cases.[8] And the Toronto 18 prosecution was an exceptional case. It was exceptional in terms of the post-arrest sensational press conference. This press conference was world-wide news in the wake of the 2004 Madrid and 2005 London bombings. The Toronto 18 case was also exceptional because the publication bans remained in place during a pre-trial process that in some cases lasted four years.[9]

Although the *Charter* includes the right not to be denied reasonable bail without just cause, the Court has been deferential to Parliament in reviewing the grounds for denying bail. The number of accused denied bail and held in pre-trial custody has expanded significantly in the *Charter* era.[10] This raises the question of whether the due process guarantees of the *Charter* may actually enable and legitimize crime control activities such as extensive pre-trial detention. The fourth part of the chapter will examine how the

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8 *Toronto Star*, SCC.

9 After five days of deliberation, a jury convicted Steven Chand and Asad Ansari in June 2010. Previously, seven others pled guilty. Two were found guilty by judge-alone trials, and seven others had charges dropped or stayed sometimes on the condition that they agree to peace bonds. See Allison Jones, "Last of Toronto 18 terror cases in hands of jury," *Canadian Press*, June 18, 2010.

10 Kent Roach, "A *Charter* Reality Check: How Important is the *Charter* to the Justness of our Criminal Justice System?," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 40, no. 23 (2008).

Toronto 18's *Charter*-related claims about bail failed and how many of the accused spent years in pre-trial detention.

Not only were many of the Toronto 18 subject to extensive pre-trial detention, but they raised concerns about their conditions of confinement, including allegations of torture and challenges to the use of solitary confinement. Despite these allegations, judges found no *Charter* violations. Today, courts would more likely conclude that prolonged solitary confinement violated the *Charter*.[11] This is not merely a historical quibble given that seven of the Toronto 18 pled guilty. Even though guilty pleas are viewed as admissions of guilt, there is a growing recognition that some accused, especially those subject to harsh conditions in pre-trial detention, make rational or irrational decisions to plead guilty even though they might be innocent or have a valid defence.[12] Prosecutorial stays of proceedings and peace bonds also left six more of the Toronto 18 without judicial findings of guilt or innocence. The stigma of such a form of legal limbo has been increasingly recognized by commissions of inquiry and courts in the wrongful conviction context.[13]

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11 Canadian Civil Liberties Association v. Canada, 2019 ONCA 243; British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 228.

12 Omar Khadr, for example, has argued that he pled guilty before a military commission in order to advance his case for release from Guantanamo Bay. In Canada, about 25% of those recognized as wrongfully convicted made a decision to plead guilty. Almost three quarters of these false guilty pleas came from female, Indigenous, racialized, or people with mental disabilities – all of whom may suffer more than others in pre-trial detention. Kent Roach "You Say You Want a Revolution?: Understanding Guilty Plea Wrongful Convictions" in Kathryn Campbell et al., eds. *Wrongful Convictions and Barriers to Exonerations: International Comparisons* (Milton Park: Routledge, forthcoming).

13 For recognition of three different wrongful conviction inquiries that a prosecutorial stay of proceedings can leave victims of miscarriages of justice in a kind of limbo where neither their guilt or innocence is determined, see Newfoundland and Labrador, *Report of the Lamer Commission of Inquiry into the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken*, by Right Hon. Antonio Lamer (St. John's: Queens Printer, 2006), 320; Manitoba, *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, by Hon Patrick Lesage (Winnipeg: Queens Printer, 2007), 130–33; Saskatchewan, *Report of the Inquiry into the Wrongful Conviction of David Milgaard*, by Hon. Edward MacCallum (Regina: Queens Printer, 1998), 332–37. The Ontario Court of Appeal has recognized that a prosecutorial stay of proceedings can produce "the stigma that would accompany being the subject of an unresolved allegation of a crime as serious as this one." See Re Truscott, 2017 ONCA 575. This statement was made in the context of a murder charge, but terrorism charges in the wake of 9/11 would likely have a similar, if not greater, stigma.

The next two sections will examine specific *Charter* challenges to police and prosecutorial action. In a number of cases, the courts found that the police had violated the right against unreasonable search and seizure and the right to counsel. In each instance, however, the judges refused to exclude the unconstitutionally obtained evidence under subsection 24(2) of the *Charter*.[14] At several junctures, the accused requested the even more drastic remedy of a judicial stay of proceeding, but again no such remedy was ordered. There was also a failed *Charter* challenge when the prosecution decided to stop a preliminary inquiry that would have required it to produce evidence that, if believed at trial, would support a conviction in favour of a direct indictment. From a political science perspective, this episode reveals the continued dominance of the executive over the criminal, and especially the terrorism, trial.

A virtue of the case study approach taken in this book is that it allows us to see that the difference that the *Charter* makes on paper may not always be implemented in practice. The *Charter* may have prevented Canada from following the extremes of British law in making membership in a terrorist group a crime. Nevertheless, it did not effectively restrain broad offences applying to participation in a terrorist group that, in some cases, could include non-members of a terrorist group.[15] The seventh part of this chapter will examine the Toronto 18's unsuccessful challenges to broad terrorism offences. Although the decisions are consistent with the Supreme Court of Canada's 2012 decision in *R v. Khawaja*[16] to uphold the broad participation in a terrorist organization offence enacted after 9/11, the application of such a broad offence to some of the more peripheral participants in the Toronto 18 is problematic. It raises questions about the fairness of the offence even if it is consistent with the *Charter*.

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14 Subsection 24(2) was included in the *Charter* as a compromise to the American rule that excludes most unconstitutionally obtained evidence and pre-*Charter* rules that accepted most improperly obtained evidence. Under subsection 24(2), judges will only exclude unconstitutionally obtained evidence if they conclude that its admission will bring the administration of justice into disrepute after considering the nature and seriousness of the *Charter* violation and the adverse effects on the administration of justice of excluding important evidence in serious cases.

15 R v. Ansari, 2015 ONCA 575.

16 *Khawaja*, SCC. I represented the British Columbia Civil Liberties Association in this case which intervened to argue that the broad definition of terrorist activities violated the *Charter*.

The final substantive section of this chapter will continue to examine the dominant role of the executive and the legislature even under "*Charter* proof" national security laws by examining how the Supreme Court of Canada unanimously reversed one of the few *Charter* victories won by the Toronto 18 at trial: namely, the decision to hold that Canada's cumbersome two-court process for determining whether relevant information can be withheld from the accused in order to protect national security confidentiality did not violate the *Charter* rights of the accused. This decision has implications for the intelligence-to-evidence issues examined in other chapters of this book.

The universal failure of *Charter* challenges in the Toronto 18 case reflects a confluence of due process desperation as the accused brought challenges at every possible turn and judicial retrenchment from their initial enthusiasm in interpreting the *Charter* in the accused's favour. The Toronto 18 *Charter* litigation occurred during a period where the Supreme Court was generally more restrained in its approach to the *Charter* than it had been in the 1980s and 1990s. In addition, the specific context of the case and post-9/11 fears of terrorism may also have made the courts more cautious about striking down terrorism laws or issuing remedies that could thwart terrorism prosecutions.

II. A BRIEF HISTORY OF THE *CHARTER* AND THE *ATA*, 2001

In a relatively short time, the *Charter* has become an integral part of Canadian identity and its legal system. Much has been written about the origins of the *Charter*, but its relation to past national security excess has not been given the attention that it deserves.

A. The *Charter* as an Apology for National Security Excess? Responding to the October Crisis

Although he never apologized for invoking the *War Measures Act* and martial law in response to the kidnapping by two cells of the FLQ in October 1970, then-Prime Minister Pierre Trudeau's push for a *Charter* could be seen as a form of amends. Unlike the 1960 *Canadian Bill of Rights*, the *Charter* did not provide that it would not apply to the *War Measures Act*. The *Charter* did include the section 33 override that would allow legislatures to enact laws notwithstanding the fundamental freedoms and legal and equality rights protected by the *Charter*. Pierre Trudeau and his Minister of

Justice Jean Chrétien reluctantly accepted the override as a means to gain substantial provincial support for the *Charter*.

An important fallout from the 1970 October Crisis and one that helped create support for the *Charter* were concerns about RCMP illegalities in the lead-up to the 1976 Montreal Olympics. These illegalities were the subject of both a provincial and federal inquiry. The inquiries eventually resulted in taking domestic security intelligence away from the RCMP and giving it to the Canadian Security Intelligence Service (CSIS), created in 1984 as a civilian intelligence agency subject to special controls and without police powers. It was only in 2015 that CSIS was given the power to take threat reduction measures with continued conflict over whether the result complied with the *Charter*.[17] In 2019, the Justin Trudeau government retained these threat reduction powers while taking some steps to ensure consistency with the *Charter*.[18] The *Charter* may have been designed, in part, to stop national security excess, but it also can help legitimize state powers, including limits on rights.

B. The *Charter* as a Guarantee Against National Security Excess? *Charter*-Proofing the *ATA*, 2001

The Toronto 18 prosecution was only the second criminal prosecution conducted under the *ATA*, 2001, which was enacted quickly in the months following the 9/11 attacks. The Jean Chrétien government that enacted this law took great pains to stress that its response to 9/11 would be consistent with the *Charter*. Chrétien never considered using the section 33 override when the *ATA* was enacted within three months of 9/11. Unlike the U.K., Canada did not declare an emergency and derogate from rights, something that British courts and the European Court of Human Rights subsequently found to be both disproportionate and discriminatory as applied against non-citizens.[19] To be sure, Canada had some immediate post-9/11 abuses in relation to immigration detention and complicity in American practices of extraordinary rendition and military detention, but its approach was still

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17 Anti-Terrorism Act, S.C. 2015, c. 20. For criticism, see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism Law* (Toronto: Irwin Law, 2015).

18 National Security Act, S.C. 2019, c. 13.

19 [2004] UKHL 56 aff'd app 3455/05 European Court of Human Rights Grand Chamber.

more restrained than the American response or the Australian response that was not subject to any Bill of Rights.[20]

Parts of the *ATA*, 2001 expanded police powers including giving them new powers of preventive arrest and investigative hearings, but Parliament provided for judicial supervision of these new powers as well as legislative reporting requirements and sunsets. In turn, the courts relied on the *Charter* to insist that such powers be conducted in accordance with the presumption of open courts and with respect to the rules of evidence.[21] At the same time, neither the extraordinary powers of preventive arrests nor investigative hearings were used in the Toronto 18 prosecution.

What was used were ordinary powers of arrest, denial of bail, and peace bonds that required a number of the Toronto 18 to agree to year-long restrictions on their liberty, such as surrendering their passports in exchange for prosecutorial decisions to stay charges. The fact that the *Charter* may have restrained the most draconian state national security powers does not mean that it restrains all of its powers. Indeed, critical criminologists have long argued that due process rights that prevent extraordinary abuses of state powers may help legitimate, less extraordinary but significant state powers.[22] There is considerable evidence of this phenomenon in the Toronto 18 case. For example, the majority of the Toronto 18 case ended in guilty pleas or prosecutorial withdrawal of charges. Only three adults and one youth were found guilty after a full trial. This is consistent with the critical insight that, even under the *Charter*, the criminal justice system continues most often to function as a crime control assembly line run by police and prosecutors. It rarely operates as a due process obstacle course where defence lawyers and appellate courts play a dominant role.[23]

In enacting 14 new broad terrorism offences in the *ATA*, Parliament did not follow the British model of criminalizing membership in a proscribed terrorist group. Instead, the Canadian Parliament made it an offence to knowingly participate or contribute to any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to

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20 See generally Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge, 2011).

21 *Re Section 83.28 of the Criminal Code*, SCC; Re Vancouver Sun, 2004 SCC 43.

22 Doreen McBarnet, *Conviction* (London: MacMillan, 1981); Richard Ericson, *The Constitution of Legal Inequality* (Ottawa: Carlton University Press, 1983).

23 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto, 1999), 11–50.

facilitate or carry out a terrorist activity.[24] This was patterned after a 1997 offence of participation in the activities of a criminal organization.[25] The application of the new offence, however, to a few on the periphery of the Toronto 18 demonstrated its considerable breadth. For example, the participation offence convicted a few of the Toronto 18 such as N.Y., a young offender, and Asad Ansari who could not easily be characterized as actual members of a terrorist group. Nevertheless, trial judges and the Ontario Court of Appeal in the Toronto 18 prosecution upheld the conviction of both N.Y. and Ansari under the broad participation offence which was in 2012 held by the Supreme Court to be consistent with the *Charter*.[26]

The *ATA*, like the *War Measures Act*, allows the executive to proscribe groups. One difference is that it provides for judicial review of the executive's listing. This due process protection, however, is illusory in part because the executive can defend listings on the basis of secret intelligence not disclosed to the challenger, and challengers themselves must risk possible prosecution for their association with a listed terrorist group. Not surprisingly, there has only been one challenge to terrorist listing under the *ATA* and the *Charter*, and it was not successful.[27] In any event, the Toronto 18 prosecutions, like most Canadian terrorism prosecutions, did not have to rely on the listing of a terrorist group because a terrorist group itself was also defined expansively enough in the *ATA*, 2001 to include the infamous "bunch of guys," such as the Scarborough or Mississauga groupings of the Toronto 18.

The government defined terrorist activities in the *ATA* broadly, but it responded to concerns that a political or religious motive requirement adopted from British legislation might violate the *Charter* by amending the *ATA* to ensure that "the expression of a political, religious or ideological thought, belief or opinion"[28] would not be a terrorist activity unless such speech itself constituted a terrorist activity. At one level, this amendment reflected the government's desire to comply, and to be seen to comply, with the *Charter*. On another level, the amendment could be seen as a strategy of

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24 Criminal Code, R.S.C. 1985, c. C-46, s. 83.18.
25 Criminal Code, s. 467.11.
26 R v. N.Y., 2012 ONCA 745; R v. Ansari, 2015 ONCA 575; *Khawaja*, SCC.
27 International Relief Fund for the Afflicted and Needy v. Canada, 2015 FC 435.
28 Criminal Code, s. 83.01(1.1).

governmentality in which a legally meaningless amendment was made to assuage civil society concerns. As will be seen, trial judges in the Toronto 18 trial allowed some evidence of religious and political belief into the one jury trial held in this case, though they also excluded some of this type of evidence.[29] The effect that such evidence may have had on the jury's decision to convict two of the more peripheral participants will likely never be known given that Canada, unlike the United States, continues to make it a criminal offence for jurors to reveal their deliberations.

In short, the *Charter* can be seen as a response to Canada's prior drastic abuse of national security powers. It was successful in preventing the declaration of an emergency[30] and martial law after 9/11. It helped prevent mass detention or internment of Muslims or foreign nationals.

Some critics on the right, such as the late Christie Blatchford, raised the spectre of a "*Charter* right to Jihad,"[31] and others questioned why Canada could not simply convict the Toronto 18 of disloyalty to the state in the form of treason.[32] These critiques, however, did not account for the almost

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29 Emon and Mahmood in Chapter 11 in this volume, explore how the admission of this sort of political and religious motive evidence, especially after Asad Ansari was ruled to have put his character in issue, was problematic. For my own exploration of how the requirement in the *ATA* to establish political or religious motive may force judges to admit evidence whose prejudicial effect would generally outweigh its probative effect, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill Queens Press, 2003), 25–28.

30 Section 4 of *Canada's Emergency Act*, R.S.C. 1985, c. 22 (4th Supp) restricts internment of Canadian citizens or permanent residents on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability in recognition of the internment of Japanese Canadians during World War II, but it does not address attempts to remove citizenship as was done to some Japanese Canadians after World War II, with similar attempts having been made to remove the Canadian citizenship of four of the Toronto 18. On attempts to remove the Canadian citizenship of some of the Toronto 18, see Audrey Macklin in this volume.

31 Christie Blatchford, "There's no *Charter* right to jihad… at least not yet," *Globe and Mail*, April 26, 2008.

32 Political scientist Barry Cooper argued with respect to the Toronto 18 that "the crimes of which they were accused would unquestionably have been considered treasonous, but apparently the option of charging them with treason was not entertained. The uproar in the media concerning the threat to multiculturalism made any thought of prosecution on the grounds of treason politically impossible." He related this to the rise of a bureaucratic state and "a duty-less, transnational and postmodern society." See Barry Cooper, "The end of treason: A hundred years ago, enemies of the state were tried and hanged. Today they're a matter for the bureaucracy," *National Post*, April 12, 2010.

universal failure of *Charter* claims made by the Toronto 18 and the media in the case. They are perhaps best seen as a sort of resistance to the *Charter*.

The more pressing question in the Toronto 18 case was whether the *Charter* actually ensured that the Toronto 18 were treated fairly. Bills of Rights, like the *Charter*, have the potential to curtail the most blatant abuses of state powers, but they are less likely to cut back increases in state powers tied to pressing social objectives, such as preventing terrorism. In what follows, it will be suggested that we should not be too mesmerized by the bottom-line conclusion of the Courts that the Toronto 18 prosecutions were *Charter*-proof.

III. Pre-Trial Publicity and Failed *Charter* Challenges to Mandatory Publication Bans

"*The damage is already done.*"[33]

Perhaps the most dramatic episode of the entire Toronto 18 case was the press conference held by the RCMP, the chiefs of four other police services, the Ontario Provincial Police, and CSIS officials on June 3, 2006. This was the day after the arrest of 12 adult and five youth suspects. The officials displayed weapons, ammunition, a cell phone detonator, camouflage clothing, and a bag of ammonium nitrate. They noted that the suspects had access to three tonnes of the latter substance, whereas only one tonne was used in the 1995 Oklahoma City terrorist bombing that killed 168 people. An RCMP Assistant Commissioner added that "it was their intent to use it for a terrorist attack. This group posed a real threat. It had the capacity and intent to carry out these attacks."[34]

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[33] Michelle Sheppard and Isabel Teotonio, "Bombing making material delivered in police sting," *Toronto Star*, June 4, 2006, quoting a father of one of the Toronto 18 after the June 3, 2006 press conference.

[34] Stewart Bell and Patrick Kelly, "Arrests part of global operation," *Ottawa Citizen*, June 4, 2006. Prime Minister Harper told military recruits at the Canada War Museum the day after the arrests that "their alleged target was Canada, Canadian institutions, the Canadian economy, the Canadian people." Allan Woods, "Our values are 'under attack,'" *Ottawa Citizen,* June 4, 2006. A statement by a defence lawyer on June 6, 2006, that revealed an allegation that one of the accused intended to behead Prime Minister Harper also played a role and received much publicity. Maria Iqbal, "Making a Terrorist," *Ryerson Review of Journalism*, May 23, 2018, https://rrj.ca/making-a-terrorist/.

A year after the 2005 London bombings, this sensational press conference received world-wide publicity. It was followed by the accuseds' first court appearance. A lawyer for the accused, Anser Farooq, responded: "[t]his is ridiculous. They've got soldiers here with guns. This is going to completely change the atmosphere. I think (the police) cast their net too far."[35] The father of one of the accused, Mohammed Abdelhaleem, observed, "[t]he damage is already done."[36]

Some of the Toronto 18's lawyers had concluded that the press conference combined with a leak of an allegation that one of the Toronto 18 had planned to behead Prime Minister Harper was designed "to sink these guys in those first few days."[37] By releasing such emotive and scary information, defence lawyer Rocco Galatti argued that the Crown was trying to manufacture a case under the tertiary grounds that a grant of bail would undermine public confidence.[38] As will be seen, some of the Toronto 18 would be denied bail on the controversial, yet *Charter*-proof, tertiary ground for denial of bail that release would harm public confidence in the administration of justice, even though judges had concluded that if released, they would not flee the jurisdiction or commit criminal offences.

A concern about an imbalance of information available to the public resurfaced in a subsequent *Charter* challenge made by Galatti, representing Ahmad Ghany, and by the media. Galatti opposed the publication ban by arguing that its eventual end after a jury was sequestered at trial would come "too late in the day" after the "damage had been done by the police and the Crown with respect to their feeding the frenzy of the press until it was convenient enough for them to seek the ban."[39] He also argued that a request by some of the accused for the publication ban should not bind all the other accused. This may have reflected the fact that the prosecution's case against his client (who would eventually be released on a peace bond) was weaker than its case against some of the other Toronto 18 who supported the publication ban.

Ghany argued that he must be able to "counter" the one-sided information in the press conference and press leak in order to preserve a

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35 Michelle Sheppard and Isabel Teotonio, "Bombing making material delivered in police sting," *Toronto Star*, June 4, 2006.

36 Sheppard and Teotonio, "Bombing making material delivered in police sting."

37 Isabel Teotonio, "A tale of two trials," *Toronto Star*, September 29, 2007.

38 R v. Ghany, 2006 CanLII 24454 at para 65 (Ont Sup Ct) [*Ghany* (ONSC)].

39 R v. Ahmad, Transcript, June 12, 2006, 30, 49.

fair trial.[40] He was also concerned about the social stigma that the accused, their families, and their associates would suffer from the relentlessly negative publicity surrounding the case. Such concerns about social reaction and stigma, however, held very little weight in *Charter* analysis. For example, the Supreme Court of Canada in 2012 upheld the broad participation offence and the broad definition of terrorist activities in the *ATA*, in part by stressing that any chill on religious or political expression "flowed from the post 9/11 climate of suspicion"[41] rather than the law itself. This reveals the limits of the *Charter* in dealing with post 9/11 climates of fear where people suspected or associated with terrorism are harmed by non-state actors, including, in some cases, the media.

"[A] bail hearing is not and should not become a "press conference" for the defence to counter misinformation in the media."[42]

In a decision delivered in late July 2006, Justice Durno took a dim view of arguments that the publication ban harmed the accused. He concluded:

> Defence counsel in Canada generally do not, and should not, try cases in the media. Counsel make their representations on behalf of their clients in the courtroom, not outside on the courthouse steps... While it may be frustrating for counsel, the accused, their families and friends, when allegedly groundless or inconsistent allegations are made in the press, or allegations are taken out of context, engaging in a defence media campaign is neither appropriate nor in keeping with the role of counsel as officers of the court.[43]

The experienced former defence counsel had a point about the dangers of trial by media. Nevertheless, Justice Durno's conclusion downplayed the exceptional nature of the case and why a few of the Toronto 18 wanted to attempt to counter the negative publicity that stemmed from the exceptional press conference.

Justice Durno agreed with other lawyers for the Toronto 18 and the Crown who were concerned that bail hearings without publicity bans would harm the accused's interests in a fair trial. He concluded that the mandatory publication ban did not violate *Charter* rights relating to freedom of expression, right to bail, the presumption of innocence, or equality rights.[44]

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40 R v. Toronto Star Newspapers Ltd, 2006 CanLII 25418 at para 125 (ON SC).
41 *Khawaja*, SCC.
42 *Toronto Star Newspapers*, CanLII at para 130.
43 *Toronto Star Newspapers*, CanLII at para 126.
44 *Toronto Star Newspapers*, CanLII at paras 117–24.

Isabel Teotonio, who covered the case for the *Toronto Star*, contrasted the wide-ranging publication bans in the Toronto 18 case with an ongoing terrorism prosecution in the United States where the frailties of the prosecutor's evidence had become fodder for jokes by late-night talk show hosts.[45] Although the Canadian approach to publication bans had been modified under the *Charter* to avoid an automatic or universal preference for fair trial rights over freedom of expression, there were still important differences between the *Charter*'s lukewarm protection of free speech and the First Amendment.

American courts are more comfortable than Canadian courts in allowing extensive questioning of prospective jurors as a way of dealing with extensive pre-trial publicity. At the same time, when a jury trial was ultimately held for three of the Toronto 18, the trial judge allowed fairly extensive questions of prospective jurors relating to their exposure and memory of pre-trial publicity.[46] This begs the question of whether more pre-trial publicity might have been consistent with the selection of an impartial jury. Would the publication of the accused's bail submissions, including the extensive family and community support some of them had, have humanized them in the public eye? With the publication ban firmly in place, many people viewed the Toronto 18 only through the eyes of the sensational press conference held on June 3, 2006, and, alas, through the eyes of post 9/11 prejudices and fears of Brown and Black Muslim men.

"The accused men are mostly young and mostly bearded in the Taliban fashion."[47]

In the one jury trial held in the Toronto 18 case, prospective jurors were asked eight questions about their exposure to prejudicial pre-trial publicity; one question about prejudice against visible minorities; and two questions about prejudice against Muslims charged with planning to target non-Muslims.[48] These questions attempted to deal with the extensive and almost universally negative pre-trial publicity surrounding the case.

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45 Isabel Teotonio, "A tale of two trials: Why is it that Americans get to know so much about important Court cases?," *Toronto Star*, September 29, 2007.

46 R v. Ahmad et al., 2010 ONSC 256 at para 51. For arguments that more searching questions could have been asked about religious and racial prejudice, see Kent Roach, "Trial by Jury and the Toronto 18" in this volume.

47 Christie Blatchford, "Ignoring the biggest elephant in the room," *Globe and Mail*, June 5, 2006.

48 *Ahmad et al.*, ONSC. For criticism of the simplistic "yes/no" format of the questions about whether jurors could put aside racial or religious prejudice, see Kent Roach,

A particularly egregious example of such pre-trial publicity – one that flirted with religious stereotypes, if not religious hatred – was published by Canada's leading national newspaper, the *Globe and Mail*, a few days after the arrests and press conference. Christie Blatchford wrote:

> Even before I knew for sure that they're all Muslims, I suspected as much from what I saw on the tube, perhaps because I am a trained observer, or you know, because I have eyes. The accused men are mostly young and mostly bearded in the Taliban fashion. They have first names like Mohamed, middle names like Mohamed and last names like Mohamed. Some of their female relatives at the Brampton courthouse who were there in their support wore black head-to-toe burkas (now there's a sight to gladden the Canadian female heart: homegrown burka-wearers darting about just as they do in Afghanistan), which is not a getup I have ever seen on anyone but Muslim women.[49]

Blatchford's statements provide a revealing and disturbing glimpse about the fear and prejudice that surrounded the case.

Although Justice Durno upheld the publication ban as not violating the *Charter*, a strong five-member majority of the Ontario Court of Appeal reversed his decision, holding that the mandatory publication ban was an unreasonable and disproportionate restriction on freedom of expression. All five judges had problems with the mandatory nature of the publication ban. They held that the Supreme Court's new willingness to balance free press against fair trial interests on a case-by-case basis required a new approach. The Court of Appeal noted that almost 5000 articles were written about the Toronto 18 after their arrest. They stressed that the mandatory ban would only ensure was that the only information published about the case would not include evidence or representations made at the bail hearing. Three judges would have modified the mandatory publication to apply only in cases where jury trials were still possible, whereas two judges would have

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"Juries, Miscarriages of Justice and Bill C-75: Superficial or Radical Reform?," *Canadian Bar Review* 98, no. 2 (2020).

49 Blatchford, "Ignoring the biggest elephant in the room." Blatchford also ridiculed concerns about vandalism against a Toronto mosque shortly after the arrests by stating: "It's those bastard vandals (probably crazed right-wing conservatives, or maybe the Jews) who yesterday morning broke windows at a west-end Mosque who stand before us as the greatest danger to Canadian society… Thank God: Windows everywhere in Canada's largest city are safe, especially windows in mosques. The war on windows will be won, whatever the cost." For further criticism see Wendy Naava Smolash, "Mark of Cain(ada): Racialized Security Discourse in Canada's National Newspapers," *U Toronto Quarterly* 78, no. 2 (2009): 757–58.

struck the mandatory publication ban subject to a 12-month suspended declaration of invalidity.[50] A year later, however, the Supreme Court reversed the Court of Appeal's approach and held that it was not necessary to take a more refined case-by-case approach. In an 8:1 decision, it rejected the *Charter* argument made by the media and some of the accused that the mandatory publication ban was a disproportionate and, hence, unreasonable limit on freedom of expression.

The Supreme Court did not acknowledge that a few of the Toronto 18, including Ghany, who had been released and had charges dropped by the time the Court made its decision, argued that the publication ban harmed their interests. Ghany's factum to the Supreme Court stressed the prejudice he suffered as a result of the massive pre-trial publicity in the case, most of which he linked to statements from representatives of the RCMP and CSIS. Ghany also stressed the importance of judicial discretion in determining the appropriate balance between freedom of expression and fair trial interests for each accused as an individual.[51]

The majority of Toronto 18 who were represented on the appeal, however, supported the mandatory publication ban. For example, Steven Chand defended the mandatory publication ban. He warned that a fair trial might not be possible without it, especially given the saturation of media coverage and its accessibility on the internet.[52] The Toronto 18 may have socially been viewed as a homogenous entity, but they were not united in their *Charter* arguments.

Despite these varying arguments from the Toronto 18, the Supreme Court simplified the dispute as a traditional battle between the media invoking freedom of the press and concerns about the fairness of the trial. This downplayed the inconvenient fact that at least some of the Toronto 18 believed that if they were not allowed to counter negative state-generated publicity at the pre-trial stage, the harm to their reputations would be irreparable. The *Toronto Star* took a more contextual approach editorializing that the publication ban was imposed "after the police had already held a press conference and outlined in lurid detail plans to blow up buildings and

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50 Toronto Star Newspapers Ltd v. Canada, 2009 ONCA 59.

51 Factum of Ahmad Ghany and Amin Durrani to the Supreme Court of Canada, October 2009.

52 Factum of Steven Chand to the Supreme Court of Canada, October 2009. I thank Delmar Doucette, co-counsel for Mr. Chand in this appeal, for supplying me with these and other factums in the appeal.

behead the Prime Minister. The ban meant that the alarmed public was left in the dark on why some of the alleged conspirators were let out on bail."[53] The Court expressed concerns that bad character evidence from the bail hearing might be published.[54] This downplayed that some of the Toronto 18, such as Ahmad Ghany, the McMaster health sciences graduate, had been granted bail in part on the basis of good character evidence.[55]

"[A]lthough not a perfect outcome, the mandatory publication ban is a reasonable compromise."[56]

In her majority judgment, Justice Deschamps of the Supreme Court concluded:

> In light of the delay and the resources a publication ban hearing would entail, and of the prejudice that could result if untested evidence were made public, it would be difficult to imagine a measure capable of achieving Parliament's objectives that would involve a more limited impairment of freedom of expression.[57]

This played into formal images of bail hearings as quick and pre-trial detention as brief, both contrary to the reality of the Toronto 18 prosecutions. Justice Deschamps also noted that journalists could still report the outcome of the bail hearing while downplaying the breadth of the ban that applied not only to the evidence heard in the bail hearing but also the representations made at it by the parties and the judge's reasons.[58]

"[A] profound interference with the open court principle."[59]

Justice Abella dissented on the grounds that a mandatory publication ban was disproportionate. She stressed the extensive delay that could be caused by pre-trial proceedings. She also averted to the role that more extensive challenges for cause for prospective jurors could play in countering prejudicial effects of pre-trial publicity. This was closer to the reality of the Toronto 18 prosecution.

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53 "A loss for open courts," *Toronto Star*, June 11, 2010.
54 Toronto Star v. Canada, 2010 SCC 21 at para 52.
55 "Friend describes suspected terrorist Ahmad Ghany as 'quite humble,'" *Canadian Press*, June 9, 2006; "Virtual house arrest for Mac grad," *Hamilton Spectator*, July 26, 2006.
56 *Toronto Star*, SCC.
57 *Toronto Star*, SCC at para 37.
58 *Toronto Star*, SCC at para 38.
59 *Toronto Star*, SCC at para 38.

The unsuccessful *Charter* challenge to the sweeping publication ban both before Justice Durno and the Supreme Court tended to focus on the law as written as opposed to how it was applied in the Toronto 18 case. In particular, it ignored the impact of imposing a publication ban in the wake of the widely publicized press conference held by state officials on June 3, 2006, and the sensational leaks about plans to storm Parliament and behead the Prime Minister. This pre-trial publicity raised fear and even hatred against the accused that made a lasting impression. On this topic, at least, the *Charter* was only a formal and superficial restraint on state power.

IV. FAILED *CHARTER* CHALLENGES TO BAIL PROVISIONS AND PRE-TRIAL DETENTION

Subsection 11(e) of the *Charter* provides that any accused has the right "not to be denied bail without just cause." Bail is a critical stage in the criminal process, and especially in terrorism trials where pre-trial detention can last years.

Despite hearing many *Charter* challenges to bail provisions, the Supreme Court has upheld most of them. Moreover, judicial officials have become risk-averse in the *Charter* era in granting bail. Over half of those detained in the type of provincial correctional facilities where the Toronto 18 were detained before their trials were people denied bail but formally presumed innocent.[60]

The first *Charter* argument raised by the Toronto 18 was that a superior court judge, as opposed to a justice of the peace, should hear their bail applications. The accused maintained that the charges were effectively as serious as murder charges, which require bail hearings before superior court judges. They also argued that rushed enactment of the *ATA*, 2001 meant that Parliament probably did not have time to consider whether terrorism offences should be added to the short list of offences in section 469 of the *Criminal Code* that require a bail hearing before a superior court judge. In early July 2006, Justice Durno rejected these *Charter* claims in a 76-paragraph decision. He stressed Parliament's role in determining the appropriate forum for bail.[61] The *Charter* and the courts would ensure

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60 "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention," Canadian Civil Liberties Association, July 2014, https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf.

61 *Ghany* (ONSC), CanLII at para 38.

procedural fairness, but Parliament still established the rules of the game. He also rejected a request that the Crown be restrained from publicizing evidence about the case after the sensational press conference.[62]

"What we've learned over the last 19 months is that 'innocent until proven guilty' is a phrase. It has no weight."[63]

Although some of the Toronto 18 were granted bail, many had bail denied, first by justices of the peace and later by superior court judges on bail reviews. Asad Ansari, who had primarily offered computer support to one of the leaders, was denied bail on all three grounds even though a person's detention needs only be justified on one of the three grounds. The primary ground was that he might flee to another jurisdiction, the secondary ground was there was a substantial likelihood that he would engage in criminal conduct, and the final tertiary ground was that public confidence would be shaken if he was granted bail. At the same time, the reviewing judge alluded to *Charter* values by stating that "the courts cannot infer guilt by association."[64]

Saad Gaya was also denied bail. On review, Justice Hill held that he was satisfied that if released pending trial, Gaya would still attend trial and not commit criminal offences. Nevertheless, Gaya was not granted bail. Justice Hill concluded his release would harm public confidence in the administration of justice.[65] This reflected a controversial 5:4 decision in which a majority of the Supreme Court upheld the public confidence ground for denial of bail over strong dissents that denying liberty on such grounds sacrificed the role of the courts in protecting unpopular accused.[66] This decision itself reflected the Supreme Court of Canada's increased caution in applying the *Charter* in light of increased criticisms of its judicial activism.[67]

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62 Teotonio, "A tale of two trials."

63 Isabel Teotonio, "Give us a trial or let us go," *Toronto Star*, December 26, 2007, quoting Shareef Abdelhaleem.

64 R v. Ansari, 2006 CanLII 42261 at para 27 (ON SC).

65 R v. Gaya, 2008 CanLII 24539 (ON SC). See also R v. Durrani, [2008] O.J. No. 5948 denying bail on secondary and tertiary grounds relating to the commission of offences and maintaining public confidence.

66 R v. Hall, 2002 SCC 64.

67 See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, 2nd ed. (Toronto: Irwin Law, 2016), 285–325, 335–83.

The tension between the presumption of innocence and the extensive pre-trial detention that some of the Toronto 18 were subject to was evident. One of the accused, Shareef Abdelhaleem, told a reporter: "What we've learned over the last 19 months is that 'innocent until proven guilty' is a phrase. It has no weight."[68] This mirrored the name of those who protested the conditions of pre-trial detention who called themselves "the presumption of innocence project."[69] The *Charter* guaranteed both the presumption of innocence and reasonable bail, but many of the Toronto 18 were subject to prolonged pre-trial detention.

A. Failed *Charter* Challenges to Solitary Confinement and Torture Allegations

Not only were most of the Toronto 18 denied bail, but they alleged that they were mistreated in pre-trial custody. The justice of the peace hearing a bail hearing on June 12, 2006, appeared to accept the Crown's submission that he had no jurisdiction to deal with such allegations.[70] Even under the *Charter*, Parliament limits the jurisdiction of statutory courts and tribunals to apply the *Charter*.

"[E]xtreme isolation, conditions more severe than... convicted murderers and rapists."[71]

Because of security concerns and concerns for their own safety, those of the Toronto 18 who were subject to pre-trial detention were held in solitary confinement except for 20 minutes a day for a shower and 20 minutes a day for phone calls or solo trips to the exercise yard. These conditions were challenged in a 12-day hearing before the trial judge in May 2007.[72] The trial judge did not decide whether the conditions of pre-trial confinement violated the *Charter*. Instead, he relied on representations by the Ontario Ministry of Correctional Services that it would construct common areas within six to eight weeks that would allow the accused to come out of their cells and communicate with each other. This plan was subject to correctional officials retaining their discretion to reimpose administrative

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68 Teotonio, "Give us a trial or let us go."

69 James Bradshaw, "Protesters decry treatment of bomb suspects," *Globe and Mail*, April 23, 2008.

70 June 12 transcript, on file with author.

71 "Toronto 18 deserve better treatment," *Toronto Star*, April 24, 2008, written by 17 organizations opposing the Toronto 18's conditions of detention.

72 R v. Ahmad, 2007 CanLII 28750 at para 2 (ON SC) [*Ahmad* 2007].

segregation – also known as solitary confinement – should any "threat, behaviour or new information" warrant it.[73] This approach deferred to the executive expertise of correctional officials. It also avoided reviewing the merits of the Toronto 18's allegations that they were subject to solitary confinement in a manner that infringed both their freedom of religion and their right against cruel and unusual punishment under the *Charter*.

The ducking of whether the Toronto 18's conditions of confinement violated the *Charter* can be contrasted with more recent decisions that have held that prolonged solitary confinement violates the *Charter*, with special attention to its effects on Indigenous inmates and those with mental health issues.[74] One explanation may be that the Toronto 18's challenge to solitary confinement was made before its time. In subsequent years, there were highly publicized cases that illustrated the harms that solitary confinement imposed on prisoners and many advocacy groups brought *Charter* claims against such solitary confinement. In any event, the prolonged solitary confinement imposed on the Toronto 18 also raises questions as to whether some may have had incentives to plead guilty or agree to peace bonds in the hope that this would improve their conditions of living.

In June 2007, Justice Dawson eased the conditions of confinement by overturning non-communication orders for all except Amara and Ahmad, the two leaders. He concluded that the non-communication orders did not violate the *Charter*.[75] This decision helped most of the Toronto 18. At the same time, it meant that the *Charter* did nothing to improve the conditions of pre-trial detention faced by their two leaders. The *Charter* promises equal justice, but its application is more problematic.

The common area for the Toronto 18 was constructed, but in April 2008, the *Toronto Star* published a letter by 17 organizations that raised concerns that three of the remaining accused had been transferred to the dilapidated Don Jail in Toronto where they were again subject to solitary confinement. The letter acknowledged the difficulty of balancing liberty with security "especially when the balancing process involves people who

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73 R v. Ahmad, [2007] O.J. No. 2891 at paras 9, 77 (Ont Sup Ct).

74 Canadian Civil Liberties Association v. Canada, 2019 ONCA 243 (solitary confinement beyond 15 days is cruel and unusual); R v. Carpay, 2019 ONSC 535 (years of pre-trial solitary confinement for a young Indigenous man justified a stay of proceedings of his first-degree murder charge).

75 *Ahmad* 2007, CanLII.

may be unpopular."[76] Nevertheless, it questioned why "extreme isolation, conditions more severe than the majority of Canada's convicted murderers and rapists are subject to" were being applied to "persons who have not been found guilty by our justice system."[77]

In April 2008, four of the Toronto 18, including Ahmad Ghany, were told by a judge, "you're all free to leave" after three of them agreed to peace bonds. A lawyer for Qayyum Abdul Jamal, the oldest of the Toronto 18 at 43 years of age, stated: "there should be some form of inquiry as to why it is this gentleman spent such a period of time of custody and spent in the fashion that he did."[78] Jamal had been imprisoned from his arrest in June 2006 to when he was granted bail in November 2007.

"*abu Ghraib lite*?"[79]

In May 2008, Steven Chand's lawyer complained about "petty torment by a small number of guards who have absolute power over these guys". He characterized the treatment as "abu Ghraib lite" in reference to the infamous torture by Americans of detainees at the Iraqi prison.[80] There were also allegations that the prisoners had been fed pork and experienced delays in receiving dental treatment.[81] Civil society protests against the conditions of confinement were not deterred by the Court's conclusion that the *Charter* was not violated.

Given that one of the virtues of terrorism prosecutions (as opposed to less restrained measures such as the use of immigration law security certificates) is increased public legitimacy, it is surprising that the various judges in the Toronto 18 case were not more proactive in responding to various allegations of mistreatment made by the accused. The general passivity of the judges in the face of such allegations may in part be explained by the limited jurisdiction of different judges during the pre-trial process and the high volume of motions they faced. Nevertheless, it remains

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76 "Toronto 18 deserve better treatment," *Toronto Star*, April 24, 2008, allegation by a lawyer for Steven Chand.

77 "Toronto 18 deserve better treatment," *Toronto Star*.

78 Tobi Cohen, "4 'terror suspects' go free," *Waterloo Record*, April 16, 2008; Isabel Teotonio "So-called terror zealot vindicated," *Toronto Star*, April 16, 2008.

79 Isabel Teotonio, "Terror suspected persecuted in jail, says lawyer," *Toronto Star*, May 8, 2008.

80 Teotonio, "Terror suspected persecuted in jail."

81 "Terrorist suspects troubling tales," *Toronto Star*, April 9, 2008.

troubling. It prevents definitive judgments about whether the accused were mistreated during their lengthy pre-trial confinement.

There was a similar apparent lack of urgency to determine if conditions of confinement violated the *Charter* in responding to Amin Durrani's claim that he was mistreated in custody. In 2008, Justice Dawson dealt with the application on the record "to investigate the merits."[82] At the same time, he attached scare quotes around Durrani's claims of torture stating: "I conclude that the so called 'Torture' application should not proceed until the conclusion of the trial."[83] He stressed that Durrani's main request was for a stay of proceedings and that such a drastic remedy was not justified in large part because "the conduct complained of is not continuing. A stay is not required to prevent ongoing misconduct."[84] This conclusion reflected restrictions that the Supreme Court had placed on the use of the drastic remedy of a stay of proceedings. At the same time, however, it postponed answering the question of whether Durrani, who would plead guilty in early 2010, had been mistreated. As will be explained in the next section, it also demonstrated how judicial concerns about giving the accused a drastic remedy that might permanently stop a terrorism trial influenced the way they applied the *Charter*.

Justice Dawson indicated that other remedies could be sought during another bail review or at sentencing. This approach reflected an understandable determination to wade through the mountain of pre-trial motions, many themselves based on the *Charter*, which threatened the ability of the case to be decided on its merits and also lengthened the period of pre-trial custody. At the same time, it failed to produce a clear statement that the accused had been being treated properly and in accordance with the minimum standards of the *Charter* in pre-trial custody. Such basic respect for human rights should have been very important to the legitimacy of the trial process and, indeed, Canadian counterterrorism in general. In this sense, the Toronto 18 prosecution did not provide resounding support for the proposition that criminal prosecutions respected human rights better than administrative or military detention or that the *Charter*

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82 R v. Ahmad, 2008 CanLII 54312 at para 10 (ON SC) [*Ahmad* 2008].

83 *Ahmad* 2008, CanLII at paras 13, 14–16. The judge elaborated that the application by Durrani was time consuming, that alternative remedies could be dealt with under bail provisions and that Durrani was not ready to proceed.

84 *Ahmad* 2008, CanLII at para 11.

guaranteed that prisoners subject to pre-trial detention would not be mistreated.

V. REMEDIAL DETERRENCE AND THE REAL MEANING OF *CHARTER* RIGHTS AGAINST UNREASONABLE SEARCHES AND THE RIGHT TO COUNSEL

From the days of Blackstone and Dicey, it has long been recognized that the true meaning of rights is determined by the availability of remedies. Nevertheless, scholars influenced by legal realism have predicted that judges will avoid strong remedies that may threaten social interests.[85] There is significant evidence of such remedial deterrence in the Toronto 18 case.

The trial judge ruled that while Asad Ansari's *Charter* rights against unreasonable search and seizure had been violated (when the police had breached a warrant requirement of live monitoring the recording of his conversations), the evidence obtained should not be excluded under subsection 24(2) of the *Charter* because the adverse effects on the accused's privacy were minimal and societal interests favoured admission. The Court of Appeal deferred to this balancing of interests.[86] In another case, the Court found that while the failure to name the accused in a wiretap warrant was a serious violation of the right against unreasonable searches, it should still be admitted because "the public has a strong interest in seeing [the prosecution of a terrorism offence] resolved on the merits."[87] In yet another case, an incriminating statement obtained in violation of the right to counsel was admitted on the basis that the young accused would have made the statements in any event, the violation was in good faith, and the statement was important evidence in a serious case.[88] These three cases affirm that the practical meaning of *Charter* rights often depend on the willingness of courts to issue remedies. The Courts were uniformly reluctant to exclude evidence obtained in violation of the *Charter* in the Toronto 18 cases.

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85 Daryl Levinson, "Rights Essentialism and Remedial Equilibration," *Columbia Law Review* 99, no. 4 (1999); Kent Roach, *Remedies for Human Rights Violations* (Cambridge: Cambridge University Press, 2021), 32–33, 298–302.

86 *Ansari*, ONCA at paras 53–57, 73–82.

87 R v. Ahmad et al., 2010 ONSC 123 at para 30.

88 R v. N.Y., 2008 CanLII 24542 (ON SC).

In May 2007, a number of accused applied for a stay of proceedings on the basis that they could not receive a fair trial because the state was not paying their lawyers enough to read all the disclosure in the case. Problems with voluminous disclosure are endemic in modern terrorism prosecutions. One study has warned that because of the sheer volume of disclosure of wiretap transcripts, counsel are required to conduct trial by "edited highlights".[89] Canada has a broad right of disclosure under the *Charter* that responded to concerns that non-disclosure of relevant material had caused wrongful convictions in the past. The Toronto 18's motion related not so much to disclosure but the practical ability of their lawyers to wade through the massive disclosure in the case.

The Ontario courts had made clear that the proper remedy for courts to order if the accused could not receive a fair trial would be a stay of proceedings stopping the trial. This is because courts are reluctant to order the state to spend more money on legal aid. In the Toronto 18 case, however, the Court dismissed the application for a stay despite hearing that many of the lawyers had already spent all their allotted time preparing for the preliminary hearing. Justice Dawson stressed that there was no positive obligation on the state for open-ended legal aid funding and that the accused had not led enough evidence to demonstrate that they could not receive a fair trial.[90]

In another case, the trial judge held that the difficulties of investigating terrorism meant that the right against unreasonable search and seizure did not require the Crown to establish, as it must in most other cases, that no other means of obtaining the information were practical before obtaining a wiretap warrant for electronic surveillance.[91] In yet another case, the trial judge held that while CSIS's destruction of its original notes after the RCMP had requested their retention violated the section 7 *Charter* rights of the accused. Nevertheless, evidence obtained after this violation could still be admitted.[92] The Toronto 18 had *Charter* rights, but not *Charter* remedies.

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89 Willem De Lint and Wondwossen Kassa, "Bent into Security: Barrister Contributions to a Skewed Order in Two Terrorism Prosecutions in Australia," *Journal of Law and Society* 44, no. 2 (2017): 187.

90 Ontario v. Ahmad, 2007 CanLII 21968 (ON SC).

91 R v. N.Y., 2008 CanLII 15908 (ON SC).

92 R v. Ahmad, 2009 CanLII 84784 (ON SC). CSIS's routine destruction of its original notes was declared unlawful by the Supreme Court in *Charkaoui v. Canada*, 2008 SCC 38.

VI. FAILED *CHARTER* CHALLENGES TO PROSECUTORIAL CONDUCT

The Toronto 18 alleged prosecutors, as well as the police, violated their *Charter* rights. The prosecution started a preliminary inquiry but then abandoned it during the testimony of its key, but controversial, witness and undercover informant Mubin Shaikh.[93] The prosecutors used an extraordinary power called a direct indictment. This power, which has been used quite frequently in terrorism prosecutions, relieves the prosecutor of the need to present evidence at a preliminary inquiry to convince a judge that there is sufficient evidence, if believed by a jury at trial, that would support a conviction.

"[T]hey don't want to give us our disclosure. They cancelled our preliminaries."[94]

The Toronto 18 argued that the prosecutor's direct indictment that terminated the preliminary inquiry violated the *Charter*. They had been denied an opportunity to cross-examine Shaikh and other Crown witnesses before trial. One of the accused, Shareef Abdelhaleem, went on television to argue "they don't want to give us our disclosure. They cancelled our preliminaries. They're making deals with people here: if you plead guilty we will give you three weeks' time served. What does that say about the Crown's case?"[95]

The Toronto 18's argument against the direct indictment and for increased disclosure was another losing *Charter* argument. Justice Dawson followed prior authority in holding that the Attorney General's power under section 577 of the *Criminal Code* to prefer a direct indictment was consistent with the principles of fundamental justice protected under section 7 of the *Charter*. With respect to more fact-specific arguments based on the need for disclosure of why prosecutors halted the preliminary inquiry during the middle of Shaikh's testimony, Justice Dawson stressed "the Attorney General and Deputy Attorney General are presumed to exercise their discretion properly. If there is evidence of abuse of process or constitutional violation the court will review the exercise of the

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93 Thomas Walkom, "Terror trial proceedings troubling," *Toronto Star*, September 25, 2007.

94 "One of the so-called 'Toronto 18' laments his legal limbo," *Canada AM-CTV Television*, January 4, 2008 statement by Shareef Abdelhaleem, one of the Toronto 18.

95 CTV Television, "One of the so-called 'Toronto 18' laments his legal limbo."

discretion."[96] No such evidence was available. Indeed, it is unlikely that smoking gun evidence of prosecutorial misconduct will ever be available given rules of privilege that protect against disclosure of many prosecutorial communications. The judge determined that the innocence at stake and the fraud and future crimes exceptions to the broad and powerful rule protecting the secrecy of communications between lawyers (in this case, the prosecutors) and their clients (in this case, the state) applied to the deliberations leading to the decision to stop the preliminary inquiry.[97] There was no *Charter* violation but a lack of transparency about why the prosecutors pulled the plug on the preliminary inquiry.

These decisions placed the accused in difficult catch 22 positions similar to that faced by security certificate detainees who would not have access to some of the evidence/intelligence that was used to justify their detention and possible deportation. In theory, the accused could vindicate their rights if they had evidence that the prosecutors had engaged in misconduct. In practice, however, they did not have access to evidence that would demonstrate whether the prosecutors had acted properly or improperly. The remedy fashioned by Parliament in response to a successful *Charter* challenge to the security certificate[98] — security-cleared special advocates who see and challenge the secret information — was not used in the Toronto 18 prosecution.[99] The *Charter* gives those accused of criminal offences more rights than those subject to immigration detention, but the Toronto 18 almost always lost the *Charter* arguments they made.

A subsequent attempt by the Toronto 18 to subpoena the deputy Attorney General to explain why the direct indictment was used was dismissed as a "classic fishing expedition."[100] The *Charter* gave the Toronto 18 broader rights to disclosure of information held by the state than they would have in the United Kingdom or the United States or if they had been subject to immigration detention. At the same time, however, the Toronto 18's disclosure rights were far from absolute. They had no right to obtain information covered by either solicitor-client privilege or national security confidentiality privilege.[101] Again, my point is not to suggest that these

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96 R v. Ahmad, 2008 CanLII 54311 at para 57 (ON SC).
97 R v. Ahmad, 2008 CanLII 27470 (ON SC).
98 Charkaoui v. Canada, 2007 SCC 9.
99 For proposals for such use, see Forcese and Pelletier in this volume.
100 R v. Ahmad, 2008 CanLII 34268 at para 34.
101 The operation of this latter privilege will be examined in part VIII of this chapter.

Charter decisions on direct indictments and disclosure were incorrectly decided. It is simply to demonstrate that the *Charter* is consistent with executive and prosecutorial domination of the terrorism trial process and non-disclosure of evidence that might be useful to the accused.

VII. FAILED *CHARTER* CHALLENGES TO BROAD TERRORISM OFFENCES

"[T]he scope of the threat that terror poses to our way of life has no parallel."[102]

In rejecting a *Charter* challenge to the participation offence and definition of terrorist activities in the *ATA*, 2001, Justice Dawson stressed the origins of the *ATA* in the events of 9/11 that killed almost 3,000 people in New York City and Washington. He observed that the UN Security Council had unanimously enacted Security Resolution 1373 in the wake of 9/11. This resolution placed "a definite emphasis... on prevention and disruption of terrorist acts before they could occur."[103] He quoted with approval Minister of Justice Anne McLellan's warnings that it would be "too late" if the terrorists got on planes in reference to the 9/11 attacks. A new preventive approach was necessary because "the scope of the threat that terror poses to our way of life has no parallel."[104] These arguments were made in the wake of both immediate post-9/11 concerns about a second strike and an anthrax scare, though, with hindsight, they seem exaggerated in light of a COVID-19 global pandemic that has already killed over a million people.[105] The Court's appreciation of and deference to Parliament's intent in responding to 9/11 demonstrated how both *Charter* jurisprudence and the *Criminal Code* could reflect and perpetuate post-9/11 fears. Parliament was still very much in the driver's seat when it came to formulating anti-terrorism laws. Both the Toronto 18 trial judge and

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102 R v. Ahmad, 2009 CanLII 84774 at para 55 (ON SC) [*Ahmad* (ONSC)], quoting then-Minister of Justice Anne McLellan.

103 *Ahmad* (ONSC), CanLII at para 52.

104 *Ahmad* (ONSC), CanLII at para 55. For a critique of the assumption that 9/11 represented a failure of law as opposed to intelligence and law enforcement, see Roach, *September 11: Consequences for Canada*, 56–85. This book also defends the type of all-risk national security strategy that Canada was later to adopt in the wake of the SARS pandemic, see Roach, *September 11: Consequences for Canada*, 168–205

105 For arguments that courts and scholars too readily accepted inflated security risks in the wake of 9/11 see Robert Diab, *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case for Reform* (New York: Oxford University Press, 2015), 99–125.

eventually the Supreme Court would defer to Parliament's preventive purpose in enacting the *ATA*.

"[C]learly, the net is broadly cast."[106]

In terms that foreshadowed the Supreme Court of Canada's 2012 decision to uphold the heart of the *ATA* definition of terrorist activities and the broad participation offence, Justice Dawson refused to apply judge-made common law restrictions on combining different forms of inchoate liability, such as its prohibition on attempted conspiracy, to Parliament's decision to criminalize conduct well in advance of any completed terrorist act. Although "clearly, the net is broadly cast,"[107] it was not constitutionally overbroad in part because of the harm of "the preparatory acts criminalized in s. 83.18(1)"[108] of the *Criminal Code*. This approach postponed to sentencing the need to distinguish the different moral blameworthiness of the leaders of the plot and those only on the periphery.[109] It discounted the inherent stigma that would come with any conviction for a terrorist offence even if the accused was unaware of any specific planned act of violence.

The preventive focus of the *ATA* offences may have been justified, but it also raised a number of dilemmas. Offences based on participation, financing, and facilitation would be an awkward fit for those who acted alone and who completed acts of terrorism. This would include subsequent right-wing extremists such as Justin Bourque, Alexandre Bissonnette, and Alek Minassian.[110]

It also raised concerns that the legislature could "make a terrorist out of nothing".[111] One of the striking features of post 9/11 terrorism prosecutions is that there have yet to be celebrated cases of wrongful convictions, like the so-called Irish cases of the Guildford Four and the Birmingham Six because

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106 *Ahmad* (ONSC), CanLII at para 11.

107 *Ahmad* (ONSC), CanLII at para 11.

108 *Ahmad* (ONSC), CanLII at para 87.

109 On sentencing, see Michael Nesbitt in this volume.

110 For findings that no right-wing terrorists have been charged under Canada's terrorism laws, see Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials Between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2 (2019).

111 Victor Tadros and Jacqueline Hodgson, "How to Make a Terrorist Out of Nothing," *Modern Law Review* 72, no. 6 (2009); Kent Roach, "'Terrorism' in Dubber and Hornle," in *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014).

of new evidence of innocence.[112] Broad post-9/11 terrorism offences raise questions about whether innocence has effectively been defined out of existence.

At the same time, Justice Dawson stressed that both the participation and facilitation offences required "subjective mens rea and specific intent".[113] This meant that even if the terrorism offences had the same stigma as murder and war crimes, they would still be consistent with the *Charter*. Comparatively, Canada's terrorism offences were demanding on the state. In contrast, the U.S. Supreme Court upheld a material support of terrorism offence even though it did not require proof of a subjective purpose related to terrorism.[114] The Canadian *ATA* could cast the net broadly while also being restrained by the *Charter*.

The legal breadth of terrorism offences created a disjuncture with lay understandings of terrorism.[115] For example, Thomas Walkom observed in the *Toronto Star* after the first conviction of a young offender among the Toronto 18[116] that:

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112 Kent Roach, "Defining Miscarriages of Justice in the Context of Post 9/11 Counter-Terrorism," in *Counter-Terrorism, Constitutionalism and Miscarriages of Justice*, eds. Genevieve Lennon, Colin King, and Carole McCartney (Oxford: Hart Publishing, 2019).

113 *Ahmad* (ONSC), CanLII at para 73.

114 Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

115 On the differences between lay and legal understandings of guilt and innocence, see Richard Nobles and David Schiff, *Understanding Miscarriages of Justice* (Oxford: Oxford University Press, 2000).

116 The young offender in *R v. N.Y.*, 2008 CanLII 24534 had challenged the constitutionality of the broad participation offence and definition of terrorist activity as excessively vague, a ground that is recognized under s. 7 of the *Charter* but has almost never been successful and was not successful in this case. The trial judgment convicting the young offender focused on his attendance at the Washago and Rockwood Camps and his subsequent shoplifting of walkie talkies and other material for the group. The trial judge found that N.Y. intended to enhance an ability of the group to facilitate or carry out a terrorist activity even though the young man "did not understand symbolic references or allusions requiring more than rudimentary knowledge of Islam or world politics such as the suggested significance of a black banner with white lettering or the description of Rome in the Qu'aran" and that he shared political views about Western involvement in Afghanistan and Iraq and about CSIS shared by "a significant number of Muslims in Canada." See R v. N.Y., 2008 CanLII 51935 at para 205 (ON SC). The young offender spent two years in pre-trial custody. He was sentenced to two and a half years for participating in the activities of a terrorist group on the basis of the seriousness of the offence and the need for general deterrence of others. See R v. N.Y., [2009] O.J,

> To a layman, the Crown's case against the young Toronto man convicted yesterday… might have seemed weak. He did not make bombs or buy guns. Nor did he advocate doing so. He did not threaten to kill anyone, did not call for holy war, did not pledge allegiance to Osama bin Laden… yesterday's verdict indicates that under anti-terrorism laws, the government need not supply inconvertible, direct evidence of a person's guilt.[117]

Walkom also noted that the Crown's star witness Mubin Shaikh similarly said outside of court that he did not believe that the young offender "was a terrorist. I don't believe he should have been put through what he was put through but that is our system."[118] The Toronto 18 could be legally labelled and punished as terrorists even when they did not satisfy public understandings of terrorism. Conclusions that broad terrorism offences were consistent with the *Charter* could also delegitimize lay opinion such as that expressed by Shaikh and Walkom that at least some of the Toronto 18 were not terrorists.

A. Asad Ansari's Conviction and Unsuccessful Appeal

In upholding Asad Ansari's conviction in 2015, the Ontario Court of Appeal ruled that the trial judge did not err in allowing the jury to consider religious and ideological material because it "was relevant to cast doubt on the truthfulness of the appellant's claim that he was a moderate Muslim who eschewed jihadist activity."[119] This rejected the arguments that Ansari's lawyer, John Norris, had made to the jury that "much of the evidence raised by the Crown against Mr. Ansari arises from his own exercise of fundamental freedoms" under the *Charter*.[120]

Ansari had attended the Washago Camp from December 24 to 29, 2005. His main activities involved converting a recruitment video into a digitized format and repairing Amara's computer. When the police searched Ansari's house, they found undated letters to his family. They made

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6495 at para 21 (Ont Sup Ct). The Ontario Court of Appeal upheld the conviction in *R v. N.Y.*, 2012 ONCA 745.

117 "Terror verdict bad news for rest of Toronto 18," *Toronto Star*, September 26, 2008, as quoted in Jeremy Kowalski, *Domestic Extremism and the Case of the Toronto 18* (New York: Palgrave Macmillan, 2016), 224.

118 Thomas Walkom "Terror verdict bad news for rest of Toronto 18," *Toronto Star*, September 26, 2008.

119 *Ansari*, ONCA at para 154.

120 As quoted in Allison Jones, "Accused Toronto 18 member did not know of plot, did nothing criminal, lawyer says," *Canadian Press*, June 7, 2010.

reference to his leaving for "an unknown location to fight for the sake of Allah." Ansari said they were draft suicide notes. The police also found downloaded files from public websites containing what the Court of Appeal described as "bomb making materials" and "religious texts and videos espousing radical Islamic views, violence and terrorism."[121] The Court of Appeal upheld the decision to admit this evidence. It concluded that any prejudice caused by the jury hearing the religious and ideological nature of the evidence was "scarcely remarkable." By testifying, Ansari had placed his character in issue.[122] The *Charter's* protection of fundamental freedoms seemed no longer to protect him.

Although juries do not give reasons, the above political and religious opinion evidence likely had an impact on their conclusion after five days of deliberation that the Crown had proven the high terrorist purpose requirement beyond a reasonable doubt and that Ansari should be convicted.[123] *Ansari* underlines how the introduction of motive evidence, including motives related to an accused's religious, ideological, or political beliefs, could influence juries to convict those of terrorism offences even though they lack knowledge about terrorist plots or a clear intent to engage in them.

The Court of Appeal also held that the trial judge had not erred in defining the prohibited act of the offence broadly to include Ansari's actions in providing computer skills to the ringleader and that these actions exceeded the minimal risk requirement that the Supreme Court had read in to uphold the broad participation offence in *Khawaja*.[124] The appellate affirmation of Ansari's conviction affirms the breadth of the terrorism offences upheld under the *Charter*. Nevertheless, it is troubling that the Court of Appeal affirmed Ansari's terrorism conviction even though the jury was never told of how the Supreme Court of Canada subsequently required minimal risk requirements for the offence that exempted innocent or socially useful conduct that a reasonable person would not regard as materially enhancing the ability to carry out a terrorist activity.[125]

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121 *Ansari*, ONCA at para 34.
122 *Ansari*, ONCA at para 122.
123 For additional discussion, see Aver Emon and Aaqib Mahmood in this volume.
124 *Ansari*, ONCA at paras 187–89.
125 *Khawaja*, SCC at paras 51–52.

VIII. THE FAILED *CHARTER* CHALLENGE TO THE USE OF TWO COURTS IN TERRORISM TRIALS

The most potentially significant *Charter* victory secured by the Toronto 18 was a successful claim made before the trial judge that section 38 of the *Canada Evidence Act* violated section 7 of the *Charter*. Section 38 gives specially designated judges of the Federal Court, sitting in a secure courthouse in Ottawa, exclusive jurisdiction to balance the need for disclosure to the accused against the harm of disclosure to national security. The trial judge, in this case, Justice Dawson sitting in his Brampton courthouse, would be required to accept any order from the Federal Court under section 38 that information should not be disclosed to the accused because of national security privilege. Justice Dawson concluded that such a state of affairs — one that requires two courts to participate in many terrorism prosecutions — risked depriving the Toronto 18 of fundamental justice protected under section 7 of the *Charter*.

"[L]ikely to require that this case stop dead in its tracks."[126]

Justice Dawson bolstered his decision that the two-court system violated the *Charter* rights of the accused by also holding that it violated his constitutionally guaranteed jurisdiction as a judge of a provincial superior court to decide what information should be disclosed to the accused in his courtroom. He warned that if the two-court process:

> [I]s constitutionally valid it is likely to require that this case stop dead in its tracks while [national security privilege] NSP issues are resolved in the Federal Court, with an appeal as of right to the Federal Court of Appeal and a further appeal to the Supreme Court of Canada with leave.

He noted that there was a "likelihood that one such interruption will take place when the case is proceeding before the jury. This raises the risk of a mistrial which would result in starting the trial over again. That has already happened in one major prosecution in Ontario."[127]

The Canadian two-court system is unique and cumbersome. It represents Canada's caution as a net importer of intelligence about the potentially harmful effects of disclosure of secret information to the accused. Justice Dawson's decision that this system violated the accused's

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126 R v. Ahmad, 2009 CanLII 84788 at para 7 (ON SC) [*Ahmad* 84788].

127 *Ahmad* 84788, CanLII at para 7.

rights, however, recognized that Canada also has broad constitutional disclosure rules designed to prevent miscarriages of justice. He concluded that the trial judge, as opposed to a judge of the Federal Court sitting in Ottawa, is in the best position to determine whether the need to ensure that that the accused has a fair trial requires disclosure to the accused of classified information. However, even the accused's initial *Charter* victory against the two-court system was not much of a victory for the Toronto 18. Justice Dawson's rationale was related more to the need for trial efficiency than fairness to the accused. As will be seen, this would help the Supreme Court reverse his decision and characterize section 38 as a policy matter for Parliament rather than one involving the rights of the accused to disclosure.

During the trial, Justice Dawson effectively acted both as a trial judge and as a Federal Court judge without any concerns being raised about improper disclosure or leakage of secret material. He held that while CSIS had been involved in the investigation, it had kept its investigations distinct enough from the police that it remained a third party not subject to the broad disclosure obligations under *Stinchcombe*.[128] The trial judge decided that a CSIS representative could be cross-examined on their affidavit in light of CSIS's destruction of raw intelligence behind its advisory letters to the RCMP.[129] In the end, however, the trial judge rejected claims for a stay of proceedings that relevant information was not disclosed to the Toronto 18. He stressed that the undisclosed evidence would not be part of the Crown's case against the accused,[130] an important difference from the security certificate cases under immigration law.

It was only after the trial was completed that the Supreme Court overturned the Toronto 18's rare *Charter* victory. The unanimous Court defined the accused's *Charter* claims as a policy debate about the efficiency of Canada's two-court system that should be resolved by Parliament. The Court did not see the issue as involving the risk of a miscarriage of justice stemming from a lack of full disclosure to the accused. This reflected the Court's increasing deference to legislatures in part because of criticisms that it sustained starting in the late 1990s for engaging in "judicial activism."

The Court also stressed that when section 38 of the *Canada Evidence Act* was reformed as part of the *ATA*, 2001, Parliament had put in place adequate safeguards to ensure that the accused's right to a fair trial was

128 R v. Ahmad, 2009 CanLII 84776 (ON SC).
129 R v. Ahmad, 2009 CarswellOnt 10015 (Ont Sup Ct).
130 R v. Ahmad, 2009 CanLII 84782 (ON SC).

respected. For example, section 38.13 of the *Canada Evidence Act* instructs the trial judge to order any remedy that is necessary as a result of the Federal Court's non-disclosure order, including the drastic remedy of a stay of proceedings which would halt the trial against the accused. The Court added that trial judges in cases of doubt should not hesitate to use such a statutory remedial power. In theory, this could avoid some of the reluctance discussed above that trial judges displayed to order stays or other drastic remedies in the Toronto 18 case. But practice does not always follow theory. Trial judges could still be placed in the most difficult position of having to decide whether to end a terrorism prosecution because of a non-disclosure order made by a Federal Court in Ottawa. There is no guarantee that the Federal Court judge will be as familiar as the trial judge is with the trial and the accused's evolving defence.[131]

Non-disclosure orders are a staple of modern terrorism prosecutions. They recognize that the fields of secret intelligence and public evidence have become blurred as terrorism offences have expanded into pre-criminal space. This means that intelligence and police terrorism investigations frequently overlap. At the same time, the frequent use of non-disclosure orders by the Federal Court in terrorism trials reveals the stark contrasts that can be overdrawn between the fairness of the criminal trial and a Kafkaesque process of immigration or military detention.

Criminal accused such as the Toronto 18 may find themselves unable to access secret information that they might believe would be useful to their defence, both on the merits but also with respect to *Charter* and entrapment defences. The two-court system has been held by a unanimous Supreme Court to be consistent with the *Charter*, but that does not mean that it is not problematic. The Federal Court may make an order of non-disclosure before the trial. The trial judge will be bound by it even in the face of late disclosure or a late-breaking defence by the accused. In theory, Canada's cumbersome two-court approach is *Charter*-proof because the trial judge can stay proceedings to protect the accused's right to a fair trial. Theory and practice, however, do not always align.[132]

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131 For more discussion of these issues, see Craig Forcese and Croft Michaelson in this volume.

132 For further arguments, see Kent Roach, "'Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions," *Supreme Court Law Review* 54, no. 13 (2011): 357.

The Supreme Court of Canada's decision in upholding the two-court system is also noteworthy in recognizing that even if trial judges are prepared to issue robust due process remedies, such as a stay of proceedings in response to non-disclosure orders by the Federal Court, the executive may have the final word. The Court strongly hinted that a trial judge's stay of proceedings under section 38.13 would be provisional because the Attorney General of Canada would retain its power under section 38 to authorize the disclosure of the information that the Federal Court ordered not to be disclosed. The Court was aware of Canada's risk-averse practices of overclaiming national security. It pragmatically recognized that threat of a stay of proceedings that would permanently stop a terrorism trial would force Canada and its allies to rethink whether secrecy was truly necessary. This approach places the final word on the appropriate balance between secrecy and disclosure in the hands of the executive in the form of the Attorney General of Canada, even after decisions had been made by both the Federal Court and the trial judge.[133] Again, this suggests that the executive may dominate terrorism trials even after much *Charter*-inspired litigation before both the trial judge and the Federal Court.

Although the Supreme Court took pains to indicate that its decision that section 38 did not violate the *Charter* did not resolve the policy debate, as is often the case, the minimum standards of fairness that courts are prepared to enforce under the *Charter* have become *de facto* maximum standards of fairness. Under both the Harper and Trudeau governments, Parliament has refused to implement the recommendations of the 2010 Commission of Inquiry into the 1985 Air India bombings. Retired Supreme Court Justice John Major had recommended that the two-court system under section 38 should be abolished for terrorism trials because it threatens both the fairness and efficiency of terrorism prosecutions and departs from international best practices.[134]

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[133] Section 38.14 also constitutes another form of potential executive domination by allowing the Attorney General of Canada to issue a certificate blocking disclosure. To be sure, the exercise of such an extraordinary power would trigger the trial judge's power to order remedies to protect fair trials. After some initial controversy when the *ATA*, 2001 was first introduced, there is also a light form of judicial review in Federal Court to confirm that the information subject to the AG's non-disclosure certificate indeed relates to sensitive information.

[134] Air India Commission Report, *The Relation Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions* (Ottawa: Supply and Services, 2010). I was director of research for this inquiry.

Parliament's inertia may also reflect executive domination in the national security field. In the immediate aftermath of the September 2014 terrorist attack on Parliament, CSIS was able to secure an evidentiary privilege for its informants. This was done despite warnings by the Air India Commission that CSIS's promises of anonymity to its informants had hindered the Air India investigation and trial. The Federal Court itself was also likely reluctant to surrender its powers and claims to special national security expertise under section 38 to the superior courts despite the ability of the trial judge in the Toronto 18 case to exercise such powers. In any event, no reform has taken place. The minimum standards of the *Charter* have again become maximum standards. Canadian courts continue to struggle with terrorism trials.

IX. Conclusion

Examining the Toronto 18 prosecution through the lens of its many failed *Charter* challenges reveals a number of insights. The failed *Charter* challenges suggest that the cases will not likely be remembered as an assault on civil liberties or even an example of national security excess. On one level, this affirms that the *Charter* has served one of its purposes in preventing gross national security excess, such as the internment and banishment of Japanese Canadians and the declaration of martial law during the October Crisis of 1970. The *Charter* helps give the public trust in the system.

But is this trust warranted? The assurance that the Toronto 18 prosecution was consistent with the *Charter* produces a danger of over-confidence with respect to the fairness of the prosecution. The Courts rejected the accused's *Charter* challenges to solitary confinement, torture allegations, and non-disclosure of relevant information held by the state, but largely on the basis that the drastic *Charter* remedy of a stay of proceedings was not warranted. There were violations of the *Charter* right against unreasonable search and seizure and the *Charter* right to counsel, but no evidence was excluded under subsection 24(2) of the *Charter* in large part because of the seriousness of the terrorism charges faced by the Toronto 18. The *Charter* gives rights, but courts decide whether they will be enforced. Even independent judges are not blind to reactions an alarmed public may have if they grant remedies that halt highly publicized terrorism trials.

The complete failure of all *Charter* claims in the Toronto 18 case may have an anesthetic effect on our ability to evaluate the fairness of terrorism laws and terrorism prosecutions. In other words, just because the Courts were not prepared to issue *Charter* remedies in these emotive cases, does not mean that there are not reasons to question the fairness of the Toronto 18 prosecutions or to change practices or laws in the future. This is especially true with respect to the broad terrorism offences and a two-court approach to protecting state secrets that continue to be used today. Mandatory publication bans should also be questioned, especially, if as in the Toronto 18 case, they follow sensational press conferences by security officials that may leave the public with an incomplete and biased view of the case and the suspects.

Even if one accepts that the Toronto 18 prosecution was not a gross abuse of national security power, there are concerns about the cumulative effects of how police, prosecutorial and legislative power was used in this case. This is particularly so if one is attentive not simply to the law as written, but that law as it was applied in the "post 9/11 climate of suspicion"[135] that could not be targeted by *Charter* litigation. This helps explain why the *Charter* made no difference to the bottom line of the Toronto 18 prosecutions.

The failed *Charter* challenge to the extensive publication ban, in this case, reflects Canada's comparatively weak freedom of expression tradition. The publication ban was justified by the Supreme Court on the basis of protecting fair trials, even though a few of the Toronto 18 argued it prevented them from countering prejudicial and extraordinary publicity surrounding their arrests and the sensational June 3, 2006, press conference.

The judicial rejections of *Charter* challenges to the definition of terrorist activities and terrorism offences, in this case, foreshadowed the Supreme Court's subsequent decision in *Khawaja* to similar effect. Nevertheless, these judicial decisions should not stop Canadians from questioning the fairness of broad terrorism offences, especially as applied to those on the periphery of terrorist plots who perform tasks as shoplifting or fixing computers in association with those who may have terrorist plans.

The conclusion that the broad *ATA* offences are consistent with the *Charter* may discount the danger, especially in jury trials such as the one that

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135 *Khawaja*, SCC.

convicted Ansari and Chand, that evidence relating to motive and extreme religious and political beliefs will play an unwarranted role in any conviction. It may also discount the danger that those charged with terrorism offences who are subject to prejudicial pretrial publicity and prolonged pre-trial detention under difficult conditions may plead guilty or accept peace bonds simply to end pre-trial detention. It should be no comfort to reflect on our increasing recognition that even innocent people plead guilty.

The Ontario Court of Appeal's rejection of Asad Ansari's appeal in 2015 underlines the breadth of terrorism offences. Those without awareness of terrorist plots or clear intent to engage in violence may be guilty of *Charter* compliant terrorism offences. The exercise of sentencing discretion is practically important. Nevertheless, it cannot compensate for the inherent and lasting stigma of being convicted of a terrorist offence. The courts have deferred to the ability of Parliament to create extremely broadly defined terrorism offences.

Consistent with a pre-*Charter* crime control system, it was the exercise of prosecutorial and sentencing discretion in the Toronto 18 case that provided the main means to differentiate between the culpability, non-culpability, and blameworthiness of the accused. The *Charter* made no difference. The Toronto 18 case is consistent with executive and legislative domination of the national security rules of the game. This belies the popular idea that the *Charter* has fundamentally slanted the criminal justice system in the accused's direction.

Parliament had the final word on the problematic two-court system for terrorism trials, mandatory publication bans, direct indictments, and broad terrorism offences. The *Charter* guarantees the right to disclosure, but non-disclosure orders are a staple of terrorism prosecutions. The *Charter* guarantees freedom of expression, but mandatory publication bans in the Toronto 18 cases lasted years. The *Charter* provides rights but also legitimizes limits to rights and the denial of remedies such as stays of proceedings and exclusion of evidence.

The Toronto 18 were able to engage in extensive, and some might say even endless, *Charter* litigation before independent judges. Some may bemoan this fact. Some may celebrate it. I am more ambivalent because, at the end of the day, it was the police, prosecutors, jurors, and Parliament who decided the fate of the Toronto 18 and not the *Charter*. *Charter*

litigation did not affect the outcome of these cases, but it helped legitimize the ultimate result.

Sentencing the Toronto 18: Lessons from Then, Lessons for Now

MICHAEL NESBITT *

ABSTRACT

Eleven of the Toronto 18 were eventually charged and tried for terrorism offences. All of them were found guilty and received various lengthy custodial sentences. This chapter considers the enduring importance of these ground-breaking sentencing decisions, including what they have meant for future cases in terms of the length of sentence, how aggravating and mitigating factors are to be considered in the context of terrorism offences, and how the fundamental principle of sentencing is to be conceived in cases of terrorism. It finds that the Toronto 18 sentencing decisions have had lasting importance on subsequent terrorism sentencing decisions, especially since they were amongst the very first and thus, precedent setting terrorism sentencing decisions, there were so many of them relative — even now — to the total number of terrorism cases in Canada, and their logic has been adopted by subsequent judges. But this judicial logic also comes under scrutiny.

While each sentencing decision was tailored to the individual, varied in length and analysis, and clearly gave longer sentences for the lead actors,

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they also diverged in approach from the usual application of the "fundamental principle." Instead, the analysis of terrorism offences in the Toronto 18 sentencing decisions was often portrayed through the broader lens of terrorism and the threat it poses conceptually; the result was a downplaying of individuality, which in turn caused certain fundamental mitigating considerations – such as youth and prospects for rehabilitation – to be turned into neutral, or even aggravating, factors. The result seemed to skew the normal balancing of individual moral culpability with the seriousness of the offence (the fundamental principle) towards the latter consideration, with a view to elevating denunciation and deterrence as the preeminent sentencing goals in terrorism cases.

I. INTRODUCTION

Between June 2 and August 6, 2006, 14 adults and four youths (under the age of 18) were arrested in what authorities called Project Osage.[1] While all of the accused lived in the Greater Toronto Area, their backgrounds varied. The group included high school students,[2] a computer programmer,[3] a janitor,[4] and a gas station attendant.[5] Likewise, their active involvement in the plots – and thus their moral culpability for any offences – also differed greatly, from Zakaria Amara and Fahim Ahmad, the recruiters and leaders of what became the two Toronto 18 splinter cells,

1 Michael Friscolanti, "The Fall of a Would-Be Bomber," *Macleans*, October 22, 2009, https://www.macleans.ca/news/canada/the-fall-of-a-would-be-bomber/.

2 The names of three of the youth were never published as they were tried as minors. The fourth was Nishanthan Yogakrishnan, who was a youth at the time of the offense but whose name was later published. Yogakrishnan was found guilty of participation in an activity of a terrorist group under section 83.18 of the *Criminal Code* and received a two-and-a-half-year sentence. See R v. N.Y., [2009] O.J. No. 6495 (Ont Sup Ct) [*N.Y.* (Sentencing)].

3 Shareef Abdelhaleem, a 30-year-old with stable employment. Mr. Abdelhaleem's professional background is described in *R v. Abdelhaleem*, 2011 ONSC 1428 at para 40 [*Abdelhaleem* (Sentencing)].

4 Qayyum Abdul Jamal, a 43-year-old who worked at the mosque where some of the group met. Mr. Jamal's custodial work at the Al-Rahman Islamic Centre in Mississauga is described in Isabel Teotonio, "Four have Terror Charges Stayed," *Toronto Star*, April 15, 2008, https://www.thestar.com/news/gta/2008/04/15/four_have_terror_charges_stayed.html.

5 Zakaria Amara, the 20-year-old hardliner who masterminded the bomb plot. Amara's position as a gas station attendant is described in *R v. Amara*, 2010 ONSC 441 at para 51 [*Amara* (Sentencing)].

down to the youths whose charges were eventually dropped and whose involvement went little beyond showing up to the "training camps."

Despite some media coverage that implied the monolithic character of the Toronto 18 plotters, some of which seemed further to be based on grouping the accused together by racial stereotypes,[6] this was indeed a disparate group of accused with disparate levels of corresponding moral and legal complicity. This varying complicity was explicitly recognized at the sentencing phase of the criminal trials, particularly with respect to the relative length of the various custodial sentences. Nevertheless, at sentencing, the offenders' complicity was, at times, also portrayed through the lens of terrorism as a generalized concept, reading as though there was one crime of terrorism, which there is not, rather than a series of offences that attach to discrete individual activities. As we shall see, the result was a range of custodial sentences but always custodial sentences no matter the accused; lower sentences for younger, less central figures, yet relatively long sentences regardless of their moral or physical involvement in the plots; and a respect for the roles of individuals coupled with a significant downplaying of individuality when it came to mitigating factors. This is an approach to sentencing terrorism that has since become common in Canada.

The intention here is not to suggest that all of the Toronto 18 were treated without recognition of their distinct individuality at sentencing – they were most definitely not. Nor is it to suggest that those accused of terrorism should not be subject to long periods of incarceration. Rather, this chapter suggests that at sentencing proceedings, certain important aspects of the defendants' individuality – and the corresponding spectrum of moral culpability – were downplayed in favour of a generalized assessment of the seriousness of terrorism in general. In particular, we saw a diminution of mitigating factors like age and a defendant's prospects for rehabilitation, coupled with a persistent return to the (aggravating) threat of terrorism in general rather than the threat posed by the individual before the court. In the result, the relationship between the individual and seriousness of the crime is skewed towards the broader concept of terrorism.

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6 Christie Blatchford, "Ignoring the Biggest Elephant in the Room," *Globe and Mail*, June 5, 2006, https://www.theglobeandmail.com/news/national/ignoring-the-biggest-elephant-in-the-room/article1100051/; Linda Frum, "Q&A with Terrorism Expert David Harris: On How Canada is Handling the Issue of Islamic Extremism," *Macleans*, June 13, 2006, http://web.archive.org/web/20061004162747/http://www.macleans.ca/topstories/canada/article.jsp?content=20060619_128873_128873.

The end result is a practical reconfiguration of the theoretical commitment to the fundamental principle of sentencing in Canada – that being proportionality between individual responsibility and the seriousness of the crime. The repercussions of this approach include, of course, a diminution of the ever-important individual in the sentencing of crime, but also a theoretical approach to terrorism that values primarily the principles of denunciation and deterrence yet is seen to accomplish little of either, in practice.

In the end, a case study approach to the Toronto 18 provides valuable insight into both what to expect in future sentencing proceedings and what corrections might be made to a jurisprudential approach to sentencing terrorists that increasingly looks entrenched in Canadian law. To show why, this chapter will proceed in two parts. Part II will provide an empirical overview of the Toronto 18 sentences, looking in particular at the length of the custodial sentences (all accused were sentenced to jail time), how these sentences were broken down by plot and as between the leaders and major contributors and followers of each plot (their complicity, in other words), the age of the accused, and whether or not they pled guilty. This will set the stage for Part III, which draws from the numbers in Part II and offers a qualitative analysis of the legal reasoning in the Toronto 18 sentencing decisions, and particularly the approach to the fundamental principle of sentencing.

II. EMPIRICAL OVERVIEW OF THE TORONTO 18 SENTENCES

The importance of the sentences handed down in the Toronto 18 trials – and the judicial reasoning used to justify them – continues to have an outsized impact on the law and jurisprudence related to terrorism offences and how convicted terrorists are sentenced in Canada. Just by the numbers alone, the Toronto 18 trials represent a significant percentage of the total case law on terrorism crimes in Canada: as of December 2019, of the 18 Canadian terrorism cases that had gone to trial and resulted in a judicial decision on the accused's guilt or innocence, four came from the Toronto 18 (22%);[7] of the 28 trial-level sentencing decisions released between

[7] See Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2. Of the Toronto 18, only the charges against Mr. Abdelhaleem, Mr. Yogakrishnan, Mr. Ansari, and Mr. Chand proceeded to trial and resulted in a judicial

December 2001 and December 2019 (including sentences after guilty pleas), 11 came from the Toronto 18 trials (39%);[8] and of the seven terrorism sentencing appeals that were issued by December 2019, three were the result of Toronto 18 prosecutions (43%).[9]

But to be clear, it is not just the influence of the raw numbers that matter. It is also the timing of the Toronto 18 sentencing decisions. The series of Toronto 18 cases were among the very first judgements and sentencing decisions released in Canada,[10] with *R v. N.Y.*[11] being the first sentencing decision released while the Ontario Court of Appeal (and then the Supreme Court) was still grappling with the sentencing of Momin Khawaja,[12] Canada's first terrorism prosecution and the only precedent for the Toronto 18 line of cases. Indeed, with release dates between May 2009[13] and March 2011,[14] all but two of the Toronto 18 sentencing decisions were released before the *Khawaja* Court of Appeal decision (Khalid was released concurrently[15] while Abdelhaleem was released shortly after), and all were released before the *Khawaja* decision was released at the Supreme Court of

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pronouncement on guilt or innocence. The remaining cases involved either guilty pleas or stays. See R v. Abdelhaleem, [2010] O.J. No. 5693, 89 W.C.B. (2d) 233 (Ont Sup Ct) [*Abdelhaleem* (ONSC)]; R v. N.Y., [2008] O.J. No. 3902, 89 W.C.B. (2d) 83 (Ont Sup Ct) [*N.Y.* (ONSC)]; Public Prosecution Service of Canada, *Sentence in R. v. Ansari* (News Release) (Ottawa: PPSC, 4 October 2010), https://www.ppscsppc.gc.ca/eng/nws-nvs/2010/04_10_10.html; Public Prosecution Service of Canada, *Sentence in R. v. Chand* (News Release) (Ottawa: PPSC, 26 November 2010), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/26_11_10.html.

8 Nesbitt, "Empirical Study." It is also worthwhile to note that, at the time of writing, the terrorism cases involving Raed Jaser and Chiheb Esseghaier had been sent back for retrial.

9 Non-Toronto 18 appeals are *R v. Khawaja*, 2010 ONCA 862 sentence aff'd *R v. Khawaja*, 2012 SCC 69; *R v. Thambaithurai*, 2011 BCCA 137; *R v. Ahmed*, 2017 ONCA 76; and *R v. Hersi*, 2019 ONCA 94. Toronto 18 appeals are *R v. Khalid*, 2010 ONCA 861; *R v. Amara*, 2010 ONCA 858; and *R v. Gaya*, 2010 ONCA 860.

10 *N.Y.* (Sentencing), O.J., was released only 7 months after the first *Khawaja* judgment. See R v. Khawaja, 2008 CanLII 92005 (Ont Sup Ct) [*Khawaja* (ONSC)].

11 *N.Y.* (Sentencing), O.J.

12 *Khawaja*, SCC was the final word on the sentencing of Momin Khawaja, released three years after the first Toronto 18 sentence of Nishanthan Yogakrishnan in *N.Y.* (Sentencing), O.J. and 21 months after the last Toronto 18 sentence was handed down in *Abdelhaleem* (Sentencing), ONSC.

13 *N.Y.* (Sentencing), O.J.

14 *Abdelhaleem* (Sentencing), ONSC.

15 *Khawaja*, ONCA at para 201.

Canada in 2012. The Toronto 18 cases had, in this sense, a first-movers advantage. Not only were they the second through twelfth sentencing decisions ever released, but they were also released at a time where the Court of Appeal and then the Supreme Court were struggling with the only other sentencing decision (*Khawaja*). Moreover, they were never overturned by the Supreme Court and a number of other important terrorism cases were shortly to follow. Today, even if a newly released sentencing decision does not go directly back to the Toronto 18, it more than likely relies on a decision that in turn draws from the Toronto 18.[16]

Of course, the size, scope, and timing of the Toronto 18 decisions do not tell the whole story. Over the first 20 odd years of terrorism prosecutions in Canada – since the offences found their way into the *Criminal Code* in December 2001[17] – the vast majority of cases have been heard in two jurisdictions (Toronto then Ottawa) before a very small number of judges.[18] Put another way, in Canada, a very small number of judges, largely in two jurisdictions, have built case law on terrorism offences, starting with the Toronto 18.

In terms of the Toronto 18 sentences themselves, 11 individuals were ultimately tried and sentenced for a variety of terrorism offences (the remaining charges against seven individuals were ultimately stayed, meaning, in this case, that the prosecution did not deem them worthy of proceeding to trial).[19] The following chart provides a brief summary of the

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16 An excellent example is the Court's important decision in *R v. Esseghaier*, 2015 ONSC 5855, particularly at para 96. Here, the Court could have turned to *Khawaja*, SCC as the Supreme Court's final say on sentencing terrorism. Yet, the Court in *Esseghaier* was clearly of the opinion that the Toronto 18 ONCA decisions in *Ahmad*, *Khalid*, and *Gaya* had been affirmed by the SCC in *Khawaja* and, as such, used them to find what it said were the sentencing guidelines for terrorism cases in Canada. This was despite the fact that the Supreme Court in *Khawaja* made no mention of the Toronto 18 ONCA decision.

17 Anti-Terrorism Act, 2001 S.C. 2001, c. 41.

18 Nesbitt, "Empirical Study," 137–38.

19 The individuals who pled or were found guilty were Zakaria Amara, Shareef Abdelhaleem, Fahim Ahmad, Steven Vikash Chand, Saad Gaya, Amin Mohamed Durrani, Jahmaal James, Saad Khalid, Nishanthan Yogakrishnan, Mohammed Ali Dirie, and Asad Ansari. See *Amara* (Sentencing), ONSC; *Abdelhaleem* (Sentencing), ONSC; R v. Ahmad, 2010 ONSC 5874 [*Ahmad* (Sentencing)]; R v. Chand, 2010 ONSC 6538 at para 1 [*Chand* (Sentencing)]; R v. Gaya, 2010 ONSC 434 [*Gaya* (Sentencing)]; Public Prosecution Service of Canada, *Durrani Pleads Guilty to Terrorism Offence* (News Release) (Ottawa: PPSC, 20 January 2010), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/20_01_10.html; Public Prosecution Service of Canada, *R. v. James* (News

individuals involved, the terrorism offences with which they were charged, and their ultimate sentences (where applicable).

Name of Accused	Charge(s) Under the *Criminal Code*	Outcome	Sentence (if applicable)
Shareef Abdelhaleem[20]	83.18(1), 83.2	Guilty at Trial	Life + 5 years concurrent
Ibrahim Aboud[21]	83.18	Charges Stayed	–
Fahim Ahmad[22]	83.18(1)(a), 83.2, 83.21(1)	Pled Guilty	16 years
Zakaria Amara[23]	83.2 (81(1)(a)), 83.18	Pled Guilty	Life + 7 years + 24 months concurrent
Asad Ansari[24]	83.18(1)(a)	Guilty at Trial	6 years, 5 months
Steven Vikash Chand[25]	83.18(1), 83.2	Guilty at Trial	10 years
Mohammed Ali Dirie[26]	83.18	Pled Guilty	7 years

Release) (Ottawa: PPSC, 26 February 2010), https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2010/26_02_10.html; *Khalid*, ONCA; *N.Y.* (Sentencing), O.J.; R v. Dirie, 2009 CanLII 58598 (ON SC) [*Dirie* (Sentencing)]; R v. Ansari, 2010 ONSC 5455 at para 1 [*Ansari* (Sentencing)]. Those whose charges were dropped, stayed, or withdrawn were Ibrahim Aboud, Ahmad Mustafa Ghany, Qayyum Abdul Jamal, Yasin Abdi Mohamed, and the three unnamed youth. None who went to trial were found not guilty. See https://www.thestar.com/topic.toronto_18.html.

20 *Abdelhaleem* (Sentencing), ONSC at paras 83–85.

21 Teotonio "Four Have Charges Stayed."

22 *Ahmad* (Sentencing), ONSC at para 72.

23 *Amara* (Sentencing), ONSC at paras 159–62

24 *Ansari* (Sentencing), ONSC at paras 20–22.

25 *Chand* (Sentencing), ONSC at paras 93–95.

26 *Dirie* (Sentencing), CanLII at para 73.

Amin Mohamed Durrani[27]	83.18	Pled Guilty	7 years + 6 months
Saad Gaya[28]	83.18, 83.2	Pled Guilty	18 years
Ahmad Mustafa Ghany[29]	83.18	Charges Stayed	–
Qayyum Abdul Jamal[30]	83.18	Charges Stayed	–
Jahmaal James[31]	83.18	Pled Guilty	7 years
Saad Khalid[32]	83.2 (81(1)(a))	Pled Guilty	20 years
Yasin Abdi Mohamed[33]	–	–	–
Toronto 18 Youth 1[34]	–	Charges Stayed	–
Toronto 18 Youth 2[35]	–	Charges Stayed	–

27 Bob Mitchell and Isabel Teotonio, "Toronto 18 Member Pleads Guilty," *Toronto Star*, January 20, 2010, www.thestar.com/news/gta/2010/01/20/toronto_18_member_pleads_guilty.html.

28 *Gaya*, ONCA at paras 18–20.

29 Teotonio, "Four Have Charges Stayed."

30 Teotonio, "Four Have Charges Stayed."

31 Isabel Teotonio, "Toronto 18 Terrorist Freed after Guilty Plea," *Toronto Star*, February 27, 2010, https://www.thestar.com/news/gta/2010/02/27/toronto_18_terrorist_freed_after_guilty_plea.html.

32 *Khalid*, ONCA at paras 57–58.

33 Teotonio, "Four Have Charges Stayed."

34 Isabel Teotonio, "The Toronto 18," *The Toronto Star*, 2010, http://www.thestar.com/static/toronto18/index.html.

35 Teotonio, "The Toronto 18."

Toronto 18 Youth 3[36]	–	Charges Stayed	–
Nishathan Yogakrishnan[37]	83.18	Guilty at Trial	2 years + 6 months

As indicated in the above chart, only four of the 18 individuals arrested challenged their charges in court (pled not guilty) – meaning that coming out of the Toronto 18 trials, there were only four (written) trial court judgements evaluating the guilt or innocence of the accused. All accused received (relatively) lengthy custodial terms, and the average (mean) sentence for Toronto 18 plotters was almost 20 years in prison[38] or 10.5 years not including Amara and Abdelhaleem, who received (non-numerical) life sentences. This result presages the broader trend in terrorism trials in Canada which is, perhaps not surprisingly, that you go to jail and spend years in custody if you are convicted of any terrorism offence.[39]

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36 Teotonio, "The Toronto 18."

37 *N.Y.* (ONSC), O.J. at paras 282–83; "Ban Lifted on Convicted Terrorist's Identity," *CBC*, September 9, 2009, http://www.cbc.ca/news/canada/toronto/ban-lifted-on-convicted-terrorist-s-identity-1.778966. Yogakrishnan was convicted as a youth but was sentenced as an adult.

38 How to count the length of a life sentence is, of course, a matter of debate. One could simply use the stand-in of 25-years, the minimum parole ineligibility for first-degree murder (see Michael Nesbitt, Robert Oxoby, and Meagan Potier, "Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases," *UBC Law Review* 52, no. 2 (2019), 567, n. 70). One could also use the parole eligibility number for life imprisonment for terrorism, though this conflates the release date with the sentence, which is not generally done to calculate a sentence at trial. Here, I have used the 2015–2017 life expectancy at birth rates for male Canadians – the most up-to-date information on life expectancy available through Statistics Canada at the time of writing. That is 80.0. See Statistics Canada, *Life expectancy at various ages, by population group and sex, Canada* (Ottawa: Statistics Canada, last modified 26 February 2021, https://doi.org/10.25318/1310013401-eng. I then subtracted the age of the two accused who received life sentences from 82. Thus, the sentence for Adbelhaleem (30) was 50-years, and the sentence for Amara (20) was 60-years. Of course, as with all the accused, they will be released on parole before serving their full sentences.

39 See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 566–69.

The average sentence for those that pled guilty was approximately 19.3 years, whereas the average sentence of those that challenged their charges at court was 17.25 years, a result that arguably influenced, or at least was consistent with, a broader trend in Canadian terrorism sentencing: there is seemingly little or no meaningful discount by the numbers for those that plead guilty (thereby admitting fault),[40] which contradicts the general approach to sentencing guilty pleas in Canada. Other factors, of course, bear on these numbers, including that two of the youngest accused with arguably the lowest moral culpability in terms of their commitment to and involvement in the plots (Ansari and N.Y.) challenged the charges. Still, the consistency with which guilty pleas receive similar sentences to those that challenge their charges across almost 20 years of terrorism trials and sentences in Canada, coupled with the fact that in the case of the Toronto 18, those that pled guilty actually received higher sentences (including the highest sentence of all for Amara), is notable, particularly for future accused considering their plea options.

In particular, the experience with the Toronto 18 might then explain why 59% of Canadian criminal cases result in guilty pleas and only 9% proceed to trial, whereas a recent study suggests that 44% of terrorism cases proceed to trial (a much higher number than average) and 33% of terrorism prosecutions have ended in a guilty plea[41] – and even this relatively low overall guilty plea rate is inflated by the high number (seven) of Toronto 18 plea deals. Simply put, as the numbers to date seem to bear out, there is limited value in pleading guilty to a terrorism charge in Canada; as a result, a defence lawyer advising a client to plead guilty to terrorism charges would surely be doing their client a disservice, at least insofar as the decision is based on a prospective custodial sentence alone.

This result is not without its problems. First, it means that the courts seem to be treating those convicted of terrorism the same whether they admit to their wrongdoing and work with authorities or not. This is seemingly inconsistent with the general principles of sentencing that require courts to consider as mitigating all expressions of remorse and admissions of guilt. But second, this may also well signal a problem for the already-overburdened Canadian criminal justice system: in both the Toronto 18 cases and more generally in terrorism trials, a higher percentage of accused take their cases to trial as discussed above – cases that are generally long and

40 Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 569–70.

41 Nesbitt, "Empirical Study," 111.

very complex – resulting in increased costs for the system and a tax on overstrained court resources. This trend started with the Toronto 18, but it remains equally true as of the time of writing this chapter.

Finally, of the 11 individuals involved in the Toronto 18 plot that the Crown proceeded with charges against, all were male (as were all 18 members of the Toronto 18), with ages at the time of the arrests ranging from 18 to 30 and an average (mean) age of 21-years old (see Age Table, below). Only two plotters who were tried were age 24 or older (Chand and Abdelhaleem; Jamal, an accused member of the Toronto 18 who was not tried, was an outlier within the larger group, at 43-years old).[42] Putting these results together, we see that the plotters were young, male, and, seemingly, largely without prior criminal records,[43] all of which is consistent with the overall make-up of those prosecuted for terrorism in Canada.[44]

Age Table

Faction	**Accused**	**Age at Arrest**	**Guilty Plea**	**Sentence**
Parliament Hill Plot	Fahim Ahmad	21	Yes (mid-trial)	16 years
	Steven Vikash Chand	24	No	10 years
	Amin Mohamed Durrani	19	Yes	7.5 years
	Jahmaal James	23	Yes	7 years
	Nishanthan Yogakrishnan	18	No	2.5 years
	Mohammed Ali Dirie	22	Yes	7 years

42 Anthony DePalma, "Six of 17 Arrested in Canada's Antiterror Sweep Have Ties to Mosque Near Toronto," *New York Times*, June 5, 2006, https://www.nytimes.com/2006/06/05/world/americas/05canada.html.

43 Mr. Dirie did have a youth criminal record. See *Dirie* (Sentencing), CanLII at para 29.

44 Nesbitt, "Empirical Study," 113–14.

	Asad Ansari	21	No	6 years, 5 months
Bomb Plot	Zakaria Amara	20	Yes	Life
	Shareef Abdelhaleem	30	No	Life
	Saad Khalid	19	Yes	20 years
	Saad Gaya	18	Yes	18 years

As the above table suggests, the Toronto 18 offenders were split into two groups.[45] The first was the Parliament Hill plot, also called the Scarborough Group, which was led by Fahim Ahmad. The second group, also called the Mississauga Group, was led by Zakaria Amara along with the group's recruiter, Shareef Abdelhaleem, and was planning the bombing of the Toronto Stock Exchange. The latter group, and plot, was considered the more serious because it was deemed further along in its planning – and thus closer to its deadly execution – but also because its leaders, Amara and Abdelhaleem, were considered the more effective planners, and thus the plot itself was considered more plausible. As a result, both Amara and Abdelhaleem received sentences of life imprisonment and, as of writing, they remain the only two members of the Toronto 18 still incarcerated.

Breaking down the charges and sentences by plot reveals that the Court did indeed tailor the custodial terms of the offenders such that those in the more serious plot bore the more serious moral culpability, and thus, the associated offenders got the longer sentences. Likewise, as the tables below make clear, the group leaders got the longest sentences while those on the periphery of the less serious Scarborough group received the most lenient terms, at least relative to the other offenders in the broader Toronto 18.

[45] See the Introduction to this book for background on the characteristics and leadership of these two groups.

Sentencing the Scarborough Group/Parliament Hill Plot (Less Serious)

Name of Accused	**Charge(s) Under the *Code***	**Outcome**	**Sentence**
Fahim Ahmad *	83.18(1)(a), 83.2, 83.21(1)	Pled Guilty[46]	16 years
Steven Vikash Chand	83.18(1), 83.2	Found Guilty	10 years
Amin Mohamed Durrani	83.18	Pled Guilty	7.5 years
Jahmaal James	83.18	Pled Guilty	7 years
Nishanthan Yogakrishnan	83.18	Found Guilty	2.5 years
Mohammed Ali Dirie	83.18	Pled Guilty	7 years
Asad Ansari	83.18(1)(a)	Found Guilty	6.5 years

* Plot leader

Sentencing the Mississauga Group/Bomb Plot (More Serious)

Name of Accused	**Charge(s) Under the *Code***	**Outcome**	**Sentence**
Zakaria Amara *	83.18, 83.2 (83(1)(a))	Pled Guilty	Life
Shareef Abdelhaleem	83.18(1), 83.2	Found Guilty	Life
Saad Khalid	83.2 (81(1)(a))	Pled Guilty	20 years
Saad Gaya	83.18 (charge dropped), 83.2	Pled Guilty	18 years

* Plot leader

[46] Mr. Ahmad originally pled not guilty but changed his plea partway through the trial. See Isabel Teotonio, "Toronto 18 Ringleader Pleads Guilty in Terror Trial," *Toronto Star*, May 10, 2010, https://www.thestar.com/news/crime/2010/05/10/toronto_18_ringleader_pleads_guilty_in_terror_trial.html.

In the result, we can see from the two above Tables, for example, that Abdelhaleem and Ahmad were both considered recruiters for the Toronto 18 and both pled guilty to the similar offences (participation under 83.18 and the most serious terrorist offence, commission, under 83.2; Ahmad also pled guilty to section 83.21, instructing others to carry out an activity for a terrorist group). Nevertheless, it was Abdelhaleem, a member of the more serious bomb plot, that received the life sentence, whereas Ahmad received a more lenient, but still stiff, 16 years in prison. Indeed, all members of the bomb plot received custodial sentences longer than the leader (Ahmad) in the Parliament Hill plot, with the lowest custodial sentence in the former group being 18 years in custody for Gaya. N.Y. or Yogakrishnan – a member of the less serious Scarborough plot and youth at the time of his participation, thus the alternating use of N.Y. – received the shortest custodial sentence (2.5 years).[47] N.Y.'s sentence is notably light as compared to the custodial sentence of other terrorists, though it is similar in length to other youth terrorism offences.[48] The numbers suggest that at least relative to one another within the group(s), the judges did tailor the sentences to the individual.

One might be tempted to take from the numbers – and the fact that we are talking about terrorism, after all – that things are as they ought to be. The group leaders got longer sentences than the followers, and the members of the more serious plot got uniformly longer sentences than those associated with the more speculative plan. Terrorism was treated seriously upon sentencing while, by the numbers, it is evident that account was taken for the moral culpability of each offender in accordance with the fundamental principle of sentencing, which demands that a judge balance the seriousness of the offence with the culpability of the offender. While all of that is undoubtedly true, it is also the case that relative to other Canadian sentences, even serious offences, the custodial sentences were comparatively very long, particularly when considering youthful offenders without a

47 *N.Y.* (Sentencing), O.J.

48 One youth charged in Quebec received a two-year sentence. See Nesbitt, "Empirical Study,"134–35, 137. See also Cour du Québec, 17 December 2015, Judgements du Québec, No 7759; Cour d'appel du Québec, Montreal, 24 November 2015, *Green v. R*, Judgements du Québec, No 14345; Cour d'appel du Québec, Montreal, 26 November 2018, *X c. Sa Majesté la Reine*, 2018 QCCA 1985; Cour d'appel du Québec, Montréal, 26 September 2018, *X c. Sa Majesté la Reine*, Judgements du Québec, No 11200. Another youth charged in Manitoba received a 20-month sentence (including six months deferred).

criminal record and those, like Asad Ansari (Scarborough plot), who also had little knowledge about the plots or even the intentions of those at the training camps. Moreover, a closer qualitative look at the legal reasoning used by the sentencing judges to arrive at the respective sentences reveals that the fundamental principle of sentencing seems to be operating a little differently, perhaps even uniquely, when applied to terrorism offenders as compared to how it is usually approached.

III. A Qualitative Assessment of the Sentencing Decisions

Section 718.1 of the *Criminal Code* offers the fundamental principle of sentencing in Canada: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[49] The fundamental principle demands that a balance be sought between, on the one hand, the seriousness of the specific offence committed (the left side of the equation) and, on the other hand, the degree of moral culpability of the individual offender on trial (the right side of the equation). In analyzing said proportionality, the court must consider aggravating and mitigating factors (section 718.2) associated with the accused – age, prospects for rehabilitation, previous criminal record, etc. The court must also consider general objectives of sentencing (section 718), including deterrence, denunciation, separation of offenders from society, rehabilitation, reparations to society and victims, and the promotion of a sense of responsibility in offenders. Within the fundamental principle's equation, there is thus a great deal of discretion for the judge to tailor the appropriate sentence; but there are also numerous constraints and considerations in sections 718.2 and 718 that limit the options available. In *R v. Khawaja*, the Supreme Court of Canada made it abundantly clear the usual principles of sentencing – including, of course, the fundamental principle – apply with equal vigour in terrorism cases.[50]

But while it may be true that the fundamental principle applies in cases of terrorism – and the equal applicability in terrorism cases was certainly reinforced through the Toronto 18 sentencing decisions – the judicial

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49 Criminal Code, R.S.C. 1985, c. C-46, s. 718.1.

50 See *Khawaja*, SCC at para 115: "The general principles of sentencing, including the totality principle, apply to terrorism offences."

approach to evaluating the fundamental principle in the terrorism context installs different, sometimes confusing, and sometimes seemingly contradictory considerations. Put another way, the high-level (fundamental) principles are, in theory, the same in terrorism offences as all other offences, but how they are applied and analyzed looks distinctly different in practice.[51] In particular, the proportionality analysis is skewed time and again away from the individual and distinctly towards the (terrorism) offence, which itself is often described not in terms of the specific terrorism offence and charge but by the idea of terrorism in general.[52] This turn away from the individual and towards terrorism justifies a primary focus on punishing the offender and deterring others, though tautologically the focus on punishing the offender and deterring others is likewise used to bring the focus away from the individual and towards the concept of terrorism in general.

Perhaps the starkest example of the (initial) move away from the individual offender is the Court's treatment to date of rehabilitation as a mitigating factor upon sentencing terrorism offenders. As the Supreme Court confirmed in *Khawaja*, rehabilitation remains "an important factor in sentencing" terrorism.[53] Again, the starting point remains the same with terrorism as with all offences: the fundamental principle applies in theory. But in Chapter 15 of this book, Reem Zaia canvasses in stark detail how the offenders' prospects for rehabilitation and reintegration into society are routinely subordinated in the context of terrorism trials. Other studies have gone further in suggesting that courts may have flipped the logic pertaining to rehabilitation, from a logic where evidence of the possibility of rehabilitation is treated as a mitigating factor, to the terrorism context where the accused's failure to prove the possibility of rehabilitation (a virtual impossibility) becomes a previously unheard-of aggravating strike against them at sentencing.[54]

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51 For a more detailed analysis of this point across both the Toronto 18 cases and, more broadly, across almost 20-years of terrorism cases in Canada, see Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 582–83.

52 See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 591–92.

53 *Khawaja*, SCC at paras 114, 122–24.

54 See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 597–603. Other excellent studies have made a similar point about rehabilitation in the context of terrorism trials. See e.g., Robert Diab, "Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law," in *Terrorism, Law and Democracy: 10 Years After 9/11*, eds. Craig Forcese and François Crépeau (Montreal: Canadian Institute for the Administration of Justice, 2012), 347; Reem Zaia, "Mental Health Experts in

The treatment of youth and young offenders is another interesting example. Age, and particularly youthfulness, is a mandatory factor that courts must consider in the mitigation of a criminal sentence. This is true even in terrorism cases, as the court affirmed in *R v. Gaya*: "even for the most serious of offences as this one is, the mitigating effect of youth is not obliterated."[55] The same is true for the prior criminal record of the accused: the lack of a previous criminal record should remain a mitigating factor on sentencing.

But when it comes to terrorism offences, all young offenders – starting with N.Y. in the Toronto 18 context but also considering other very young adult offenders without criminal records, like Asad Ansari – receive long custodial sentences, even if such sentences are shorter than those of other terrorism offenders.[56] An analysis of the terrorism sentencing decisions reveals why: the logic implementing the recognized principle that youthfulness is mitigating begets a somewhat different story in practice.

> The young age of an offender generally mitigates the sentence because they possess the greatest potential for reform and rehabilitation... as the offence gets more serious, the mitigating effect of age decreases... That does not mean that age is totally eliminated from the sentencing equation for serious offences, just that it has less significance.[57]

Thus, although age is a consideration in sentencing, it is less so in serious offences, and terrorism of course is among the most serious. What does it mean, then, for age to both matter and have "less significance"? Perhaps the numbers from Part II tell the best story: a young offender, and especially youth, will get a lesser sentence as compared to others charged with terrorism, but they will still get a relatively long custodial sentence. Age matters, but only within the relative confines of other terrorism sentences. An honest assessment of this implementing logic was offered by the Court in *Khalid*:

> We accept that the respondent's youth and his lack of criminal antecedents were relevant considerations on sentencing. But, in terrorism cases, these factors must be viewed through a different lens. Youthful first offenders present as attractive recruits to sophisticated terrorists. They are vulnerable and impressionable because

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Terrorism Cases: Reclaiming the Status of Rehabilitation as a Sentencing Principle," *Criminal Law Quarterly* 64, no. 4 (2017), 548.

55 *Gaya* (Sentencing), ONSC at para 64.

56 See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 567–69.

57 *Amara* (Sentencing), ONSC at para 119.

> of their youth and their prior good character makes them difficult to detect by law enforcement authorities. The sad truth is that young home-grown terrorists with no criminal antecedents have become a reality. And that is something the courts must recognize and take into account when deciding how much leniency to give to youthful first offenders who commit terrorist crimes.[58]

We see here how age – a factor relevant to individual moral culpability, the right side of the fundamental principle's equation – is seen not as an independent variable to be evaluated with respect to the individual and their actions but rather as a dependent variable seen through a "different lens": that of the seriousness of terrorism.

The implication in *Khalid* (and the above quote in particular) seems to be that age and first-time offender status simply cannot matter as much in terrorism both because terrorism is serious and because the offence itself is different, or "unique" as the Court has said on other occasions.[59] But there is a further, perhaps more subtle, implication, that being that age could be treated as something other than mitigating, for it is the youthful offender that is more prone to be attracted to terrorism (something equally true for a wide variety of crimes), and it is the youthful "good character" that makes the youthful offender "vulnerable and impressionable" and "more difficult to detect by law enforcement." Perhaps, then, rather than acting as a mitigating factor, or even being largely dismissed because of the seriousness of terrorism, the youthfulness of an offender should be cause for concern.

The result of the Court's analysis of the right side of the fundamental principle's equation (individual culpability) is then the unconscious diminution of the individual at terrorism sentencing hearings in favour of the seriousness of terrorism offences. In other words, the seriousness of terrorism becomes the dominant consideration when engaging in an analysis of age, prior convictions, or prospects for rehabilitation. The next step in judicial logic then solidifies the approach and, arguably, the outcome for the accused: the court moves to an evaluation of the left side of the proportionality principle's equation and considers, once again, the seriousness of the offence. The individual, in this way, is viewed through

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58 *Khalid*, ONCA at para 47 [emphasis added].

59 See *Khalid*, ONCA at para 32. Similar sentiment was expressed in various Toronto 18 sentencing decisions, including *R v. Khalid*, [2009] O.J. No. 6414 at para 108 (Ont Sup Ct); *N.Y.* (Sentencing), O.J. at para 24 aff'd on other grounds *R v. N.Y.*, 2012 ONCA 745 at para 152; *Gaya* (Sentencing), ONSC at paras 117–18; *Gaya*, ONCA at para 19; *Amara* (Sentencing), ONSC at paras 140–42; *Abdelhaleem* (Sentencing), ONSC at para 72; and *Dirie* (Sentencing), CanLII at para 32.

the lens of the worst horrors of terrorism over and again; proportionality is adjudged as between the seriousness of terrorism (the right side of the equation) and the seriousness of terrorism (the left side). In both cases, terrorism is treated as "a crime unto itself,"[60] the most serious of crimes. Put another way, the left side of the equation is rated serious because terrorism is serious, then the right side of the equation is viewed through the lens of an individual who commits terrorism, and proportionality is discovered as between the two views of terrorism. It should then come as no surprise to see, in Part II above, extremely long custodial sentences across the board.

Moreover, the judicial approach to terrorism on both the left and right side of the equation tends to toggle between an evaluation of the specific offence charged and terrorism in the general sense, using phrases like the crime of terrorism or terrorist offences – as though there were not a host of discrete terrorism offences.[61] For example, the Ontario Court of Appeal cited with approval the sentencing judge's position in *R v. Khalid*, asserting:

> The sentencing judge… described terrorist offences as "a most vile form of criminal conduct", noting that they "attack the very fabric of Canada's democratic ideals" and "strike fear and terror into the citizens in a way not seen in other criminal offences."[62]

As seen here, the then-nine (now 14) different terrorism offences found between sections 83.02–83.04 and 83.18–83.23 of the *Criminal Code* quickly become amalgamated into more generalized "terrorist offences."

Seen in turn through the prism of terrorism writ large, it is easy to understand how one moves from an analysis of a youthful individual's involvement at the Toronto 18 Washago training camp to a decision that views such actions as putting the whole "fabric" of Canadian democracy at risk.[63] While such foundational concerns regarding the horrors of terrorist

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60 *Abdelhaleem* (Sentencing), ONSC at para 62. As the Crown prosecutor asserted to the *National Post* after Abdelhaleem's sentencing, "[t]he next terrorist that comes before the court charged with an offense like this is going to have an uphill battle… [terrorism] is a crime unto itself. It threatens all of us. It threatens our way of life. There's nothing like it, and that's why [the court] has been unequivocal in its intolerance" [emphasis added]. See Megan O'Toole, "The Defining Case for Trying Terrorists," *National Post*, March 5, 2011, https://nationalpost.com/posted-toronto/the-defining-case-for-trying-terrorists.

61 *Chand* (Sentencing), ONSC appears to be the sole case from the Toronto 18, or even thereafter, which does not discuss the seriousness of terrorism in general.

62 *Khalid*, ONCA at para 44 [emphasis added].

63 *Khalid*, ONCA at para 44.

actions are justifiable with regard to, for example, the 9/11 attacks or perhaps even with respect to the most radicalized leaders of the Toronto 18 plot, it is harder to maintain that the actions of N.Y. or Asad Ansari – whose complicity is covered in Chapter 11 of this book – offered the potential for so great a harm to the very fabric of all of Canada.

Nevertheless, in the case of Ansari, after canvassing his actions, including the editing of a video and showing up at the Washago training camp with other accused terrorists, the sentencing judge had the following to say: "[t]errorist activity of any sort poses a grave threat to the safety of the community. It also strikes at the very foundation of our democratic way of life, something ordinary people have struggled to obtain in a laborious process that has spanned hundreds of years."[64] Such logic demands a fairly specific understanding of "terrorist activity" in general – that in all its iterations, it necessarily strikes at the foundation of democracy – and that this conception be applied to a youthful, relatively marginal figure (Ansari).[65] In its sweeping generality, this statement also ignores the fact that many forms of terrorism (e.g., the IRA) make no political claim to setting back Western society hundreds of years.

In the result, the individual characteristics of the accused – in this case, Ansari – and his complicity in the plot are bound to be enmeshed in the terrorist plot and terrorism in general, which then means that the "dominant consideration" upon sentencing must be responding to terrorism as an idea. But the need to respond to terrorism, in general, explains the move away from the individual. In the end, the individual is sentenced so as to punish and denounce terrorist activity, which itself is seen as "strik[ing] at the very foundation of our democratic way of life."[66]

Putting the logic in the sentencing decisions together, the starting point of the terrorism sentencing decisions – as it was in *Ansari* – recognizes the preeminence of the fundamental principle of sentencing, that being that the court must find proportionality between the individual terrorism offender and the seriousness of the offence. That includes a consideration of the individual, including their age, prior criminal record, prospects for rehabilitation, and whether or not they pled guilty. All of this leaves enough room to level lifetime sentences for the worst offenders (leaders) and shorter

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64 *Ansari* (Sentencing), ONSC at para 17 [emphasis added].

65 For further discussion of this issue, see Chapter 11 in this book by Anver M. Emon and Aaqib Mahmood.

66 *Ansari* (Sentencing), ONSC at para 17.

custodial sentences for the hangers-on. But in the end, the court then qualifies the individual with reference back to the seriousness of the offence and then conducts (another) proportionality analysis as between the individuals seen through the lens of terrorism in general. In this way, the individual is both front and centre and significantly diminished as compared to many offenders that commit other offences. Put another way, relative to other terrorists, those most culpable will get the longest sentences and those least culpable will get the shortest; here, we see individual responsibility at work. But all sentences will be custodial, all will dismiss prospects for rehabilitation and, seemingly, the reality of guilty pleas, and as such, all sentences will tend toward the maximum of what one might expect. In the latter situation, we lose the individual to the horrors of terrorism as a generalized concern, one that is seen through the lens of threatening our very way of life.

All of this has another effect, as articulated by the court in *Ansari*, above, but also in other cases like *Ahmad*: "denunciation, deterrence and protection of the public must be treated as the predominant principles of sentencing."[67] The logic is clear: if the sentence is tied primarily to the seriousness of the offence, then the justification must be that we care most about denunciation, deterrence, and safety. Rehabilitation, youthfulness, and guilty pleas, despite being confirmed as applicable mitigating considerations in terrorism cases, fall away because the goal is to focus on other principles like denunciation. Of course, once rehabilitation and the promotion of a sense of responsibility are subordinated, this in turn surely justifies the failure to meaningfully consider the prospects for rehabilitation as a factor in mitigating the sentence of the accused. Rehabilitation is foregrounded then immediately backgrounded on principle: prospects for rehabilitation matter, but primacy is given to denunciation and deterrence as the fundamental purposes of sentencing in all terrorism cases which mandates that to come full circle at the end of the day, things like rehabilitation, youthfulness, and guilty pleas matter very little indeed.

Of course, such logic has implications for the individual, the most obvious being that the individual may feel that terrorism worldwide is being sentenced rather than the individual on trial. But there are also national security implications to this approach. First, when the prospects for rehabilitation are seen as diminished to the faintest light, one would expect

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67 *Ahmad* (Sentencing), ONSC at para 52.

to see limited options for rehabilitation in the criminal processes. As Reem Zaia discusses in Chapter 15, this is demonstrated in Canada's complete lack of programming in prisons and reduced options on parole. Similarly, when guilty pleas are seen as having no (or a negligible) effect, then we see sentences that look very similar in custodial duration as between those individuals that take responsibility for their actions and plead guilty and those that do not (see Part II, above). Taking responsibility matters less to the court and, thus, a sense of responsibility is not theoretically promoted in the individual. In light of this court messaging, specific deterrence is hardly applicable because there is little incentive or opportunity to take responsibility or corrective action. It also means that, as the numbers bear out, we should expect to see more cases going to trial as opposed to resolving via plea agreements. Unfortunately, in the context of terrorism, such trials are almost always long, complex, and resource-intensive, meaning the increased incentive to go to trial is very costly indeed.

Second, even if sentencing terrorism is in theory significantly about deterrence, as the Court has asserted, in promoting those principles in the way terrorism cases have, we may have undermined our capacity to denounce and particularly deter. The reasoning here goes as follows. We sentence to deter individuals (either the offender or others in society) from engaging in serious acts of terrorism. But most individuals are not plot leaders, and most start small, with engagement in the Toronto 18 training camp, for example, rather than specific planning about bombing the TSX – a part of the plot that only came later. Yet, in practice, Canada's sentencing decisions send the following message of specific deterrence: once a person has crossed the threshold of terrorist activity – has engaged generally in facilitating terrorism or perhaps participated with a terrorist group – then the specifics of their actions matter less than that general terrorism characterization. For example, if a person has already assisted in some minor way in a larger terrorism plot, say editing a video for a terrorist group (i.e., Ansari), there is no legal disincentive not to take further, more serious steps to help the organization; the individual actions will already be diminished in the assessment of the generalized engagement in the terrorism plot. Likewise, there is limited incentive to back out of the plot and plead guilty, for such pleas do not seem to much affect sentence lengths. When one is in for a penny, then they are in for a pound, at least as concerns the criminal law; once you cross the terrorist activity threshold, a long custodial sentence awaits regardless of your subsequent actions. In this sense at least, specific

deterrence – the threat of criminal punishment to deter the offender from escalating or taking further actions – is greatly reduced.

So, where might specific or general deterrence play a role? First, in theory, the Canadian approach might deter those that are seriously thinking about leadership roles in terrorism plots in which they are already engaged, knowing that their lesser activities are likely to get them 10–20 years in prison, but a leadership position will likely receive a life sentence. It is difficult to imagine this scenario playing out in the real world, and there is not a single example in Canadian terrorism cases of such reasoning taking place. Second, deterrence might, in theory, be engaged in advance of any individual's move towards engaging in terrorist plots (general deterrence or deterrence of other non-offenders) because those not (yet) engaged will, in theory, become aware of the long custodial sentences and choose a different path (again, an unlikely scenario). In the latter situation – already dubious because this does not tend to be how general deterrence works, if it works at all – those most likely to be deterred are not yet engaged and, in all probability, are unlikely to engage in terrorism. This is hardly the group to which we most need to send a message.

The case against Mr. Ansari again offers an illustrative example of how this all plays out at sentencing. The Court described Ansari and his involvement in the Toronto 18 plots in the following way:

> While Mr. Ansari's involvement in the offence was serious, it is not at the most serious end of the scale. Mr. Ansari was out of shape and was not selected for further training. He participated in the camp, but in a more limited way than some others; he utilized his technical skills with the requisite knowledge and for the requisite purpose, but I am not convinced he did so with complete knowledge of what was going on; the evidence demonstrates he was not in a leadership position.[68]

Ansari's involvement was "serious" because of his involvement in terrorism – his presence at the Toronto 18 training camp had crossed the terrorism threshold. By most other metrics – a consideration of Ansari the person, his age (21 at the time), or what specifically he did – his involvement was fairly limited, to the point where the Court admits he may not even have fully known what was going on. In that context, Ansari received a sentence of six and a half years in jail – an extremely stiff sentence in the broader context of Canadian criminal law. Once he crossed the threshold

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[68] *Ansari* (Sentencing), ONSC at para 14.

to terrorism, no matter his involvement, capacity, youthfulness, or knowledge, he was bound to receive a long custodial sentence.

In the end, what justifies this unique approach if deterrence is unlikely to be well-served by Canada's approach to sentencing terrorism and if rehabilitation has fallen by the wayside? Why treat terrorism as a crime unto itself and thus, in turn, treat the logic of sentencing differently than with respect to other crimes? The answer was enunciated by the Court in *Ahmad*, which is consistent with the other Toronto 18 decisions:

> In circumstances such as these the principles of denunciation and general [seen as unlikely, above] and specific deterrence [seen as unlikely, above] must come to the forefront in sentencing, together with the need to protect the public by removing the offender from society. While mitigating factors such as youthfulness, lack of a criminal record and the prospect of rehabilitation must still be taken into account, they must play a subordinate role.[69]

We are left with denunciation and the protection of society as the dominant principles, with the avowed subordination of the individual. But even here, most terrorism offenders will get out of prison, usually at an age where they are still at a theoretical risk of reoffending,[70] and if rehabilitation is not a meaningful principle, and if that means, in turn, that parole boards and prisons do not take rehabilitation seriously in the context of terrorism offences,[71] then the theory that we protect society via removal (through imprisonment) amounts to a temporary measure without a long-term plan. One is left, then, with a theory of sentencing that largely amounts to denunciation, which is to say punishment of an idea and/or action to express disapproval. Seen in this light – where punishment for the concept of terrorism becomes the driving factor in sentencing terrorism – the long custodial sentences across the board for the Toronto 18 plotters, as seen in Part II of this chapter, are no surprise.

In the end, instead of the fundamental principle of sentencing, the overriding principle in sentencing terrorism offenders appears, in practice, to be denunciation as punishment coupled with vague assertions about deterrence and protection of society, neither of which are particularly well-served by what is really a punishment-driven approach. This is a result of

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69 *Ahmad* (Sentencing), ONSC at para 51.

70 Recall that of the Toronto 18, only two received life sentences; most were scheduled to be released on parole while still in their 20s or early 30s, well within the usual age range of terrorism offences (or reoffences) worldwide. See Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 572–73.

71 See Chapter 15 in this volume by Zaia.

the fact that courts have treated terrorism differently from other crimes and replaced a complex fundamental principle with a rather blunt theory of punishment, all with questionable societal results. Moreover, though such an approach might offer catharsis for a Canadian populace looking to disavow and punish terrorism, it has also diminished the individual on trial – an individual who rightly must be central to all sentencing considerations in Canada.[72] The Toronto 18 sentencing decisions began this trend and have reinforced its consistent application; it is a trend that, respectfully submitted, is neither fair to the offender nor offers the greatest protection and security for society. Rather, it is a trend that strains to fit a punishment-oriented approach to sentencing within a broader, much more nuanced fundamental principle. In the end, the theoretical commitment to the fundamental principle is lost in the practical analysis of terrorism writ large; meanwhile, the individual is subordinated, the crime is punished harshly, the individual is left feeling wronged, and society is left without rehabilitation programs in prison. It is time to turn the theoretical commitment to the fundamental principle of sentencing into a manifest commitment to its ideals. It is time for the logic and the analysis to move away from the worst fears of terrorism worldwide and towards the individual offenders and the sentences best suited to their actions and society's needs.

IV. Conclusion

In many ways, the factual and legal circumstances of the Toronto 18 cases have presaged the Canadian terrorism cases that would follow: young men plan a terrorist attack, some of which are scarily plausible while others are wildly implausible; they are found guilty (usually for inchoate, or planning, activities), receive relatively long custodial sentences regardless of age, past criminal involvement, prospects of rehabilitation, or even if they plead guilty; and, that custodial sentence is justified by the unique character of terrorism. Prospects for rehabilitation and taking personal responsibility are limited throughout the process, from the decision to plead guilty or not and go to trial, to the sentencing considerations, through to opportunities for reform upon incarceration and parole. The individual, and the personal capacity to change, is muted while the fear of terrorism, in general, is foregrounded. This is an approach that seems inconsistent in practice with

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[72] See generally Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions."

the fundamental principle of sentencing to which the Canadian system has committed.

As this chapter has shown, the similarity between Toronto 18 sentencing decisions and subsequent decisions – and, indeed, virtually all terrorism sentencing decisions in Canada that are subsequent to the Toronto 18 decisions – should come as no surprise. First, there is the fact that they were the original sentencing decisions dealing with the new terrorism offences under the *Anti-Terrorism Act* 2001, a significant consideration unto itself in a legal system that demands respect for judicial precedent.[73] Second, the Toronto 18 plot remains the biggest homegrown terrorism plot in Canadian history, and, consequently, the largest-scale mass arrest and series of prosecutions for terrorism offences. As a result, and as shown in Part II of this chapter, the Toronto 18 prosecutions represent a statistically significant percentage of the overall sentencing decisions for terrorism offences in Canada. More important than statistical prevalence, however, is the fact that, as shown in Part III of this chapter, certain aspects of the juridical reasoning established in the Toronto 18 sentencing decisions – for example, those which have militated towards longer custodial sentences, diminished the relevance of plea bargaining, obfuscated the importance of rehabilitation, and overemphasized deterrence – have been followed in subsequent terrorism cases. Finally, it is worthwhile to note that the majority of terrorism cases in Canada have been tried in the same jurisdiction, with the same small group of judges as the Toronto 18 cases, which might explain how the original sentencing decisions have taken on increased importance.

As we in Canada move further down the road, and as other Canadian jurisdictions and other judges begin to assess the individual moral culpability of young men without prior criminal records convicted of heinous, ideologically driven violent plots that seem, in motivation, to tear at the fabric of Canada's democratic institutions, it is worth remembering the context of those initial (Toronto 18) sentencing decisions and revisiting the logic that drove the results. Within the Canadian system and, in my best guess, within the Canadian psyche, there is nothing wrong with punishing a convicted terrorist seriously; indeed, it is likely that much of the Canadian public would demand it. But in our *Criminal Code*, there are a series of (14) discrete terrorism offences, not one offence of terrorism, and some of these

[73] As noted at above, Khawaja's appeal went all the way to the Supreme Court was ongoing at the time of the Toronto 18 trials.

are more serious than others. Similarly, there is a spectrum along which terrorism offenders will fall, from the repentant young offender on the fringes of an implausible plot to the leader of a group intent on blowing up the TSX (i.e., Amara). The fundamental principle of sentencing demands that we take these individuals and these circumstances seriously, that the generalities of the offence with which an individual is charged are but one balancing consideration in the overall sentence of an individual.

The fundamental principle of sentencing – the demand for proportionality between the individual moral culpability and the seriousness of the specific offence as charged – has generally served Canada well, even as we strive and occasionally fail to live up, in practice, to its high-minded principles. Perhaps, then, it is all the more important that when it comes to offences dubbed "terrorism" – offences that uniquely stigmatize offenders and accused – we retrench in those high-minded principles. We must treat the fundamental principle of sentencing as the most fundamental where it is hardest to do so. We must see individuals as unique, and even individual criminal acts as unique, but no set of crimes necessarily and abstractly as such. Mitigating factors like youth, prospects for rehabilitation, a willingness to express remorse (as shown by, for example, pleading guilty), the lack of a criminal record, and the accused's level of moral and physical complicity in the plot must remain front and centre to the sentencing decision, no matter the crime. An approach to sentencing that nibbles away at the protections which are foundational to a balanced application of justice is one that both betrays the citizen – the pillar of democracy – and strays from the principles of fundamental justice protected by the *Charter*.[74] The Toronto 18 sentencing decisions helped remind us that centring the individual and contextualizing the crime that the individual committed – in contrast to engaging with the idea of a crime more broadly – are of preeminent importance. But these cases also reveal that we must be careful to manifest in practice what we claim to do in theory.

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[74] The application of the principles of fundamental justice to substantial rights within the *Charter* is discussed at length in the Supreme Court's decision in *Reference Re: BC Motor Vehicles Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

Rehabilitation, Intervention, and Parole for the Toronto 18: Dead Ends and Silver Linings

REEM ZAIA [*]

"There was no correctional programming recommended in your case as traditional programming does not target the needs specific to offenders involved in terrorist related offences." – Parole Board of Canada (Decision for Inmate #5)

ABSTRACT

This chapter assesses the spectrum of intervention measures (on a state and non-state level) available to offenders who plan to, or have, committed terrorism-related offences. The author does so with a view to determining

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whether intervention measures or rehabilitative efforts are sufficiently mitigating for the purpose of sentencing or parole. The author begins by surveying various intervention programs in Canada for persons at the "pre-charge" stage and highlights their practical shortcomings. Relying on this information, she emphasizes that evidence of rehabilitation efforts or work with intervention groups can prove insufficient for the purpose of mitigating a sentence of incarceration or granting parole. The author argues that this phenomenon results in a dead-end at every milestone of the criminal justice system for offenders convicted for terrorism-related offences. Even in cases where offenders have shown an ability to rehabilitate, the weight of their rehabilitative efforts is often questioned by courts and the National Parole Board by virtue of the crime they committed.

I. INTRODUCTION

What awaits those convicted and sentenced for terrorism-related offences at the sentencing and parole stages? A dead end. Indeed, this fate pervades the criminal justice system. Specifically, Canada's existing framework for interventions, such as mentoring, coaching, social support, counselling, and programming[1] lacks cohesion and consistency. They are limited in terms of their jurisdictional reach, accessibility, and utility. Unlike the Partner-Assault Response Program, or Alcoholics Anonymous, which are designed to offer therapeutic and non-therapeutic intervention for offenders with addictions or predilections in the post-charge phase, there is no decades-old, systematized "go-to" for persons convicted of terrorism-related offences. Likewise, the Correctional Service of Canada (CSC) does not offer specialized programming for inmates convicted of terrorism-related offences. Making matters worse, clinical risk assessments for inmates convicted of terrorism offences are frequently viewed with skepticism by courts and the National Parole Board of Canada (the "Board"). These cumulative tensions render it difficult to identify appropriate interventions and, more importantly, determine how a sentencing court or the Board would receive them.

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1 Canada Centre for Community Engagement and Prevention of Violence, *National Strategy on Countering Radicalization to Violence*, Catalogue No. PS4-248/2018E-PDF (Ottawa: Canada Centre, 2018), 31, https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/ntnl-strtg-cntrng-rdclztn-vlnc-en.pdf.

Relying on the Toronto 18 cases and, more broadly, cases involving inmates convicted of terrorism offences since 2001, this chapter sheds light on the systemic resource deficit for interventions at the tail ends of the justice system (i.e., the pre-charge, pre-sentence, and custodial stages). This deficit is double-edged – it applies to inmates who lack the resources to rehabilitate and taxpayers who are burdened with the cost of keeping an inmate incarcerated without appropriate interventions and the risk of further radicalization. Worse, those who do not receive appropriate interventions are at a greater risk of harbouring the same grievances that initially led them into the criminal justice system and re-offending upon release.

Part II of this chapter provides an overview of existing interventions available to offenders in Canada at the governmental and non-governmental levels. It will also address some of the practical and strategic challenges offenders face as a result of this resource deficit. Part III highlights how evidence of rehabilitation or positive intervention has fared at the sentencing stage by drawing on pre-sentence and psychiatric reports from selected Toronto 18 cases. Part IV focuses on 15 cases from the Board involving inmates convicted of terrorism offences since 2001. Relying on these decisions, I identify cases where the Board's decision to refuse release were partly attributable to the absence of structured, institutionalized programming or the reliability of clinical risk assessments. I also comment that in nearly half of those cases, the Board imposed a condition on the inmate to participate in religious counselling. I conclude by making recommendations for counsel who intend to introduce their clients to intervention programs at various stages of the criminal justice system to avoid the dead ends articulated, with a view to facilitating their clients' eventual reintegration into the community.

II. A Dead End for Concerted Intervention at the Pre-Charge and Pre-Sentence Stages

Between 2001 and 2018, 55 individuals were charged with terrorism offences under the *Criminal Code*.[2] By the end of 2015, only 12 offenders

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2 Public Safety Canada, *2018 Public Report on the Terrorism Threat to Canada*, Catalogue No. PS1-16E-PDF (Ottawa: PSC, 2019), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/pblc-rprt-trrrsm-thrt-cnd-2018/index-en.aspx#s32.

were federally incarcerated for terrorism-related offences, with sentences ranging from six years to life – the majority of them being in maximum-security facilities.[3] As some researchers later discovered, the average sentence for those in leadership roles was 21 years, as compared with 11 years for those in non-leadership roles.[4] Moreover, of the 26 prosecutions that resulted in a guilty plea or conviction since 2001, 23% received life sentences, and the average sentence for terrorism offences to date is 13 years.[5]

Comparatively speaking, the total number of inmates convicted of terrorism offences when measured against crime statistics is low when viewed in light of all offenders in Canada. However, the potential harms caused by these offenders are significant as compared with those who commit more common crimes. At first blush, it would seem that the absence of specific programming during the pre-charge, pre-sentence, and custodial phases is a product of scarce resources. From a fiscal standpoint, one might question the rationale behind implementing inmate-specific programs of a highly specialized nature, particularly if the volume of inmates committing terrorism offences is low. By contrast, from a public policy perspective, one might argue that the rise of extremism in Canada and globally[6] should raise the spectre of concern. Whether a far-right online subculture incites a mass shooting, or a radicalized inmate is released without access to the appropriate intervention tools, society never stands to gain when individuals who need intervention do not receive it.

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3 Access to Information Request A-2016-0014, Email Correspondence between Departmental Staff in Preparation for Minister's U.K. Trip, 582 [*A-2016-0014*] [ATIP, Email Correspondence] (on file with author).

4 Michael Nesbitt, Robert Oxoby, and Meagan Potier, "Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases," *UBC Law Review* 52, no. 2 (2019).

5 Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 10–11.

6 See e.g., Gordon Corera, "Is There a Growing Far-right Threat Online?," *BBC News*, July 8, 2019, https://www.bbc.com/news/world-europe-48830980; Josee St-Onge, "Social Media Fuelling Rise of 'New Generation of Extremism' in Alberta, report says," *CBC News*, April 23, 2019, https://www.cbc.ca/news/canada/edmonton/alberta-study-extremism-radicalism-online-hate-terrorism-1.5108262; Alex Boutilier, "Rise of Right-wing Extremists Presents New Challenge for Canadian for Law Enforcement Agencies," *Toronto Star*, October 7, 2018, https://www.thestar.com/news/canada/2018/10/07/rise-of-right-wing-extremists-presents-new-challenge-for-canadian-law-enforcement-agencies.html.

Relatedly, the importance of programming is also relevant when measured against the average age of inmates convicted of terrorism offences. As evidenced in Chapter 14 by Dr. Michael Nesbitt, many of the Toronto 18 inmates were relatively young compared to their cohort in custody. Regrettably, many of them are being released from custody still radicalized.[7]

Due to restrictions attributable to privacy laws, it is difficult to ascertain exactly how many and which offenders participated in intervention programming prior to their sentences and/or during their time in custody. More importantly, it would be helpful to know the proportion of offenders who were able to identify, match with intervention programs during the pre-charge phase, and successfully complete them prior to their sentence passing. A brief survey of existing interventions at the pre-charge and pre-sentencing phases may shed light on the difficulties that inmates have in locating appropriate interventions. As the information below demonstrates, existing intervention resources are limited in their availability and may not serve as appropriate templates in terms of meeting the grievances and needs of the offender.

A. State and Non-State Actors in the Intervention Forum

1. Federal State Actors

Few centres across Canada specialize in the delivery of intervention programs. At the federal level, there is no unified intervention program for persons who have been charged with a terrorism-related offence at the pre-trial stage. However, there are some centres and government-funded groups with mandates to work with various stakeholders across the country. These groups operate with a view to gathering and disseminating evidence-based research on the efficacy of intervention programs and supporting their implementation.

For example, in 2017, the federal government established the Canada Centre for Community Engagement and Prevention of Violence (the "Canada Centre") to build a knowledge base in this capacity. The Canada Centre exists under the auspices of Public Safety Canada to research and

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7 Stewart Bell, "Canada's Terrorism Offenders are Coming out of Prison Still Radicalized," *Global News*, February 27, 2020, https://globalnews.ca/news/6574722/terrorism-in-canada-deradicalization-programs-parole/.

advise on counter-radicalization measures as well as assist stakeholders across the country with the implementation of intervention mandates.

In 2017, long after the Toronto 18 trials were heard and after some inmates were paroled, the federal government allocated $35 million in funding to establish the Canada Centre and support its work over five years, with an additional $10 million each year following.[8] Based in Ottawa, the Canada Centre provides leadership at the national level in areas such as policy guidance to the Minister of Public Safety and Emergency Preparedness. It also promotes coordination and collaboration with organizations to prevent radicalization, secure funds, and coordinates research relevant to deradicalization from violence, and targeted programming through the Canada Centre's Community Resilience Fund to support initiatives that prevent radicalization to violence.[9] The Canada Centre is comprised of professionals with expertise in countering radical violence in research, policy, and advocacy-based roles. It also represents Canada at the international level alongside other state and non-state actors, including the Five Eyes.[10] The Canada Centre constitutes the backbone for various organizations that require funding support and community-based resources. As members of the Toronto 18 are slowly released on parole, this type of funding becomes less directly applicable to them, as it is not designed to facilitate contact with inmates.

While the Canada Centre does not work directly with accused persons, it works closely with community groups that deliver intervention programming. It is helpful to know that the Centre releases information about its work to the public from time to time. Counsel might also benefit from learning where the Canada Centre allocates its dollars to build intervention programs across the country when considering programming for clients.

Relatedly, CPN-Prev (Canadian Practitioners Network for Prevention of Radicalization and Extremist Violence) is a public, evidence-based organization funded by Public Safety's Community Resilience Fund. The fund is administered through the Canada Centre. CPN-Prev was established to fill a gap by connecting practitioners to one another across the country to assist radicalized individuals. Practitioners include, but are not limited to, social workers, psychologists, and psychiatrists. CPN-Prev supports

8 Canada Centre, *National Strategy on Countering Radicalization to Violence*, 5.
9 Canada Centre, *National Strategy on Countering Radicalization to Violence*, 5–6.
10 Canada Centre, *National Strategy on Countering Radicalization to Violence*, 6.

interventions across Canada and trains practitioners by sharing tools for intervention. CPN-Prev produces systemic reviews and publishes its findings for public consumption on a range of issues including, but not limited to, extremist online content and factors that lead to radicalization. Presently, the organization is studying empirical evidence regarding intervention and counter-violent extremism programs to assess whether they actually work.[11] Importantly, CPN-Prev has a dedicated team of academics, practitioners, and policymakers who are able to locate practitioners in various communities for individuals who require intervention.

CPN-Prev is a valuable resource for defence lawyers who wish to custom-tailor an intervention program for their clients at any stage of a prosecution. A call to CPN-Prev will assist in bridging the connection with various practitioners in different communities. For example, CPN-Prev may connect counsel to a forensic psychiatrist, psychologist, or religious leader where appropriate. These types of contacts, if made early, are particularly helpful for offenders who wish to begin rehabilitating at an earlier stage in their involvement with the justice system. They provide the offender with an array of options in terms of who might be willing to assist and how that individual can be reached. Importantly, CPN-Prev's interventions are not limited to the pre-charge phase and can be helpful prior to sentencing or while an inmate is in custody.

2. Municipal State Actors

At the municipal level, some programs also focus on intervention during the pre-charge stage of a case. Each program has a unique mandate with a focus on particular outcomes and is exclusive to its respective jurisdiction. Many of them feature prominently in more urban, metropolitan areas such as Toronto, Ottawa, Edmonton, and Calgary.

For example, the Multiagency Early Risk Intervention Tables (MERIT) is a program led by the Ottawa Police Service with a broad mandate to "reduce risk and victimization and improve community resiliency and well-being."[12] While broad in scope, the program also hosts the Preventing and Countering Violent Extremism (P/CVE) program, which is designed to

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11 "Reviews #2 and #3: Programs That Aim to Prevent Violent Radicalization & Disengage Individuals Adhering to Violent Radical Ideas/Behaviors," CPN-Prev, accessed August 1, 2019, https://cpnprev.ca/systematic-review-3/.

12 "MERIT," Ottawa Police Service, accessed August 1, 2019, https://www.ottawapolice.ca/en/news-and-community/MERIT.aspx.

increase responsiveness to radicalization. Funded by the Community Resilience Program at the Canada Centre, the program facilitates interventions with persons who are at risk of radicalizing prior to their entry into the criminal justice system.[13] The program is collaborative and operates alongside multiple community agencies to assist persons in avoiding charges under the *Criminal Code*.

The Toronto Police Service (TPS) is responsible for a similar initiative to counter violent extremism. FOCUS is a multi-agency program under the auspices of the TPS, the City of Toronto, the United Way, and various local community organizations. The program focuses on risk intervention that is required due to the probability that risk will manifest as an emergency, social disorder, crime, or further victimization.[14] The program relies on social workers, public health workers, counsellors, and community groups to identify and assist persons who are at an elevated risk of victimization or offending.[15] Using "situation tables," law enforcement and practitioners come together to review cases involving individuals who are at high risk of radicalization.[16] In 2018, the federal government granted the organization approximately $1 million in funding in addition to funding from the Community Resilience Fund for its coordinated efforts in this regard.[17]

In Edmonton, the Resiliency Project of the Edmonton Police Service (EPS) recently received funding to address sources of violent extremism online and offline.[18] The project operates in collaboration with the Organization for the Prevention of Violence (OPV), an organization that

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13 Matthew Kupfer, "Ottawa Police get Almost $1M to Prevent Violent Extremism," *CBC News*, July 21, 2018, https://www.cbc.ca/news/canada/ottawa/ottawa-police-radicalization-violent-extremism-prevention-1.4756178.

14 "Focus Situation Tables," Toronto Police Service, Presentation by Sgt. Brian Smith, accessed August 1, 2019, http://hsjcc.on.ca/wp-content/uploads/NY-HSJCC-Presentation-FOCUS_Human-Services-and-Justice-Co-ordinating-Committee-Jan-20182.pdf.

15 Chris Herhalt, "Feds offer $1M to strengthen "Focus Toronto' intervention program," *CP 24*, September 6, 2018, https://www.cp24.com/news/feds-offer-1m-to-strengthen-focus-toronto-intervention-program-1.4082874.

16 Public Safety Canada, *Federal Funding for Toronto Police to Expand Counter Radicalization to Violence Initiative* (New Release) (Ottawa: PSC, 6 September 2018), https://www.canada.ca/en/public-safety-canada/news/2018/09/community-resilience-fund-provides-torontopolice-with-1-million-to-expand-a-counterrad2violence-prevention-and-intervention-program.html.

17 Public Safety Canada, *Federal Funding for Toronto Police*.

18 Lydia Neufeld, "Edmonton police, anti-violence organization receive $3.5 million to target radicalization in Alberta," *CBC News*, January 19, 2018, https://www.cbc.ca/news/canada/edmonton/terrorism-hate-radicalization-edmonton-1.4495506.

conducts psycho-social interventions and an evidence-driven approach to countering violent extremism.[19] The OPV produces research and working relationships with organizations across Alberta, including the Royal Canadian Mounted Police and EPS, to create awareness and assist in developing evidence-based interventions. The OPV is also funded by the Community Resilience Fund to identify sources of extremism throughout Alberta and establish partnerships to address radicalization.[20]

Similarly, since 2015, Calgary's local police force has delivered a pre-charge intervention program called ReDirect. ReDirect is designed to prevent Calgary youth and young adults from being radicalized to violence through education and social support.[21] ReDirect has a dedicated case planning team that develops individualized support plans for young persons and helps find the right community agencies to implement the plan. The program accepts referrals from "concerned parents, teachers, community leaders or anyone else who knows them well enough to observe concerning behaviours."[22] Those eligible for the program are considered against the backdrop of three criteria: engagement with a radical cause or ideology, intent to cause harm, and ability to cause harm. Those who successfully complete individualized programming receive follow-up assistance from the ReDirect team if required.[23]

While police-based programming such as those discussed above can be helpful for young persons without a criminal record, radicalized adults may be hesitant to rely upon them, particularly if they are more entrenched in their ideology. For example, some offenders may be hesitant to expose their vulnerabilities and ideologies to a police agency despite assurances that information will remain confidential. For programs that offer assistance during the post-charge phase, such as MERIT, some counsel may also be hesitant to introduce their clients to the police during the pre-charge phase, especially if their arrest is imminent.

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19 Organization for the Prevention of Violence, accessed August 1, 2019, https://preventviolence.ca.

20 "Political scientist receives federal grant to help prevent violent extremism in Alberta," University of Alberta, accessed August 1, 2019, https://www.ualberta.ca/arts/faculty-news/2018/january/political-scientist-receives-federal-grant-to-help-prevent-violent-extremism-in-alberta.

21 *ReDirect*, accessed August 1, 2019, http://www.redirectprogram.ca.

22 *ReDirect*.

23 *ReDirect*.

3. Non-State Actors

It would seem that Canada's complement of non-state actors is also scant. By non-state actors, I refer to entities that are not necessarily publicly affiliated with the state. In terms of non-state actors, one of the most prominent and well-known organizations is the Centre for the Prevention of Radicalization Leading to Violence (CPR) in Montreal, Quebec. While created by the City of Montreal with additional funding from the Government of Quebec, this non-profit organization is not a government-run program. The program is run by individuals who are not government employees. It provides inter-disciplinary support for those affected by radicalization (e.g., families), persons who are radicalized, and those who are on the path to radicalization. CPR's mandate focuses on hate crimes and radicalization. Its interdisciplinary team includes psychosocial counselling services and resources to assist individuals with reintegration into the community. Notably, CPR runs a 24/7 free hotline for confidential support and counselling to persons who are worried about someone who is radicalizing or has radicalized, persons who want to cease involvement in a radical group, those suspected of being radicalized, and professionals who identify or work with people who have demonstrated signs of radicalization.[24] In 2017, CPR fielded 349 requests for help and reports through its platform.[25] It also provided 158 training sessions to various stakeholders and organizations, training approximately 2,630 persons in intervention.[26]

In terms of interventions, CPR focuses on Quebec. In that sense, the jurisdictional reach of the organization is more limited than one would hope. However, CPR shares best-practice models and research internationally. For example, individuals from CPR recently travelled to Lebanon for a range of meetings to support methods of prevention against radicalization in prisons. CPR will now support the Lebanese Ministry of Justice and the United Nations Office on Drugs and Crime in the

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24 "Helpline," Centre for the Prevention of Radicalization Leading to Violence, accessed August 1, 2019, https://info-radical.org/en/intervention-en/helpline/.

25 "Annual Report: Preventing Radicalization Leading to Violence: Spreading the Expertise from Montreal and Quebec Report 2017," Canada Centre for the Prevention of Radicalization Leading to Violence, 2018, 62, https://indd.adobe.com/view/0fd55b6b-49d4-4306-9a06-9b5619063b35.

26 CPRLV, "Annual Report," 3.

development of tools/support for radicalized individuals in prisons.[27] CPR also trains local police officers on the prevention of radicalization leading to violence.

While CPR's interdisciplinary model presents a comprehensive approach to intervention, the intervention services are not available to individuals outside the province. It would seem that if other provinces followed suit with a similar model of intervention, which includes an array of social, psychotherapeutic, and educational resources, they would be well-served.[28]

B. Intervention at the Custodial Level

In addition to the pre-charge and pre-sentence phases, I have also examined interventions at the custodial stage, meaning interventions available for those who are incarcerated following convictions. In 2016, I submitted an access to information (ATIP) request to obtain information from CSC about federally available correctional programming particularly tailored for inmates convicted of terrorism offences. Specifically, I sought information about programming from 2001 onward to capture post-9/11 cases, including the Toronto 18. In response to the request, CSC issued hundreds of pages containing reports undertaken by Public Safety and CSC, and email correspondence between staff in relation to Ministerial talking points and media requests. Many of the documents were authored by Public Safety and already accessible to the public. The result of the ATIP revealed that while CSC has considered the merits of implementing programs for inmates convicted of terrorism offences in custody, a cost-benefit analysis suggested it was not worth implementing.[29]

Research studies over a multi-year initiative suggest that CSC sought information about international partners when considering best practice models for offender management and intervention. In 2015, 81 respondent institutions from 15 countries completed an online questionnaire to

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27 "The Centre went for a mission abroad to Lebanon," Centre for the Prevention of Radicalization Leading to Violence, accessed August 1, 2019, https://info-radical.org/en/mission-abroad-lebanon/.

28 At the time this chapter was drafted, the state and non-state actors identified herein were most prominent. Any omissions with respect to new entities or programs in this domain are attributable of the amount of time that has lapsed since this chapter was drafted.

29 ATIP, Email Correspondence.

address a range of issues including intake, assessment, intervention, programs, and reintegration.[30] The results of the study showed that a majority of the "respondents indicated that their jurisdiction utilizes the same intake and assessment procedures for their radicalized offenders as non-radicalized offenders, and that they do not have specialized interventions for radicalized offenders."[31]

According to correspondence between officials at Public Safety Canada, the department collaboratively shares information and intelligence with its domestic and international partners to address violent extremism "including the issue of radicalized offenders in the federal correctional system."[32] The department acknowledges that extremists do not fit well within the traditional departmental framework for managing offenders, such as risk assessment, given the various factors that influence the offenders' decision-making.[33] While it is not clear what kind of information is shared, it would seem that either through its own data-gathering process or information-sharing efforts, the department is well aware that there is a mismatch between programs and these types of offenders.

In 2014, CSC launched a three-year research initiative, *Mitigating the Threat Posed by Violent Extremist Offenders in Correctional Institutions and Communities*, to ascertain best practices for intervention and management of radicalized offenders.[34] The project was designed to bring leading experts to the table to discuss offender risk management. At the time, CSC utilized an individualized correctional plan to measure their progress towards their correctional goals, such "as commitments to participate in... jobs and programs."[35] The ATIP suggests that the approach, which resorts to individualized correctional plans, has not changed. In that sense, inmates

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30 Correctional Service of Canada, *International Consultation: Best Practices in the Management of Radicalized Offenders* (Research Report), by M. Axford, Y. Stys, and R. McEachran, No. R-361 (Ottawa: CSC, 2015), https://www.csc-scc.gc.ca/research/005008-0361-eng.shtml.

31 Axford, Stys, and McEachran, *International Consultation*.

32 ATIP, Email Correspondence, 595.

33 ATIP, Email Correspondence, 595.

34 ATIP, Email Correspondence; Correctional Service of Canada, *Best Practices in the Assessment, Intervention and Management of Radicalized Offenders: Proceedings from the International Roundtable and Mini-Symposium on Radicalized Offenders* (Ottawa: CSC, December 2014), 1–6.

35 Correctional Service Canada, *The Correctional Plan* (Ottawa: CSC, last modified 11 March 2020), https://www.csc-scc.gc.ca/002/001/002001-1001-eng.shtml. See also CSC, *Radicalized Offenders*, 4.

convicted for terrorism-related offences will be processed and considered for CSC programming that would be available to other inmates as a matter of normal course.

Having regard for the pre-charge/pre-sentence and custodial interventions above, it seems that radicalized persons are limited in terms of finding appropriate programming to meet their rehabilitative needs both in and out of custody. However, this does not mean that inmates cannot turn to interventions of their choice. For example, some offenders may consider whether religious counselling[36] or psychiatric intervention is necessary. Whether less traditional interventions are later accepted by a court at the sentencing stage as a mitigating factor, or at the Board level for release, is uncertain. In that sense, courts and Crown Attorneys are interested in programs deemed "reliable" intervention models. However, how do courts quantify or assign weight to intervention programs if there are insufficient evidence-based solutions to support their efficacy? Who is the arbiter of reliability? What are the hallmarks of reliability for intervention programs? These are just some of the questions that pervade the sentencing stage where the question of rehabilitation and intervention as a mitigating feature remains unclear.

III. A Dead End for Rehabilitation at the Sentencing Stage

Canada's sentencing regime is founded upon the principles of restorative justice and rehabilitation. Both philosophies aim to restore the offender's position in society by finding ways to meaningfully re-engage them into the community. One of the fundamental purposes of sentencing is to assist in rehabilitating offenders.[37]

As discussed by Nesbitt (Chapter 14), notwithstanding these sentencing objectives, pursuant to subparagraph 718.2(a)(v) of the *Criminal Code*, courts must rely on the mere fact of a terrorism offence as a statutorily aggravating factor for the purpose of increasing a sentence.[38] By enacting this direction,

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[36] See e.g., Stewart Bell, "'Fulfilling the wishes of God': The inside story of a police investigation into a Toronto ISIS supporter," *Global News*, February 28, 2019, https://globalnews.ca/news/5008031/inside-story-investigation-toronto-isis/.

[37] Criminal Code, R.S.C. 1985, c. C-46, s. 718(d).

[38] Criminal Code, s. 718.2(a)(v).

Parliament's intent was to lessen the degree of discretion held by judges at the sentencing stage, particularly as it pertains to aggravating and mitigating factors. This provision suggests that sentences are necessarily steeper for those convicted of terrorism offences, and there is little room left in the analysis for rehabilitation.[39] However, the Supreme Court of Canada in *R v. Khawaja*[40] suggests otherwise.

Mohammad Momin Khawaja was convicted of five offences under the terrorism provisions and sentenced to life imprisonment, a concurrent sentence of 24 years and a period of ten years without parole eligibility.[41] Mr. Khawaja was engaged with terrorist cells in the United Kingdom and Pakistan and sought to bring a small arms training camp to Canada. He hand-crafted a remote arming device for explosives and collected a range of supplies for remote arming devices, which were ultimately seized upon his arrest. He also provided funds and supplies to others affiliated with al-Qaeda to support explosives operations and the like.

At the Supreme Court of Canada, Mr. Khawaja challenged the constitutionality of the provisions with which he was charged and argued that the Ontario Court of Appeal erred in its application of the principles of sentencing. At his initial trial, the absence of evidence pertaining to Mr. Khawaja's likelihood to re-offend could not assure the judge that he would not re-offend. However, the trial judge reasoned that the potential for rehabilitation could not be overlooked.[42] The Court of Appeal reviewed the decision and concluded that the lack of information on the probability of re-offending was, in the face of evidence of compelling dangerousness, sufficient to justify a stiffer sentence.[43] At the time, Mr. Khawaja refused to submit to a pre-sentence report, which made it difficult to determine his grievances and future level of risk. In reasoning through this issue, the Supreme Court rejected the Court of Appeal's proposition that the "import of rehabilitation as a mitigating circumstance is significantly reduced in [the] context [of terrorism] because of the unique nature of the crime, the grave and far-reaching threat it poses to the foundations of our democratic society."[44]

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39 Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions."
40 R v. Khawaja, 2012 SCC 69.
41 *Khawaja*, SCC at para 1.
42 R v. Khawaja, [2009] O.J. No. 4279 at para 26.
43 R v. Khawaja, 2010 ONCA 862.
44 *Khawaja*, ONCA at para 201.

Notwithstanding the foregoing, evidence of rehabilitation infrequently carries the day at the sentencing stage.[45] In some of the Toronto 18 cases, defence counsel retained a psychiatrist to assess their clients and relied on that evidence at the sentencing stage with a view to mitigating their client's sentence. The efforts proved futile in some respects when measured against the gravity of the offences.

This section provides an overview of four cases from the Toronto 18 group, each of whom was evaluated by a psychiatrist. In each case, the psychiatrist recommended some form of intervention after sentencing to address their ideologies and motivations. Despite the fact that each offender was at a "low risk" to re-offend, each received sentences between ten years to life imprisonment.

A. Case Study One – Shareef Abdelhaleem

Mr. Abdelhaleem was a database engineer involved in the plot to detonate truck bombs in Toronto. He was not alleged to have been involved in the training camp run by Mr. Amara. At the time of his arrest, he was 30 years old. He was assessed by a forensic psychiatrist who spent just under 21 hours with him while he was in custody for the purpose of rendering an evaluation to assist with sentencing. His psychiatric evaluation suggested that he was at a low risk of engaging in violence in the future and had no criminal record. He was nonetheless sentenced to life imprisonment for intent to cause an explosion of an explosive substance for the benefit of, at the direction of, or in association with a terrorist group.[46] He also received five years imprisonment concurrently for participating in the activity of a terrorist group.[47]

Mr. Abdelhaleem's psychiatric report suggested that he began to attend mosque as a way to clean up his life.[48] He became motivated to participate in a bombing plot to gain acceptance from his peers.[49] At the time of his involvement, he felt as though he lacked a sense of self and felt like a failure in his community, which led him to believe that he needed to correct the impression others had of him by aligning himself with an Islamic cause in a

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45 See e.g., Chapter 14 in this book by Dr. Michael Nesbitt.

46 Criminal Code, ss. 81(1)(a), 83.2.

47 R v. Abdelhaleem, 2011 ONSC 1428.

48 R v. Abdelhaleem (Evidence, Exhibit 1, Sentencing of Mr. Shareef Abdelhaleem), 16 [Abdelhaleem, Exhibit 1] (on file with author).

49 Abdelhaleem, Exhibit 1, 46.

way that would influence his identity.[50] The clinician who completed the evaluation explained that it was impossible to conclude which of the multi-layered factors contributed to his circumstances, be it extremist sympathy, the potential for financial regard, acceptance and respect, pleasing his father, participating in an empowering act, or fantasizing of being recognized as a hero in the Islamic world.[51] He lacked a sense of self and had a "paucity" of close friends, which also influenced his decision-making in this regard.[52]

The clinician who evaluated Mr. Abdelhaleem relied on two tools: the Violence Extremist Risk Assessment (VERA) and the Historical Clinical Risk (HCR-20) tools. Importantly, the clinician cautioned the Court as follows at the outset of his report:

> Assessing individuals charged with terrorism-related offences is a relatively novel area in the field of psychiatry. As of the date of his report, Dr. Bloom was not aware of any universally accepted risk assessment tool that could predict an individual's risk of recidivism for such offences.[53]

The VERA is a structured professional judgment used to score risk levels as low, moderate, or high. The VERA studies a range of variables including, but not limited to:

(1) Attitudes/mental perspectives such as an attachment to ideologies justifying violence and high levels of frustration and anger;

(2) Contextual items such as the use of extremist websites, anger at political decisions, and actions of a country;

(3) Historical items such as exposure to violence in the home and prior criminal violence;

(4) Protective items such as a shift in ideology and the rejection of violence to obtain goals.[54]

The HCR-20 is a tool that requires clinicians to score individuals on a range of items used to predict dangerousness and risk. Variables that factor into the matrix include, but are not limited to, a lack of insight, previous

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50 Abdelhaleem, Exhibit 1, 60.

51 Abdelhaleem, Exhibit 1, 62.

52 Abdelhaleem, Exhibit 1, 26.

53 *Abdelhaleem*, ONSC at para 48.

54 Public Safety Canada, *Risk Assessment Decisions for Violent Political Extremism 2009-02*, by D. Elaine Pressman, Catalogue No. PS3-1/2009-2-1E-PDF (Ottawa: PSC, 2009), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2009-02-rdv/index-en.aspx.

violence, employment problems, drug/alcohol abuse, and mental disorders.[55]

On both assessments, Mr. Abdelhaleem was considered at low risk to re-engage in violent behaviour in the future. He was open to the idea of obtaining assistance through psychological interventions to better understand his motivations and assist with his self-esteem. The clinician recommended that he receive psychosocial interventions.

While the sentencing judge was alive to the fact that there is a degree of variability in terrorism cases as it pertains to the degree of danger the offender presents to society, he concluded there was insufficient evidence to mitigate Mr. Abdelhaleem's sentence. While the sentencing judge accepted the clinician's position that a host of factors contributed to his motivations, he made no comments about psychosocial interventions. Instead, he focused on the gravity of the offence and Mr. Abdelhaleem's ideological disposition to impose a life sentence. In this respect, he wrote the following:

> While the evidence does not demonstrate that Mr. Abdelhaleem represents an ongoing danger because he is ideologically committed to terrorism, he has committed serious terrorist offences and the combination of some uncertain degree of ideological motivation, together with his lack of insight and remorse leaves me unable to conclude that he does not continue to pose a substantial risk to the public.[56]

Mr. Abdelhaleem appeared before the Parole Board of Canada in March of 2019 and told the Board that he would rather die than re-offend.[57] A board member acknowledged that his progress was stymied because CSC's programming does not cater or apply specifically to persons who are motivated by violent extremism. During the hearing, he sought relief to leave prison and attend a meeting with the Centre for the Prevention of Radicalization in Montreal.[58] The status of the decision remained unclear at the time this chapter was drafted and was not public.

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55 Pressman, *Risk Assessment Decisions*.

56 *Abdelhaleem*, ONSC.

57 Note that while he received a life sentence, he would have been eligible for parole after ten years or half of his sentence, whichever was less, pursuant to s. 743.6(1.2) of the *Criminal Code*.

58 Adrian Humphreys, "'I would rather die than re-offend': Jailed architect of Toronto 18 terror plots makes plea for taste of freedom," *National Post*, March 29, 2019, https://nationalpost.com/news/canada/i-would-rather-die-than-re-offend-jailed-architect-of-Toronto 18-terror-plots-makes-plea-for-taste-of-freedom.

B. Case Study Two – Steven Chand

At the time of his offence, Steven Chand was 25 years old with no criminal record or mental health issues. He was one of several individuals involved with Mr. Ahmad in Scarborough, conducting a winter survival training camp to train for possible attacks in Canada. He played the role of a sniper shooting paintballs at other attendees and discussed simulations for an attack on a VIP motorcade.[59] Mr. Chand had some experience in the Canadian military. A jury convicted Mr. Chand of two terrorism offences – participating/contributing to the activities of a terrorist group for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity and counselling to commit fraud in association with the same terrorist group.[60] He received a global sentence of ten years, seven for the former and three years consecutive on the latter.[61]

Mr. Chand met with a forensic psychiatrist for approximately four hours,[62] with a view to generating an assessment prior to his sentencing hearing. He explained growing up with a difficult upbringing with a fractured family dynamic. He converted to Islam at the age of 21, notwithstanding that his parents were non-practicing Hindus.[63] He explained that Islam was a vessel for him to pray to God directly, as he could not identify with idolatry in Hinduism.[64] Not unlike Mr. Abdelhaleem, Mr. Chand felt that he found a sense of belonging with the community at the mosque and grew close to Mubin Shaikh, who later became a police informant.[65] He explained that he never held the view that he wished to cause harm to anyone or fight a holy war.[66]

At the time of his assessments, his religious beliefs were not strong. The clinician concluded that he likely "had problems establishing an identity for himself and his involvement with Islam in his early twenties gave him a niche and a sense of belonging."[67] He also highlighted that Mr. Chand was uncertain about himself, his spiritual affiliations, and his direction in life.

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59 R v. Chand, 2010 ONSC 6538 at paras 39–40.

60 Criminal Code, ss. 83.18(1), 83.2.

61 *Chand*, ONSC at para 93. This does not account for pre-sentence custody.

62 *Chand*, ONSC at para 65.

63 *Chand*, ONSC at para 60.

64 R v. Chand, (Evidence, Dr. Julian Gojer's psychiatric evaluation of Mr. Chand), 9 [*Chand*, Gojer's psychiatric evaluation] (on file with author).

65 *Chand*, Gojer's psychiatric evaluation, 13.

66 *Chand*, Gojer's psychiatric evaluation, 10.

67 *Chand*, Gojer's psychiatric evaluation, 15.

Relying on the VERA, among a few other assessment tools, the clinician concluded that Mr. Chand was at low risk of engaging in any terrorist activity. He was also a good candidate for counselling and recommended therapy that would assist him with unpacking his identity and cognitive distortions that led him to seek a life of harmful association.[68] Overall, it was recommended that he participate in counselling to assist in exploring identity issues and to develop a stable education plan.

The same sentencing judge from Mr. Abdelhaleem's case presided over Mr. Chand's matter. He found that he was "unable to place much reliance" on the clinician's opinion beyond accepting that as a forensic psychiatrist, he ruled out mental illness and personality disorder. He concluded that:

> When it comes to predicting whether Mr. Chand is likely to continue to pursue extremist views, I am not prepared to give [Dr. X's] evidence much weight. This is not a criticism of [Dr. X] but recognition of the fact that, at the moment, forensic psychiatry and psychology have little to offer in this area.[69]

This conclusion is difficult to accept in light of the fact that forensic psychiatry is effectively the only available and reliable tool at the sentencing stage when assessing future risk. It is otherwise difficult to identify any other possible method of predicting risk. In the common parlance of run-of-the-mill sentencing hearings, the concept of risk figures prominently, and courts rely on forensic psychiatrists to assist in that assessment. Notwithstanding this reality, risk is not a formulaic or quantitative statement of fact of what will occur in the future.[70] As aptly observed by two prominent forensic psychiatrists:

> The declaration that an individual represents a risk for dangerous conduct in the community does not necessarily say anything about the precise nature of the risk, when it will manifest, the degree to which it will manifest, exactly who it will affect, and whether it will be isolated in its expression.[71]

At the conclusion of Mr. Chand's case, the risk to re-offend remained at the forefront of the Court's decision-making calculus. The Court felt that Mr. Chand's feeling of being victimized by the criminal justice system due to his religion lacked insight and did not bode well from a rehabilitation

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68 *Chand*, Gojer's psychiatric evaluation, 16.

69 *Chand*, ONSC at para 71.

70 Hy Bloom and Richard D. Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals* (Toronto: Irwin Law, 2006), 189.

71 Bloom and Schneider, *Mental Disorder and the Law*, 191.

standpoint.[72] In fact, the sentencing judge expressed that less emphasis on rehabilitation is placed in cases involving terrorist offences.[73] Mr. Chand received a sentence of ten years in custody.[74]

C. Case Study Three – Zakaria Amara

Zakaria Amara was 20 years old when he was arrested. He had no criminal record. He was arrested for recruiting young men to conspire to bomb CSIS headquarters and the Toronto Stock Exchange in downtown Toronto. He was said to be the mastermind and primary organizer of the plot.[75] He pled guilty to (1) participating and contributing in the activities of a terrorist group and (2) conduct with the intent to cause an explosion of an explosive device that was likely to cause serious bodily harm or cause serious damage to property in association with, at the benefit of, or at the direction of a terrorist group.[76] He received a nine-year sentence for the first offence and life imprisonment for the second.

At the time of his psychiatric assessment, he was 24 years old and had been married for six years. He is the son of Catholic parents who asserted that he was "goaded" by his peers to convert to Islam at the age of ten. He sought conversation as a source of intimacy, consistency, and loyalty among his peer group.[77] At some point in his life, he intended to become an Islamic scholar. He married early in life and worked long hours to make ends meet, leaving him feeling isolated.[78]

The clinician who assessed him concluded that his ideology stemmed from his emotional needs and replaced (or supplanted) his scholarly aspirations.[79] Upon reflection, Mr. Amara expressed how contrite he was and expressed that he felt he "wasted his life."[80] He presented a strong

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72 *Chand*, ONSC at para 64.

73 *Chand*, ONSC at para 77.

74 Note that this does not account for pre-trial custody, as nine years, two months, and 20 days were credited for pre-trial custody.

75 R v. Amara, 2010 ONCA 858 at para 7.

76 Criminal Code, ss. 83.18(1), 81(1)(a), 83.2.

77 R v. Amara, 2010 ONSC 441 (Evidence, psychiatric report regarding amenability to treatment for Zakaria Amara by Dr. Arif Syed), 2–3, Terrorismcases.ca [*Amara*, psychiatric report].

78 *Amara*, psychiatric report, 7.

79 *Amara*, psychiatric report, 7.

80 *Amara*, psychiatric report, 10.

willingness to change his attitude and hoped to speak to imams who could assist in his rehabilitation.

The clinician was "confident that systemic educational dialogue with a qualified religious authority figure and skilled counselling with a Muslim therapist would bear wholesome fruition" in Mr. Amara's case.[81] He warned that extreme isolation would risk the onset of relapse and that the quantity of time served in custody would give Mr. Amara time to reflect. He also recommended that he commit to community service in a non-Muslim community, write a letter of apology to the Muslim and Canadian community, and speak to youth to overcome extremism.[82] Additionally, the clinician recommended that he enrol in higher studies and participate in a highly socialized Muslim inmate program.[83] Mr. Amara also wrote a letter to the judge at sentencing expressing that the struggle to discover truth and the reality of life gullibly led him to the path of extremism.[84]

The sentencing judge considered the psychiatric assessment as a mitigating feature from the perspective that it expressed no impediment for the capacity to change.[85] He gave less weight to the evidence that removed concerns for the underlying causes of his extremism.[86] He noted that Mr. Amara expressed a willingness to rehabilitate and an air of sincerity in his comments. However, given the circumstances of the offence, he believed that the prospects of rehabilitation were "guarded" at the time.[87] By guarded, I take the Court to mean that the prospects of rehabilitation were limited at best. This is evidenced by the fact that while the Court found Mr. Amara had the potential to rehabilitate through counselling, he was nonetheless sentenced to life in prison.[88] The Court of Appeal for Ontario upheld his sentence.[89]

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81 *Amara*, psychiatric report, 10.
82 *Amara*, psychiatric report, 11–12.
83 *Amara*, psychiatric report, 12.
84 R v. Amara, 2010 ONSC 441 at para 70.
85 *Amara*, ONSC at para 124.
86 *Amara*, ONSC at para 124.
87 *Amara*, ONSC at para 125.
88 On count 1, a sentence of 21 months was given and on count 4, life. Parole ineligibility was set at ten years pursuant to s. 743.6(1.2) of the *Criminal Code*.
89 *Amara*, ONCA.

D. Case Study Four – Fahim Ahmad

At the age of 17, Mr. Ahmad was involved in devising the training base with Mr. Chand, as described above. He was considered one of the leaders of the group who organized the Scarborough group and recruited young persons to join the training base. Halfway during his trial in 2010, Mr. Ahmad entered a guilty plea to (1) participating and contributing to the activities of a terrorist group to facilitate a terrorist activity (sentenced to 5 years); (2) importing firearms into Canada (sentenced to two years); and (3) knowingly instructing six individuals to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (sentenced to nine years).[90] His sentences were consecutive, resulting in a global sentence of imprisonment for 16 years, which does not account for pre-sentence credit. At his sentencing hearing, the Court considered a report from the same forensic psychiatrist that assessed Mr. Chand. Mr. Ahmad also submitted a letter to the sentencing judge as part of his sentencing brief.

Mr. Ahmad came from a non-practicing Muslim family. As a teenager, he was told that non-believers go to hell. In particular, he struggled to reconcile his identity from an early age when a classmate wrote "terrorist?" on his notebook after 9/11.[91] In her letter to the sentencing judge, his wife explained that her husband was suffering from an identity crisis and sought a place to belong,[92] which ultimately incited his radicalization. He eventually grew interested in participating in a mission overseas after the invasion of Iraq because he felt he had no choice but to support the Taliban's resistance to the American invasion.[93] In speaking with several imams during the course of his incarceration, he came to realize that anything can be taken from a religious text and misapplied to justify one's emotions, sentiments, political views, and actions.[94]

In his psychiatric evaluation, he scored low on the VERA and the clinician concluded that he was at a low risk to engage in terrorist activity.[95] He also had the potential to complete his university education. The

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90 R v. Ahmad, 2010 ONSC 5874 at para 73.

91 R v. Ahmad, 2010 ONSC 5874 (Evidence, Dr. Julian Gojer's psychiatric evaluation of Mr. Ahmad for sentencing), 10, Terrorismcases.ca [*Ahmad*, psychiatric evaluation].

92 *Ahmad*, psychiatric evaluation, 22.

93 *Ahmad*, psychiatric evaluation, 2–3.

94 *Ahmad*, psychiatric evaluation, 4.

95 *Ahmad*, psychiatric evaluation, 26.

clinician concluded that he took responsibility for his conduct and recommended counselling to reinforce the gains he made.[96]

These conclusions were echoed by Mr. Ahmad's letter to the sentencing judge, in which he expressed his remorse. In his letter, he explained that "after 9/11, everything changed," as he had a lot of questions about his background, "being from a country [he] hardly remembered and a religion [he] hardly practiced".[97] He cited attendance at mosque and integration into the Muslim community as a way to find like-minded persons who were similarly alienated from school and society.[98] He explained that at age 20, he became a father and experienced constraints unique from his peers.[99] He explained a comradery with other inmates in his pre-trial detention and the sense of respect they showed him, notwithstanding his faith. His letter exhibited a profound sense of realization of the power of humanity, as opposed to individual religion or background. Perhaps most striking was his concern that he "failed as a citizen of this country that has given me so much to be grateful for."[100]

Notwithstanding his strong potential to reintegrate into society, his degree of remorse, guilty plea, and honesty with the Court, Mr. Ahmad was sentenced to 16 years in prison.

These cases suggest that the weight of clinical assessments is never guaranteed for the purpose of sentencing. It seems that there is some skepticism about the reliability of actuarial tools and their ability to predict risk. While it is unclear whether this is a product of the evidence before the court or general skepticism as it generally relates to the prediction of risk, the sentencing stage also presents a dead end for inmates who are genuinely remorseful for their conduct and express a desire to reintegrate into their community.

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96 *Ahmad*, psychiatric evaluation, 26.

97 R v. Ahmad, 2010 ONSC 5874 (Written Submissions of Fahim Ahmad, Exhibit 3), 3 [*Ahmad*, Written Submissions] (on file with author).

98 *Ahmad*, Written Submissions, 4.

99 *Ahmad*, Written Submissions, 5.

100 *Ahmad*, Written Submissions, 7.

IV: A DEAD END FOR REHABILITATION AND INTERVENTION WHILE IN CUSTODY

Once inmates enter the correctional system, CSC assumes the role of preparing them for their eventual release back into society. CSC has no official rehabilitation or re-entry program for inmates convicted of terrorism offences.[101] During the incarceration period, CSC conducts an individualized needs assessment, which may result in mandatory participation in disengagement activities, psychological treatment, or religious counselling.[102] However, those incarcerated for terrorism offences do not have access to programming while in custody. This leaves inmates with yet another dead end when it comes time for their release.

Parole is a bridge between one's period of incarceration and their return to the community. In effect, it is a conditional release to the community that allows persons to serve part of their sentence in their community under the supervision of a parole officer and in accordance with certain conditions.[103] The Parole Board of Canada, which is an administrative tribunal that reports to the Minister of Public Safety, has the authority to grant, deny, and revoke parole for offenders serving sentences of two years or more.[104] In Canada, parole for individuals convicted of terrorism offences is statutorily constrained. The *Corrections and Conditional Release Act* (CCRA) requires the Board to consider whether the offender will present an undue risk to society before the end of the sentence and whether the release of the offender will contribute to the protection of society by facilitating the offender's return to the community as a law-abiding citizen.[105]

With respect to terrorism offences, most offenders' parole is constrained by an order of the court during the sentencing hearing, and pursuant to the *Criminal Code*. Subsection 743.6(1.2) of the *Criminal Code* provides that when an offender is convicted of a terrorism offence, the court

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101 Jesse Morton and Mitchell D. Silber, "When Terrorists Come Home: The Need for Rehabilitating and Reintegrating America's Convicted Jihadists," Counter Extremism Project, accessed August 1, 2019, 33, https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf.

102 Morton and Silber, "When Terrorists Come Home," 37.

103 "What is parole?," Government of Canada, accessed August 1, 2019, https://www.canada.ca/en/parole-board/services/parole/what-is-parole.html.

104 Government of Canada, "What is parole?"

105 Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 102.

must order that at least half the sentence, or ten years, whichever is less, must be served before the offender can be released on parole.[106] This is normally the case unless the court is satisfied that "the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served" by the regular ineligibility periods under the *CCRA*.[107] Under the *CCRA*, normal full parole, which would allow an offender to serve part of their sentence in the community, follows the successful completion of day parole. Generally, all inmates are eligible for full parole at one-third of their sentence, or seven years, whichever is less.[108] For those serving a life sentence, parole eligibility must be set at the time of sentencing. If parole is not granted at one-third of one's sentence, inmates must be released by two-thirds of their sentence.[109] All evidence that is relevant and available to the Board can be used to assess the offender's risk of re-offending.[110]

In 2018, I requested a copy of all "parole decisions for inmates convicted of terrorism offences since 2001" from the Board. A common theme from the decisions is that the Board was well aware of the absence of institutional programming and its effect on release. I also observed that the Board is circumspect about the accuracy of psychiatric risk assessment tools despite the fact that 93% of offenders granted day and full parole by the Board have not committed a new offence while on parole, and 99% have not committed a new violent offence.[111] In most of these cases, inmates were denied day parole or full release notwithstanding no criminal history and a low to moderate risk of recidivism.

The chart below summarizes the decisions released in response to my request on January 24, 2019.[112] Notably, the following conclusions can be made from the results:

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106 Criminal Code, s. 743.6(1.2).

107 Criminal Code, s. 743.6(1.2).

108 "Types of Conditional Release," Government of Canada, accessed August 1, 2019, https://www.canada.ca/en/parole-board/parole/types-of-conditional-release.html. See also Corrections and Conditional Release Act, s. 120.

109 Government of Canada, "Types of Conditional Release." Note that some offences attract certain parole exceptions.

110 Corrections and Conditional Release Act, s. 101. See also Government of Canada, "What is parole?"

111 Government of Canada, "What is parole?"

112 Note: The request did not have a file number.

- Approximately half of the decisions impose a mandatory condition on the inmate to participate in religious counselling as a form of "treatment plan" approved by a parole officer;
- The Board questions the reliability of clinical risk assessments; and
- The absence of in-custody programming for inmates convicted of these offences does not assist inmates in making the case for release.

Inmate	Request	Outcome	Absence of Correctional Programming Identified	Inadequate or Inconclusive Risk Assessments	Counselling for Deradicalizati-on Imposed
1	Detention review	Detention ordered	~	~	~
2	Detention review	Detention ordered	~	~	~
3	Full parole – pre-release	Change to conditions	~	Yes	~
4	Detention Review	Detention ordered	Yes	Yes	~
5	Full parole – pre-release	Denied	Yes	~	~
6	Day parole – pre-release	Continued	~	~	Yes
7	Day parole – pre-release	Granted	~	~	Yes
8	Statutory Release – pre-release	Change condition	Yes	Yes	Yes

9	Full parole pre-release	Denied	Yes	Yes	Yes
10	Day parole – pre-release	Continued. Condition changed for statutory release	~	Yes	Yes
11	Day parole-post release	Change condition	~	~	Yes
12	Day parole – pre-release and full parole	Full parole denied – day parole granted	Yes	~	Yes
13	Day parole – pre-release	Denied	~	~	~
14	Detention review	Detention order confirmed	Yes	~	~
15	Detention review	Detention order confirmed	~	Yes	~

Note: The Board did not release these decisions as numbered above. I individually numbered each decision as the inmates' names and identifiers were redacted in accordance with the Privacy Act.

A. The Absence of Institutional Programming

Inmate 3 came from a moderately religious family and had pro-social views. Citing the absence of a validated, reliable, and standardized test for assessing risk of re-involvement in terrorist acts, the Board ultimately confirmed his detention order. By the time of his parole hearing, this inmate shared that he began turning his life around by reading the right materials and teachings and only listening to people who are qualified. He cited his exposure to several risk factors including, but not limited to, the

media, the "wrong" people, and "teachers".[113] The Board was concerned that he had downplayed his role with the index offences.[114]

In Inmate 14's decision, the Board concluded that his radical beliefs were not mitigated and thus confirmed his detention order. Recognizing the institutional gaps at play, the Board wrote, "there does not exist a community strategy that would offer enough structure to prevent you to engage in behaviour that could potentially result in serious harm or death."[115] The same concerns were expressed in another decision in which the Board denied full release:

> There was no correctional programming recommended in your case as traditional programming does not target the needs specific to offenders involved in terrorist related offences. You attended one session of psychological counselling, however, the clinician felt that she did not have the necessary knowledge or training to address your criminal dynamics. Further, it is felt that the standardized risk assessments completed by Correctional Service of Canada (CSC) would not appropriately capture the true risk levels for the type of crimes you were involved in.[116]

Other cases echo the same concerns, citing the fact that there are "no programs" available to inmates that would "facilitate" statutory release.[117] In one case, the inmate participated in spiritual counselling in search of a new attitude, and yet the Board remained skeptical due to the lack of programming within CSC.[118] In addition to the fact that the inmate's "changes in beliefs" were not yet "tested in the community," the Board concluded that a "structured and highly monitored environment" was necessary to manage the inmate's risk to re-offend.[119]

B. Issues with Psychiatric Risk Assessments

In many cases, despite the fact that inmates did not present with mental health issues, the Board questioned the accuracy of actuarial risk assessments used by psychiatrists to predict the risk of recidivism. In others,

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113 Inmate 1, Parole Board Decision, 5.
114 Inmate 1, Parole Board Decision, 4.
115 Inmate 14, Parole Board Decision, 3.
116 Inmate 5, Parole Board Decision, 6.
117 Inmate 4, Parole Board Decision, 5; Inmate 8, Parole Board Decision, 4; Inmate 9, Parole Board Decision, 4.
118 Inmate 8, Parole Board Decision, 4.
119 Inmate 8, Parole Board Decision, 4.

notwithstanding a positive actuarial score or a low possibility of risk, offenders were denied parole.

Consider Inmate 4, whose detention was ordered. Inmate 4 received a psychiatric assessment and evaluation, which suggested that he was at a low risk of engaging in terrorist activity. To be clear, this conclusion apparently originated from the inmate's score on the Violent Extremism Risk Assessment (VERA). By contrast, a psychological risk assessment suggested that there are no "available standardized tools for assessing risk for recidivism in terrorist acts."[120] The Board concluded that there was no medical psychological or psychiatric evidence that this inmate was likely to commit an offence causing bodily harm or death if released. Parole was ultimately denied due to the absence of a "reliable release plan, lack of coping strategies and an inability to understand and identify risk factors."[121]

Inmate 5 faced a similar issue. In denying his release, the Board cited several reasons including an unreliable risk assessment score. Specifically, the Board was concerned that the standardized risk assessments completed by CSC could not capture the "true" risk levels for the types of crimes committed by the inmate. The Board further reported that it placed no weight on a psychiatric assessment by the inmate's psychiatrist from his sentencing. The Board did not provide a rationale to explain why the risk assessments did not capture true risk levels. It was unclear whether this conclusion related to the absence of literature in the Board's impression of this inmate. Nevertheless, the risk assessment component was just one factor that led to the denial of his request for full parole.

While concerns about the reliability of actuarial measures were echoed in several other decisions released, in one case, a clinical assessment was relied upon as just one factor which resulted in the Board granting day parole for one inmate. In the case of Inmate 7, the Board accepted an assessment from the trial on the basis that there were no "significant changes" to the case.[122] The clinician who assessed Inmate 7, who was considered an "expert" by the Board with respect to terrorism cases, concluded that the inmate was at low risk for re-offending and concluded

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120 Inmate 4, Parole Board Decision, 4.
121 Inmate 4, Parole Board Decision, 5.
122 Inmate 7, Parole Board Decision, 5.

that any lingering risk could be further mitigated through religious and psychological counselling.[123]

Comparatively speaking, Inmate 7 was described as more contrite and willing to change. In other decisions, the desire to change, coupled with a low risk of re-offending, was insufficient. Some decisions reflect doubt in the degree of authenticity associated with the inmates' desire to change. A global read of the decisions suggests that those who participate in traditional models of counselling, have a low risk of re-offending, participate in traditional CSC programming, and have been genuinely contrite before the Board were more likely to receive day parole. The underlying premise in these decisions suggests that participation in more conventional rehabilitative efforts such as counselling proved advantageous at the parole stage.

C. Counselling for Deradicalization

Counselling for deradicalization presents a point of inherent tension. On the one hand, a recommendation in favour of counselling suggests that the underlying grievance of the accused is religion and any misconceived notions or beliefs about the faith ought to be de-programmed. On the other hand, counselling is frequently utilized as a tool to rehabilitate the general offender population.

This tension was at issue in the case of Aaron Driver in Manitoba. Mr. Driver was the subject of a peace bond. In a constitutional challenge to the terrorism peace bond provisions, the Court also considered whether the condition to participate in religious counselling was considered "overbroad." In concluding that the condition to be subject to such programming ran contrary to section 7 of the *Charter*, the Court explained that requiring treatment would constitute an unreasonable condition:

> If terrorism is "a litmus test for the dearly held beliefs", it follows that the concept of terrorism is an ideological construct. Accordingly, imposing ideological programming is to impose subjective belief systems upon the subject. Given that freedom of thought and expression are protected by section 2 of the *Charter*, it is inconsistent with *Charter* values to implicitly prohibit such thought, ideology and expression.
>
> While the Crown argues that the procedural safeguard of allowing the court to have the option of not imposing such a condition saves the constitutionality of the provision, the condition itself must be reasonable. With respect, requiring

[123] Inmate 7, Parole Board Decision, 5.

> deprogramming "treatment" does not amount to a reasonable condition. No other type of treatment has been offered that would be in any way rationally connected to section 810.011(6)(a).[124]

While the case of Mr. Driver did not concern parole matters, it suggests that compelling treatment is dangerous because it compromises one's right to think and be free. While framed as a *Charter* argument, the Court's thinking is in line with existing literature about the efficacy of religious intervention for the purpose of deradicalization. For example, in a 2019 study commissioned by European scholars, a study of 111 publications was commissioned to understand the efficacy and types of intervention programming in the world. The literature identified a focus on interventions that prevent or counter the intention to commit extremism. They included preventing recruitment and creating opportunities to leave extremist groups through deradicalization.[125] Notably, while the author found that the results of many studies suggested that educational interventions were beneficial, he was unable to identify studies comparing the outcomes of various interventions.[126]

Importantly, the above study concluded that there was a lack of evidence-based interventions that focus on countering/preventing violent extremism. The authors recommended that future researchers consider evaluating the comparative efficacy of interventions. These conclusions are relevant to decisions of the Board, which frequently impose religious counselling as a condition of release. Oddly, while the Board acknowledges that there is insufficient evidence that proves the efficacy of intervention such as therapy, the Board has not hesitated to impose a condition requiring the inmate to participate in religious counselling.

Consider the case of Inmate 9, who was denied parole for a host of reasons. The inmate's psychiatrist recommended that he participate in cognitive behavioural therapy (CBT).[127] The inmate was willing to obtain this type of therapy. Despite the inmates' willingness, the Board wrote:

> Terrorism related offences occur infrequently and there is a lack of empirical evidence about therapeutic treatment (including CBT) to address radicalized

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124 Canada (Attorney General) v. Driver, 2016 MBPC 3 at para 52 [emphasis added].

125 Isabella Pistone et al., "A Scoping Review of Interventions for Preventing and Countering Violent Extremism: Current Status and Implications for Future Research," *Journal for Deradicalization* 19 (2019): 24–25.

126 Pistone et al., "Preventing and Countering Violent Extremism," 25.

127 Inmate 9, Parole Board Decision, 5.

> offenders. The Psychology department at the institution is unable to operate outside their area of competency, particularly when there is a lack of guiding information about standard treatment and assessment.[128]

It is worth noting that the Board drew these conclusions without reference to the existing literature on the subject matter. It is unclear whether the Board received submissions on this point and whether those submissions accounted for literature in this area. Furthermore, it would be helpful to understand whether any literature studied discussed the differences between traditional risk assessment tools derived from general-offender populations as compared with tools that are not. More importantly, it would be worth understanding whether the Board consulted with the department of psychology at the correctional facility to better appreciate what is meant by a "lack of guiding information." There is no indication that the Board consulted with a psychiatric expert in this regard, or whether psychiatry formed part of its decision-making calculus.

Inmate 9 was also advised that they had "outstanding needs with respect to deradicalization."[129] This was observed despite the fact that the inmate was assessed at a low-moderate risk for general recidivism and low-moderate risk for violent recidivism.[130] The Board did not opine on the relationship between these two elements. It also did not comment on what type of intervention would be suitable for the purpose of counselling. Additionally, the Board did not engage in an analysis that would explain why counselling would be fruitful for this inmate or whether any religious leaders were consulted about its utility.

It remains to be seen how the Board will consider counselling in future decisions. However, it would seem that there is an inconsistent approach between courts and the Board in this regard. While courts seem hesitant to impose counselling as a condition of one's release, the Board takes no issue. This disparity of approaches sets a double standard for inmates at the sentencing and parole stages. In many cases, the Board's decision presupposes that religion is the underlying issue associated with the inmate's grievances, and that re-engineering one's thoughts is required for successful integration into the community. Without evidence that this nexus is in fact possible, the imposition of religious counselling amounts to no more than a wild guess.

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128 Inmate 9, Parole Board Decision, 5.
129 Inmate 9, Parole Board Decision, 5.
130 Inmate 9, Parole Board Decision, 5.

V. Conclusion – Paving the Way Forward

The dead ends presented in this chapter do not preclude a silver lining. Various research centres and organizations work exclusively to deliver evidence-based research on the efficacy of intervention. There is no shortage of research on these issues in Canada – rather the question boils down to implementation. Organizations such as the John Howard Society and the Elizabeth Fry Society have the benefit of hindsight and institutional memory, which bolsters their reliability in the eyes of justice system participants. Radicalization remains an embryonic area in our criminal justice system. Only time can tell how intervention programs will be implemented across Canada.

At the very least, counsel seeking pre-charge or pre-sentence intervention programs should be aware of the various resources offered by organizations such as CPN-Prev and individual organizations in their respective communities assisting with interventions. Counsel may also wish to consider obtaining a clinical assessment of their client with a view to understanding their underlying grievances prior to identifying appropriate intervention programs. Without the requisite background information and a complete picture of what incited an individual to radicalize, it is difficult to pinpoint the appropriate intervention methodology with precision. This assessment can be done under the solicitor-client umbrella through, for example, a psychiatric assessment. Otherwise, advising one's client to consider a particular avenue of intervention would be of limited assistance. This recommendation is particularly salient as it pertains to religious counselling. Religious counselling is not always the answer.

In the meantime, where there are institutional deficits such as an absence of programming, inmates are left in a catch-22. This is germane to the bigger picture: if inmates remain incarcerated without appropriate interventions, they risk further radicalization. If they are released without appropriate interventions, they risk re-offending.

A Brief History of the Brief History of Citizenship Revocation in Canada

AUDREY MACKLIN*

ABSTRACT

Four of the men convicted as part of the Toronto 18 prosecution were subject to citizenship revocation on grounds of terrorism. One of the four was born in Canada, and the other three immigrated to Canada and acquired citizenship through naturalization. I situate the politics of the four men's citizenship revocation in legal and comparative context. Contemporary citizenship revocation policies, especially those invoked in the name of national security, serve both instrumental and symbolic goals. I argue that the citizenship revocation scheme enacted in Canada resonated primarily in the register of symbolic politics and lacked virtually any instrumental value related to national security. Its deployment against four of the Toronto 18 was always, and only, a calculated electoral tactic. I conclude by recounting the case of U.K.-Canadian Jack Letts in order to illustrate how citizenship revocation not only infringes fundamental human rights but is dysfunctional from the vantage point of international relations.

Keywords: Canada; U.K.; Citizenship; Denationalization; Revocation; Citizenship Stripping; Electoral Politics; Terrorism; National Security; Securitization

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I. INTRODUCTION

In early 2014, the Conservative government of Canada introduced legislation to permit the revocation of Canadian citizenship on national security grounds. The *Strengthening Canadian Citizenship Act*[1] obtained royal assent on June 19, 2014. On the eve of the 2015 federal election campaign, the Conservatives test-drove the new law by issuing notices of intent to revoke citizenship to several men convicted of 'national security' offences.[2] Four were members of the Toronto 18: Zakaria Amara, Saad Gaya, Saad Khalid, and Asad Ansari.

Predictably, citizenship revocation became a prominent wedge issue in the campaign. The Conservatives promoted it as one plank in their tough-on-crime, anti-refugee, anti-Muslim platform.[3] The Liberals and NDP opposed it and pledged to repeal the 2014 citizenship revocation law if elected. Upon receiving their notices of intent to revoke, Gaya, Khalid, and Ansari challenged the law on constitutional grounds and were joined by civil society organizations. The litigation was adjourned shortly after the election of a Liberal government, in order to give the new government time to fulfil its campaign promise. Bill C-6 amended the *Citizenship Act* by repealing citizenship revocation and restoring the citizenship of anyone whose citizenship had already been stripped on national security grounds.[4] It came into force on June 19, 2017.[5] The life span of the citizenship revocation law was exactly three years.

In this chapter, I situate the politics of the four men's citizenship revocation in legal and comparative context. Contemporary citizenship revocation policies, especially those invoked in the name of national

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1 An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

2 The identities of those served with notices of intent to revoke are unclear, and so number cannot be confirmed, but one journalist reported that ten men received notices. Stewart Bell, "Government working to revoke citizenship of nine more Canadians convicted of terrorist offences," *National Post*, September 30, 2015, https://nationalpost.com/news/canada/government-working-to-revoke-citizenship-of-nine-more-canadians-convicted-of-terrorist-offences.

3 The Conservatives retained right-wing Australian political strategist Lynton Crosby as an election strategist. Crosby was widely known for employing dog-whistle politics.

4 Zakaria Amara was the sole person to whom this applied.

5 An Act to amend the Citizenship Act and make consequential amendments to another Act, S.C. 2017, c. 4.

security, serve both instrumental and symbolic goals. I argue that the citizenship revocation scheme enacted in Canada resonated primarily in the register of symbolic politics and lacked virtually any instrumental value. Its deployment against four of the Toronto 18 was always and only a calculated electoral tactic.

II. The Return of Citizenship Revocation[6]

A. Denationalization Pre-9/11

Denationalization refers to involuntary deprivation of citizenship.[7] Denaturalization is a subcategory limited to the revocation of citizenship acquired through immigration and subsequent naturalization. From the late 19th century onwards, many states denationalized female citizens who married foreigners. The rationale drew from a mélange of ideas: dual citizenship of an individual or within a family was an aberration to be avoided; women's social, legal, and political identity was subordinate to, and subsumed by that of their husbands; and marriage to a foreign man evinced a woman's loss of allegiance to her state of nationality. Naturalized citizens who resumed residence in the country of origin were also denaturalized on the basis that they had forsaken their allegiance to the country of immigration. This ground of denaturalization persisted in Canada until 1976 when the acceptance of dual citizenship in the *Citizenship Act* made it untenable to withdraw citizenship based on non-residence.

Banishment is punishment by expulsion, and it has an ancient pedigree. Practices have evolved through the centuries and across regions. Citizens convicted of certain crimes were cast out of the political community, whether city-state, region, or country. Formal loss of membership

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6 I have explored the normative, legal, and policy objections to citizenship revocation elsewhere and do not reprise them here in depth. See Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no. 1 (2014): 1–54; Audrey Macklin and Rainer Bauböck, eds. "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?" EUI Working Paper RSCAS 2015/14, European University Institute, Italy, February 2015, http://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1, reprinted in Rainer Bauböck, ed. *Debating Transformations of National Citizenship* (London: Springer Publishers, 2018), 163–72, 239–48.

7 Matthew J. Gibney, "Denationalisation and Discrimination," *Journal of Ethnic and Migration Studies* 46, no. 12 (2019): 2551–568, https://doi.org/10.1080/1369183X.2018.1561065.

sometimes (but not always) accompanied exile. In the 18th and 19th centuries, Britain transported convicts to Australian colonies. With the rise of prisons, the diminution of 'vacant' territory,[8] and the consolidation of an international system of the sovereign, bordered states, recourse to exile via transportation became obsolete and increasingly impossible.

Under the modern statist regime, sovereign states assumed a duty to admit their nationals, while asserting the power to expel non-nationals. The constraints of legal duty produced the phenomenon of two-step exile for naturalized citizens: first, denaturalize the citizen; second, deport the newly minted alien to the country of origin. Over the course of the 20th century, and especially around the two World Wars and the Depression, denaturalizing citizens (in Canada's case, British subjects of Canada) based on alleged ties to the enemy, dissident political beliefs (especially communist sympathies), preceded deportation. The Nazis systematically denationalized Jews, not as a prelude to deportation to another country but rather as a prelude to deportation to concentration camps and annihilation.

In the aftermath of World War II, Canada effectively denationalized thousands of Canadians of Japanese descent, including those born in Canada, and then deported them to Japan.[9] Between Canada's first *Citizenship Act* and the 1977 *Canadian Citizenship Act*,[10] various grounds for citizenship revocation were added and subtracted from Canadian law. Many European states retained their pre-World War II laws allowing denaturalization on various grounds of disloyalty, but in practice, they fell into desuetude. The U.S. law of 'expatriation,' which operated under the legal fiction of constructive renunciation of citizenship, came under increasing constitutional scrutiny from the 1950s onward.

The last Canadian to be denaturalized for 'uncitizen-like' conduct was Fred Rose, a Canadian Member of Parliament elected as a Labour-Progressive Party and later convicted of espionage on behalf of the Soviet Union. Following his release from almost five years imprisonment in 1951, the RCMP harassed and hounded him. He was ostracized and unable to find work. He eventually returned to Poland, the country he had left at age

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8 The legal fiction of *terra nullius* deemed land populated by Indigenous people to be uninhabited.

9 Eric Adams, Jordan Stanger-Ross, and the Landscapes of Injustice Research Collective, "Promises of Law: The Unlawful Dispossession of Japanese Canadians," *Osgoode Hall Law Journal* 54, no. 3 (2017): 687–740.

10 Canadian Citizenship Act, S.C. 1977, c. 29.

13, in the hopes of setting up an import-export business. The Canadian government revoked his citizenship in 1957 while he was in Poland. The revocation of Rose's citizenship while abroad obviated the need to deport him, a salient detail that presages contemporary U.K. practice. Revocation for treason was removed in 1958 under Conservative Prime Minister John Diefenbaker who, as opposition MP, denounced the post-World War II denationalization of Japanese Canadians as "the very antithesis of democracy."[11] The amended statute replaced it with revocation of citizenship for naturalized Canadian fugitives who were charged with treason but who "failed or refused to return to Canada voluntarily within the prescribed time frame" to be tried for the offence.[12]

Canada's 1977 *Citizenship Act* eliminated all grounds of revocation except for naturalized citizenship obtained by fraud or misrepresentation of a material fact. A naturalized citizen could face withdrawal of citizenship on these grounds, but the misconduct would necessarily have occurred prior to citizenship acquisition. For instance, if government authorities discovered after naturalization that the individual lied about meeting the residency requirement, or denied having a criminal record, or fabricated a relevant fact, citizenship could be revoked. Unlike France, Canada has no statute of limitations on citizenship revocation on grounds of fraud or misrepresentation, which accounts for the initiation of revocation proceedings in the 1980s against Canadian citizens who allegedly failed to disclose the commission of Nazi war crimes prior to immigrating to Canada.[13] The logic of citizenship revocation for fraud or misrepresentation is that it unwinds the effect of the misleading conduct and restores the situation that would have been obtained had the truth been disclosed.

In the years prior to the 2014 amendments to the *Citizenship Act*, revocation for fraud or misrepresentation was extremely rare, though the Nazi war criminal cases attracted considerable media attention, controversy, and litigation.

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11 The 1958 amendments to the *Citizenship Act* preserved citizenship revocation for naturalized citizens who were charged with treason and who "failed or refused to return to Canada voluntarily within the prescribed time frame."

12 An Act to Amend the Canadian Citizenship Act, S.C. 1959, c. 24, s. 2.

13 These cases are complicated by many factors, including the possible disinterest of Canadian authorities to inquire or care about the past activities of certain European immigrants at the time of migration.

B. Post-September 11, 2001

The events of September 11, 2001 evoked the spectre of terrorism untethered from state sponsorship or nationalist aspirations. States reacted by deploying three legal regimes to meet the threat: humanitarian law, criminal law, and immigration law. None was fully amenable to the unrestrained exercise of power that governments believed necessary to address the exceptionality of terrorism. And so, each sphere of legal regulation was systematically deformed in the service of counterterrorism. The laws of war putatively authorized military action in Afghanistan and later Iraq, but the United States swiftly scraped away the discipline that humanitarian law concomitantly imposes on detention, interrogation, torture, fair process, combatant immunity, and substantive liability for war crimes. The residue was a system of black-hole detention sites, extraterritorial incarceration at Guantanamo Bay, and military commissions' processes that deviated from U.S. military law as well as international humanitarian law.

Along with many states, Canada adopted a suite of amendments to the *Criminal Code* that departed from established principles of criminal procedure, evidence, and liability to authorize, *inter alia*, detention without charge and non-disclosure of evidence. New terrorism offences criminalized activity whose proximity to conventional conceptions of harm was highly attenuated.

Immigration law offered the state the opportunity to apprehend, indefinitely detain, and ultimately deport people suspected of links to terrorist groups or activities under broad and vague notions of 'membership in a terrorist group.' The 'security certificate' system featured few procedural obstacles, an undemanding burden of proof, virtually unlimited admissibility of evidence, and the ability to rely on secret evidence consisting of unverified intelligence reports, including evidence obtained from foreign governments that practiced torture.

Unlike humanitarian law or criminal law, using immigration law against alleged security threats required only incremental departure from existing law in order to attain the objective of exercising maximum discretionary power with minimum accountability. While the Canadian government scrambled to introduce new, harsher criminal provisions in the wake of September 11, it did not renovate immigration law: it already had all the power it needed. It is thus unsurprising that in the early years following 9/11, immigration law was the preferred tool for Canadian state

actors to deal with individuals that intelligence services labelled as risky. Within months of September 11, five male, Muslim, non-citizens were detained under security certificates. The major limitation on the utility of immigration law was (and is) its narrow compass: it only applies to non-citizens. The historic willingness of the law to treat non-citizens in ways that would not be countenanced toward citizens made immigration law an attractive vehicle for securitization tactics. Over time, it also furnished policy instruments that could, under cover of terrorism exceptionality, creep into other fields of law.

Over the course of the next decade, *Charter* litigation dented immigration law as the ideal vehicle for counterterrorism. The *Suresh*[14] decision, rendered by the Supreme Court of Canada only months after 9/11, preserved the state's power to deport to torture in 'exceptional circumstances,' but the practical effect of the decision was to mire pending deportations of security certificate detainees in years of protracted litigation.

The U.K. decision in *Belmarsh*[15] ruled indefinite detention of security detainees unlawful. Rather than wait for Canadian courts to issue a similar ruling, Canadian authorities grudgingly mimicked the U.K. response of releasing detainees from detention under draconian variants of house arrest, known in the U.K. as control orders. The *Charkaoui*[16] judgment of 2007 struck down the security certificate secret hearing process, which in turn led to the introduction of the security-cleared special advocate model.

The allure of immigration law began to fade when the prospect of swift disposal via deportation became increasingly fraught and uncertain. Eventually, and inevitably, the security apparatus turned up a suspect who happened to be a citizen and for whom criminal prosecution was the only option. In 2004, Momin Khawaja became the first Canadian charged with terrorism-related crimes under the *Criminal Code*. The summer of 2006 witnessed the arrest of the Toronto 18. All members of the group (except possibly those whose identities were protected under the *Young Offenders Act*) were Canadian citizens by naturalization or, in the case of Saad Gaya, by *jus soli* (birth on Canadian territory).

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14 Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1.

15 A v. Secretary of State for the Home Department, [2004] UKHL 56, [2005] 2 A.C. 68.

16 Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9.

C. Emulating Britain

The Canadian revival of denationalization for citizen misconduct followed the precedent set by the United Kingdom, which led the post-September 11 revival of denationalization. The citizenship revocation provisions in the *British Nationality Act 1981* (*BNA*) were amended in 2002, 2006, and again in 2014. The 2002 amendment permitted the Secretary of State (Home Secretary) to deprive citizenship by birth or naturalization if "satisfied that the person has done anything seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory."[17] The U.K. government expanded its revocation power under the *Immigration, Asylum and Nationality Act 2006* to permit the Home Secretary to revoke citizenship if "the Secretary of State is satisfied that such deprivation is conducive to the public good."[18] The 2006 amendments came in the wake of several high-profile incidents. These included the controversy surrounding Abu Hamza, a naturalized U.K. citizen who preached incendiary sermons vilifying Jews, LGBT people, and non-Muslims from the Finsbury Mosque. The 7/7 2005 suicide bombings in the London subway were committed by U.K. citizens who were configured by politicians, pundits, and media as 'homegrown' terrorists of foreign descent. Also, in 2005, it was revealed that David Hicks, an Australian citizen detained at Guantanamo Bay, was eligible for British citizenship by maternal descent. Hicks succeeded in obtaining British citizenship, despite the strenuous litigation campaign by the U.K. government to oppose him.

The major brake on citizenship stripping imposed by international law is that it cannot render the person stateless. For practical purposes, this means that citizenship revocation is restricted to dual citizens.[19] Almost immediately, multiple citizenship was transformed from an asset to a liability. Dual or multiple nationals were vulnerable to citizenship deprivation where mono-nationals were not.

The most notorious target of citizenship deprivation post-2006 was Hilal Abdul-Razzaq Ali al Jedda. He arrived in the U.K. in 1992 as an Iraqi

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17 British Nationality Act 1981 (U.K.), c. 61.

18 British Nationality Act.

19 For an account of the international law applicable to citizenship revocation and, in particular, the preclusion on arbitrariness and avoidance of statelessness, see Eric Fripp, "Deprivation of Nationality and Public International Law: An Outline," *Journal of Immigration, Asylum and Nationality Law* 28, no. 4 (2014): 368–84; Council of Europe, PA, 1st Sess, *Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach?*, Reports, Doc. 14790 (2019), http://semantic-pace.net/tools/pdf.

asylum seeker, became a U.K. citizen, returned to Iraq sometime in 2004, and was captured and detained by U.K. forces as a suspected terrorist recruiter that same year. The Home Secretary revoked al Jedda's U.K. citizenship in late 2007, insisting that he was also an Iraqi national. Al Jedda denied this, arguing that Iraq did not recognize dual citizenship when he became a U.K. citizen, and so he automatically lost his Iraqi citizenship upon naturalization. Although Iraqi law was subsequently amended to permit dual nationality, he had not applied for restoration of his Iraqi citizenship. Therefore, deprivation of his U.K. citizenship would render him stateless. The case reached the U.K. Supreme Court,[20] which held that the fact that al Jedda could obtain Iraqi citizenship did not alter the fact that he did not actually possess it when the Home Secretary deprived him of his U.K. citizenship. Therefore, the Home Secretary's act of depriving al Jedda of his U.K. citizenship rendered him stateless.

The U.K. *Immigration Act 2014*[21] amendments, widely viewed as a reaction to the *al Jedda* decision, re-instated the distinction between birthright and naturalized citizens. Subsection 40(4A) of the amended *British National Act, 1981* now permits denaturalization where the Home Secretary considers it conducive to the public good because the person has conducted himself in a manner "seriously prejudicial to the vital interests of the U.K. or any British overseas territory." In these cases, the creation of statelessness is no longer an impediment to revoking a naturalized citizen of status if the Home Secretary "has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory."[22] Notably, the Home Secretary's belief need not be correct, only reasonable.

The U.K. was not the only state to introduce, amend, or revive pre-World War II citizenship-stripping laws post-9/11, though it quickly established itself as the prime mover in the Global North. France, Austria, Germany, Norway, Netherlands, Australia, as well as Egypt and the Gulf States also proposed, adopted or revived terrorism-related citizenship revocation. Variations exist across states: some only apply revocation to

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20 Secretary of State for the Home Department v. Al-Jedda, [2013] UKSC 62, [2014] A.C. 253.

21 An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

22 British Nationality Act, s 40(4A).

naturalized citizens, others to both citizens by birth or naturalization; some require a conviction for a criminal offence, some stipulate prohibited conduct (especially serving in a foreign armed force), and some offer vague grounds, such as disloyalty or (in the language of international instruments) conduct "seriously prejudicial to the vital interests of the state."[23] Some frame revocation as a constructive renunciation by the citizen, others as an administrative penalty meted out by the state for disloyalty. The administrative process varies from one national context to another.[24] Authoritarian regimes seized on the example of liberal democratic states to deploy or expand their own citizenship revocation policies in the service of political repression.[25]

The imprint of the U.K. precedent was visible on the Canadian version of citizenship revocation, but significant differences existed. To understand it in its domestic context, Canada's citizenship revocation law must be situated in a landscape of measures designed to make Canadian citizenship harder to get and easier to lose. In 2009, the government confined the transmission of citizenship by descent (*jus sanguinis*) to the first generation born abroad, making Canada's citizenship by descent law one of the most restrictive in the world. In the same year, it launched a revised, more jingoistic version of the citizenship guide, made the citizenship test more difficult, and raised the minimum passing grade. In a departure from past practice, applicants had to prove language ability through third-party testing as a precondition to applying for citizenship, which would require expensive certification from private language testing services.[26]Administrative hurdles

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23 The UN Refugee Agency, Convention on the Reduction of Statelessness, C.6, Convention 1961 (June 2014), at art. 8, https://www.unhcr.org/ibelong/wp-content/uploads/1961-Convention-on-the-reduction-of-Statelessness_ENG.pdf; European Convention on Nationality, Strasbourg, November 6, 1997, E.T.S. 166, at art. 4, https://rm.coe.int/168007f2c8.

24 See, generally, European Commission, *Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes* (European Migration Network, September 25, 2014), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs_en.pdf. See also "Global Database on Modes of Loss of Citizenship: Version 1.0," Robert Schuman Centre for Advanced Studies, European University Institute, *GLOBALCIT*, 2017, http://globalcit.eu/loss-of-citizenship.

25 For a recent example, *see* "Egypt: Activist Stripped of Citizenship," Human Rights Watch (February 11, 2021), https://www.hrw.org.

26 Permanent residents previously admitted as economic class immigrants were effectively exempt, however, because they could rely on the language test results that they

imposed additional financial and temporal burdens on citizenship applicants by combining onerous documentary requirements with very short deadlines.

In 2011, the government declared that it was cracking down on 'citizenship fraud.' Immigrants who participated in elaborate schemes to create the illusion that they resided in Canada were the government's main target. The following year, the Minister of Citizenship and Immigration announced that his department was poised to strip citizenship from over 3,000 people and was investigating another 11,000 files, mainly on grounds of misrepresentation of residence.[27] Next, in 2011, the Minister of Citizenship and Immigration introduced a policy prohibiting people who cover their face from swearing the citizenship oath, a prerequisite to obtaining proof of citizenship. The policy was intended to deny access to Canadian citizenship by the tiny number of Muslim women who wore niqabs.

In 2014, the Conservative government introduced Bill C-24, entitled the *Strengthening Canadian Citizenship Act*.[28] It represented the culmination of the project of increasing the value of citizenship by making it costlier and scarcer. It linked citizenship more explicitly to militarism and sought to elevate patriotic sentiment into the ultimate expression of citizenship. Amendments to naturalization rules imposed stricter requirements on

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previously submitted in order to qualify in the economic class. Before these changes, language ability was demonstrated through interactions with citizenship officers and the reading comprehension demonstrated by writing the citizenship test. Citizenship Judges also possessed discretion to evaluate or even waive language fluency requirements. In 2010, a study commissioned by Citizenship and Immigration Canada suggested that the new system for testing language ability and the elimination of discretion would have a disproportionately negative impact on access to citizenship for refugees and Southeast Asian women. See Immigration, Refugees and Citizenship Canada, *An Examination of the Canadian Language Benchmark Data from the Citizenship Language Survey* (Research Report) (Ottawa: Government of Canada, 5 October 2010), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/research/examination-canadian-language-benchmark-data-citizenship-language-survey/section-3.html.

27 A 2016 Auditor-General's report on the anti-fraud enforcement campaign critiqued the implementation and results yielded by this initiative. See Auditor General of Canada, *Report 2 – Detecting and Preventing Fraud in the Citizenship Program* (Ottawa: Office of the Auditor General of Canada, 2016), s 2.43, http://www.oag-bvg.gc.ca/internet/English/parl_oag_201602_02_e_41246.html#hd4b.

28 An Act to amend the Citizenship Act and to make consequential amendments to other Acts, S.C. 2014, c. 22.

applicant eligibility, extended the age range for language and knowledge testing from 18–55 to 14–64, and reduced the scope of positive discretion by Citizenship Judges. The residency requirement was raised from three years out of the previous four, to four years out of the previous six, except for permanent residents who served in the Canadian Armed Forces.[29] Those who entered as refugees, international students, or temporary foreign workers would no longer earn half-time credit toward fulfilling the residency requirement for citizenship.[30]

The most dramatic provisions of the *Strengthening Canadian Citizenship Act* concerned revocation for conduct committed while a citizen. In so doing, it revived elements of a Conservative private member's bill (Bill C-425) that died on the order paper the previous year.[31] The proposed law granted the Minister of Citizenship and Immigration broad discretion to revoke the citizenship of a Canadian convicted in Canada of any of a series of designated 'national security' offences, including treason, spying, and any crime defined as a terrorism offence under section 2 of the *Criminal Code*. The individual must have received a minimum sentence of five years or life imprisonment, depending on the offence. In the case of terrorism offences,

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29 This category was more or less a null set, since the Canadian Armed Forces website clearly instructs that you must be a Canadian citizen to apply. See Government of Canada, *Joining the Canadian Armed Forces* (Ottawa: GOC, last visited 18 January 2021), https://forces.ca/en/how-to-join/.
An obscure regulation entitled the *Queens Regulations and Orders for the Armed Forces* does grant exceptional discretion to "the Chief of the Defence Staff or such officer as he may designate [to] authorize the enrolment of a citizen of another country if he is satisfied that a special need exists and that the national interest would not be prejudiced thereby." See Canada, National Defence, *Queen's Regulations and Orders for the Canadian Forces*, vol. 1 – Administration (Ottawa: GOC, last modified 30 November 2017) art 6.01, https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-queens-regulations-orders-vol-02/Volume%201%20Amalgamé%20Final.pdf. This exception is not mentioned in any Canadian Armed Forces recruiting material and, in principle, does not require the individual to hold any immigration status in Canada.

30 With the shift in Canadian immigration policy from one-step (admission as permanent resident) to two-step migration (admission as temporary foreign worker, followed by transition to permanent resident status), the loss of a half-credit for residence prior to permanent resident status would affect many more newcomers than in the past.

31 Bill C-425, An Act to amend the Citizenship Act (honouring the Canadian Armed Forces), 1st Sess, 41st Parl, 2013. At least three other bills proposing to amend the *Citizenship Act*'s revocation provisions were introduced between 2000–2002. See Canada, Library of Parliament, *Legislative Summary of Bill C-18: The Citizenship of Canada Act*, by Benjamin Dolin and Margaret Young (Ottawa: Library of Parliament, 2002).

the conviction could be for an offence committed and prosecuted outside Canada, if it would also constitute a terrorism offence under Canadian law. This meant that if a Canadian was convicted of terrorism in Egypt (as was Canadian-Egyptian journalist Mohammed Fahmy), the law permitted the Minister of Citizenship and Immigration to revoke his Canadian citizenship. Another provision of the *Strengthening Canadian Citizenship Act* authorized revocation of citizenship if the Minister had reasonable grounds to believe that a person, while a Canadian citizen, "served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada."[32]

The existing treason offence in the *Criminal Code* criminalizes assistance to "armed forces against whom Canadian Forces are engaged," but does not encompass armed groups not linked to a state. Rather than amend the treason provision in the *Criminal Code*, the government added the foreign fighter provision to the *Citizenship Act*, which permitted citizenship revocation for 'foreign fighters' assisting non-state armed groups, without requiring a treason conviction. The process for revocation on this ground required a finding of fact by a Federal Court judge that the named person met the statutory requirements of assisting armed forces against whom Canada was engaged.

The national security and the foreign fighter revocation provisions were retrospective, meaning that the Minister could revoke citizenship based on convictions or conduct that preceded the legislation. Revocation for serving in an enemy force or on national security grounds were both constrained by Canada's international legal obligation to avoid the creation of statelessness. However, the new law placed the burden on the citizen to prove, on a balance of probabilities, that they are not a citizen of "any country of which the Minister has reasonable grounds to believe the person is a citizen."[33] This is a reverse onus provision that required the citizen to prove a negative, namely, that they were <u>not</u> a citizen of another country.

The process for citizenship revocation required the Minister to send a notice in writing setting out the grounds for revocation. The citizen was permitted to make submissions in writing prior to a deadline set by the Minister but was not entitled to an oral hearing unless the Minister chose

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32 Citizenship Act, R.S.C. 1985, c. C-29, s. 10.1(2).

33 Citizenship Act, s. 10.4(2).

to order one. Following submissions, the Minister issued a decision in writing.

This process was, in various respects, inferior to the process for revoking Canadian permanent residence, a status subordinate to, and less secure than, Canadian citizenship.[34] The citizenship revocation decision was judicially reviewable by leave of the Federal Court. A judgment by the Federal Court was only appealable to the Federal Court of Appeal if the Federal Court judge who rendered the initial decision certified a question of general importance. These thin procedural protections and limited recourse to judicial review were borrowed from immigration law and signaled the demotion of citizenship to something like a more secure (but still provisional) form of permanent resident status.

Once denationalized, the former citizen would be pushed down a greased slide that bypassed permanent residence and landed hard at foreign national status.[35] In light of the criminal convictions (or service in an enemy force), the foreign national would be inadmissible to Canada and, therefore, deportable.

III. REVOCATION AS SYMBOLIC POLITICS VS. POLICY INSTRUMENT

The political campaign to promote citizenship revocation in Canada, the U.K., various European states, and Australia traded in similar rhetorical tropes: citizenship is a privilege, not a right; those whose actions demonstrate disloyalty forfeit citizenship through those actions; terrorists do not deserve citizenship; citizenship is devalued when undeserving people hold citizenship, and its value is enhanced by stripping it from undeserving citizens. Securitization permeates this discourse, and racism and Islamophobia colour it.

Discourses of nationhood and national security are underwritten by the fantasy that the most grave and existential threats are external to the nation. The health of the body politic is perpetually endangered by vectors of alien infiltration, contamination, and infection. The threat may take terrorist,

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34 By way of comparison, where a permanent resident of Canada faces loss of permanent resident status for misrepresentation, subsection 63(3) of the *Immigration and Refugee Protection Act* guarantees an oral hearing before the Immigration Appeal Division, an independent quasi-judicial body.

35 Citizenship Act, s. 10.3.

military, cultural, medical, or political forms, but the common denominator is that the risk is foreign and must be defeated by whatever means necessary. The central figure of the alien in immigration law makes it an ideal repository for these febrile fears and provides a license for rights violations that would not otherwise be countenanced. And, as Bonnie Honig points out, the compulsion to characterize threats as emanating from an external other precedes, rather than follows, the designation of foreignness:

> [A]lthough we may … sometimes persecute people because they are foreign, the deeper truth is that we almost always make foreign those whom we persecute. Foreignness is a symbolic marker that the nation attaches to the people we want to disavow, deport, or detain because we experience them as a threat.[36]

Citizenship revocation can thus be understood as an exercise in producing the alien from within. It does so by turning citizens into foreigners in law. Citizens who are racialized as non-white and Muslim, are easy and obvious objects of this tactic since their claim to membership is regarded as provisional and precarious.[37] Revocation reconciles the illusion that threats to security are necessarily external to the nation with the reality of citizen perpetrators. Citizenship revocation thus operates as a truth-producing falsehood for managing the so-called 'homegrown terrorist'. Among the Toronto 18, Amara, Khalid, and Ansari immigrated to Canada as children. Khalid was not even born in the country of his citizenship (Pakistan). Gaya was born in Canada. In all meaningful ways, they were products of Canada and belong to Canada, both in absolute terms and relative to their other putative countries of nationality. Yet citizenship revocation offered a way to inscribe them with a foreign identity that, however implausible on the facts, provided moral satisfaction to a segment of the public invested in policing the borders of membership and nation.

Citizenship stripping holds out the promise of extending the functionality of immigration law. More specifically, it extends the reach of deportation of foreign nationals to grasp the banishment of ex-citizens. Here, the differences between the Canadian and U.K. models are stark: as

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[36] Bonnie Honig, "A Legacy of Xenophobia," *Boston Review* 27, no. 6 (December 2002/January 2003), http://bostonreview.net/archives/BR27.6/honig.html.

[37] See Elke Winter and Ivana Previsic, "The Politics of Un-Belonging: Lessons from Canada's Experiment with Citizenship Revocation," *Citizenship Studies* 23, no. 4 (2019): 338–55; Tufyal Choudhury, "The Radicalisation of Citizenship Deprivation," *Critical Social Policy* 37, no. 2 (2017): 225–44, https://doi.org.10.1177/0261018316684507.

noted above, deportation grew more attractive and more complicated post 9/11. As the U.K. government discovered, branding people as terrorists to justify deporting them could be self-defeating because it heightened the risk that people so labelled would be subjected to torture or cruel, inhuman, or degrading treatment by the destination country. This, in turn, brought the U.K. into collision with the European Convention on Human Rights' prohibition on deportation to torture which, unlike the Canadian Supreme Court, permits no exceptions.[38]

The U.K. contrived to circumvent this conundrum by doing what Canada did to Fred Rose in 1957: denationalize citizens who were already abroad. In the decade from 2006–2015, at least 81 U.K. citizens were denationalized, 36 on the basis that deprivation was 'conducive to the public good', and the remainder on account of fraud or misrepresentation.[39] Most in the former category were deprived of citizenship for reasons related to national security and were already outside the U.K.[40] For example, a 2013 spike in U.K. revocations was linked to an increased movement of U.K. nationals to Syria. In 2016, 14 British nationals were deprived of citizenship on grounds that it was 'conducive to the public good'. In 2017, the number rose to 104.[41] The U.K. government refuses to disclose the number who were overseas when denationalized.

During Parliamentary Debates in early 2014, the Minister of State for Immigration did not so much deny the practice of targeting citizens abroad as offer a rationale for it:

> I understand that Members are concerned about instances where deprivation action takes places when a person is outside the UK.... I restate that the Home Secretary takes deprivation action only when she considers it is appropriate and that may mean doing so when an individual is abroad, which prevents their return and reduces the risk to the UK. That individual would still have a full right of appeal and the ability to resolve

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38 Saadi v. Italy, [2008] E.C.H.R. 179.

39 House of Commons, "Deprivation of British Citizenship and Withdrawal of Passport Facilities" by Terry McGuinness and Melanie Gower, *Sessional Papers*, No. 06820 (2017), 10–12.

40 Victoria Parsons, "Theresa May Deprived 33 Individuals of British Citizenship in 2015," The Bureau of Investigative Journalism, June 21, 2016, https://www.thebureauinvestigates.com/stories/2016-06-21/citizenship-stripping-new-figures-reveal-theresa-may-has-deprived-33-individuals-of-british-citizenship.

41 U.K., Secretary of State for the Home Department, *HM Government Transparency Report 2018: Disruptive and Investigatory Powers* (Cm 9609, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727961/CCS207_CCS0418538240-1_Transparency_Report_2018_Web_Accessible.pdf.

> their nationality issues accordingly. It is often the travel abroad to terrorist training camps or to countries with internal fighting that is the tipping point—the crucial piece of the jigsaw—that instigates the need to act.[42]

The U.K. policy and practice confers several advantages from the U.K. government's perspective. First, it physically and permanently rids the state of persons considered to constitute security threats. Secondly, the broad and vague standard of 'conducive to the public good' enables revocation where the state lacks the substantive or evidentiary basis to prosecute the individual for committing any crime. Indeed, the Home Secretary need not prove that the person attempted or committed any unlawful act to justify revocation. Third, the weak procedural protections, especially the absence of an oral hearing, facilitate revocation in absentia. A notice of revocation will be sent to the last known U.K. address of the target, which the person may never receive. Indeed, individuals may not even discover they are at risk of denationalization until after they have been deprived of citizenship. Fourth, a denationalized citizen no longer has a right to enter the U.K., thereby precluding effective access to appeal mechanisms. Only in the exceptional case will the individual outside British territory be in a position to learn of the revocation and then find and instruct counsel to launch an appeal. The overall effect is to minimize state accountability for the exercise of the revocation of power, even where the individual is *de jure* rendered stateless. Indeed, once denationalized, the individual can not only be detained and tortured, but may even be executed by a drone strike,[43] or extradited[44] without drawing the solicitude that the U.K. government formally pays to citizens abroad.

In sum, the U.K. model of citizenship deprivation goes beyond the truism that it is easier to deport than to convict by capitalizing on the fact that it is even easier to exclude than it is to expel. It offers a relatively cheap, swift, and efficient alternative to lengthy, arduous, rights-compliant criminal

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42 McGuinness and Gower, "*Deprivation of British Citizenship*," 11.

43 Chris Woods and Alice Ross, "Former British Citizens Killed by Drone Strikes After Passports Revoked," The Bureau of Investigative Journalism, February 27, 2013, https://www.thebureauinvestigates.com/stories/2013-02-27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked.

44 Victoria Parsons, "Man Stripped of British Citizenship Pleads Not Guilty to Al Qaeda Terror Charges in New York," The Bureau of Investigative Journalism, March 4, 2015, https://www.thebureauinvestigates.com/stories/2015-03-04/man-stripped-of-british-citizenship-pleads-not-guilty-to-al-qaeda-terror-charges-in-new-york.

prosecution, or even the less demanding process of deportation. It minimizes the likelihood of accountability and permanently disposes of an undesirable [former] citizen on the territory of another country that lacks the capacity or will to object. Indeed, the individual may not even be a national of the country on whose territory they are located.

The Canadian model of citizenship revocation offered almost none of these instrumental advantages in respect of citizens suspected of terrorist affiliation or actions. The reason is that revocation on national security grounds required conviction for a criminal offence carrying a minimum custodial sentence. With the exception of the 'foreign fighter' provision, revocation could only supplement a criminal prosecution, not replace it. The animating idea seemed to be that the wrong embodied in national security offences exceeded that which could be contained or by ordinary criminal punishment. These various 'crimes against citizenship' warranted an additional punishment – the political death penalty of denationalization. Initiating the revocation process on a person in Canada would almost certainly embroil the government in protracted litigation, and even if the government prevailed, deportation would be complicated by the inevitable constitutional challenge arising from the risk of persecution (including torture or death) in the destination country.

Civil society and academics fiercely opposed the *Strengthening Canadian Citizenship Act*. They advanced arguments that the law was unconstitutional and the policy unsound. The constitutional objections ranged from the weak procedural protections in the scheme to the substantive injustice of depriving a person of citizenship, to the risk of torture or death facing a person branded as a terrorist and deported to a state with a poor human rights record.

On the understanding that the terminus of citizenship deprivation was deportation, opponents disputed the utility of banishment in promoting the policy goal of enhanced security. At best, it exported the problem to another jurisdiction. As such, it was a curiously parochial response to the challenge posed by terrorism, that Canada itself characterized as global in scope. Indeed, as noted above, a foreign conviction for terrorism under the laws of a foreign country qualified a Canadian for revocation of Canadian citizenship, suggesting that terrorism anywhere was a threat to Canadian national security.

Opponents of citizenship stripping argued that the appropriate response to conduct criminalized as terrorism was domestic prosecution,

coupled with rehabilitation mechanisms tailored to the specificity of radicalism. Canada already criminalized and prosecuted terrorism offences. Citizenship revocation, fastened to a mirage of swift expulsion, undermined global cooperation in combatting terrorism and distracted from the urgency of investment in de-radicalization. If the endgame of citizenship revocation was banishment, the Canadian model seemed poorly designed to produce the desired result, and the result itself was undesirable.

The opposition parties voted against Bill C-24. The Conservatives held a clear majority, and the Bill passed easily and without amendment. Yet, the government declined to exercise its power to revoke citizenship for over a year.

IV. Revocation as Electoral Opportunism

When Bill C-24 was moving through the legislative process, some wondered whether the foreign fighter provision was drafted with Omar Khadr in mind. Mr. Khadr had been captured by U.S. Forces in Afghanistan in 2002 at age 15, spent a decade in Guantanamo Bay, and had returned to Canada in a prisoner transfer agreement in 2013. One might have wondered the same question about the national security revocation provisions in respect of the Toronto 18. According to Michael Nesbitt, from 2001–2018, 54 people were charged with terrorism offences and 26 were convicted.[45] Eleven of those convicted came from the Toronto 18. The remaining seven (including four youths) were acquitted or had charges stayed or withdrawn.

In July 2015, about a year after the new law came into force, up to ten people were served with notices of intent to revoke citizenship and given 60 days to respond. On August 2, 2015, the Conservative government dissolved Parliament and announced October 19, 2015, as election day. The timing ensured that the 60-day reply period would lapse during the campaign.

The institutions of Westminster parliamentary democracies are laced with various informal norms that are legally unenforceable but customarily followed. They are rarely noticed until a government deviates from them.

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45 Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada Between September 2001 and September 2018," *Criminal Law Quarterly* 67, no. 1/2 (2019).

Shortly before the 2015 federal election, the government took the unusual step of posting online guidelines that defined and enumerated the informal norms nestled under the label 'caretaker convention.'[46] The general principle is that once Parliament is dissolved and an election is called, the incumbent government should act with restraint in undertaking new initiatives. The rationale is that "there is no elected chamber to confer confidence on the Government [and] the government cannot assume that it will command the confidence of the House after the election." The guidelines summarized the operational implications as follows:

> a. To the extent possible, however, government activity following the dissolution of Parliament – in matters of policy, expenditure and appointments – should be restricted to matters that are routine, or
>
> b. non-controversial, or
>
> c. urgent and in the public interest, or
>
> d. reversible by a new government without undue cost or disruption, or
>
> e. agreed to by opposition parties (in those cases where consultation is appropriate).[47]

None of these factors precludes the conduct of ongoing government business. Nevertheless, one might think that stripping Canadians of citizenship for 'disloyalty' for the first time in almost 60 years is not business as usual. It was undeniably controversial. No urgent public interest animated it. But the actual notices of intent to revoke were issued prior to the election call by a few weeks and, in the case of Saad Gaya, two days before the writ was dropped. The expiry of the 60-day reply period, and the ensuing consequences, could be described as routine in the sense that they unspooled without further instigating action by the Minister. Zakaria Amara was in a Quebec prison when he was served with the notice of revocation in July 2015. Saad Khalid also received his notice of revocation in prison. Asad Ansari was released in 2010 (for time served in pre-trial detention) and was attending university in 2015. Saad Gaya was serving his

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46 Canada, Privy Council Office, *Guidelines on the Conduct of Ministers, Ministers of State, Exempt Staff and Public Servants During an Election* (Ottawa: GOC, last modified 11 September 2019), https://www.canada.ca/en/privy-council/services/publications/guidelines-conduct-ministers-state-exempt-public-servants-election. The September 2019 modifications to the Caretaker Convention *Guidelines* did not alter the substance of the relevant passages.

47 Privy Council Office, *During an Election*.

sentence at a medium-security institution but attending university on day parole.

It is not clear whether Amara responded to the notice within the 60-day period, but in any event, Conservative candidate (and former Minister of Citizenship and Immigration) Jason Kenney publicly announced Amara's citizenship revocation at a campaign stop on September 26, 2015.[48] From that moment, citizenship revocation moved to the foreground of the election campaign. The parties organized their positions around talking points that candidates recycled, and the media recirculated.

The Conservatives favoured the constructive expatriation line. Jason Kenney's remarks about Amara set the tone:

> I hope that this case makes people realize what we're really trying to do here.... If you basically take up arms against your country or plan to do so, and you're convicted in a Canadian court, or an equivalent foreign court, through your violent disloyalty you are forfeiting your own citizenship and we'll just read it as it is.[49]

Justin Trudeau, on the other hand, drew on the vulnerability of dual nationals, and emphasized the equality of citizenship:

> A Canadian is a Canadian is a Canadian... And you devalue the citizenship of every Canadian in this place and in this country when you break down and make it conditional for anybody.[50]

Trudeau further remarked:

> We have a rule of law in this country and you can't take away citizenship of an individual because you don't like what someone does.[51]

With the exception of Amara, each man contested the legality of citizenship revocation under the *Charter* and was supported by the British

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48 Stewart Bell, "Canada revokes citizenship of Toronto 18 ringleader using new anti-terror law," *National Post*, September 26, 2015, https://nationalpost.com/news/canada/canada-revokes-citizenship-of-toronto-18-ringleader.

49 Bell, "Canada revokes citizenship."

50 "Munk Leaders' Debate: Harper, Trudeau Battle Over Bill to Revoke Citizenship," *Huffington Post*, September 28, 2015, https://www.huffingtonpost.ca/2015/09/28/munk-leaders-debate-harper-trudeau-battle-over-bill-to-revoke-citizenship_n_8211410.html?utm_hp_ref=ca-justin-trudeau-debate.

51 Steven Chase and Gloria Galloway, "Federal leaders clash over Canadian values, security in lively debate," *Globe and Mail*, September 28, 2015, https://www.theglobeandmail.com/news/politics/harper-trudeau-mulcair-step-it-up-a-notch-in-foreign-policy-debate/article26580458/.

Columbia Civil Liberties Association (BCCLA) and the Canadian Association of Refugee Lawyers (CARL) as public interest litigants. The individual applications were eventually consolidated. A constitutional challenge to the revocation provisions was inevitable: when the *Strengthening Canadian Citizenship Act* was introduced, lawyers and legal academics catalogued a list of potential *Charter* violations in relation to many aspects of the statute, all with predictable futility.[52] The legal challenges brought by Gaya, Ansari, Khalid, and others addressed, *inter alia*, citizenship revocation for misconduct as cruel and unusual treatment or punishment (section 12); a violation of liberty and security of the person that was both substantively unjust and procedurally unfair (section 7); a form of double punishment (paragraph 11(h)); retrospective punishment (paragraph 11(i)); discrimination against dual citizens (section 15).[53]

As noted earlier, the U.K. experience revealed that the complexity of determining dual nationality belied any fantasy of frictionless citizenship stripping. Not all naturalized citizens retained their first citizenship and some automatically lost their first citizenship by acquiring a second. The possession of dual citizenship was often not obvious in all cases, as Saad Gaya's case revealed.

Unlike the other subjects of revocation, all of whom immigrated to Canada and acquired citizenship through naturalization, Saad Gaya was born in Montreal in 1987 and was a citizen by virtue of birth on Canadian soil.[54] His parents had immigrated to Canada from Pakistan but lost their Pakistani citizenship when they naturalized as Canadians in the 1980s because Pakistan did not permit dual citizenship. Therefore, they could not and did not transmit Pakistani citizenship by descent to Gaya at birth. In 2004, an agreement between Canada and Pakistan permitted citizens of Pakistan to naturalize in Canada without relinquishing Pakistani citizenship.

Borrowing from the failed gambit of the U.K. government in the *al Jedda* litigation, the Minister contended in his notice of intent to revoke that

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52 For two academic analyses, see Craig Forcese, "A Tale of Two Citizenships: Citizenship Revocation for 'Traitors and Terrorists,'" *Queen's Law* Journal 39, no. 2 (2014): 551–86; Macklin, "Citizenship Revocation."

53 BCCLA, CARL, and Asad Ansari (20 August 2015) (Notice of Application for Leave and for Judicial Review) (on file with author); BCCLA, CARL and Asad Ansari, (20 August 2015) (Statement of Claim) (on file with author).

54 Amara was born in Jordan, Khaled was born in Saudi Arabia to Pakistani parents, and Ansari was born in Pakistan.

Saad Gaya became a citizen of Pakistan unwittingly in 2004: when Canada and Pakistan entered into the citizenship agreement, the Pakistani citizenships of his parents were (allegedly) automatically and retroactively reinstated to them, and so Saad Gaya automatically and retroactively became a birthright citizen by descent of Pakistan. The U.K. Court of Appeal and Supreme Court in *al Jedda* dismissed automatic, retroactive citizenship as an absurd and impracticable fiction. This did not deter the Canadian government from stretching the concept beyond the first generation (a naturalized citizen, like *al Jedda*) to the second generation born in Canada (Gaya). This unprecedented 'retroactive citizenship by descent' was the basis of the Minister's allegedly reasonable belief that Gaya held Pakistani citizenship by descent. According to the new Canadian law, Gaya bore the burden of proving on a balance of probabilities that he was not a citizen of Pakistan.

Citizenship revocation and the niqab ban played well to the Conservative base. According to the polls, they also resonated with the broader electorate. Convicted terrorists elicited little sympathy, and niqabs offended people from across the political spectrum. Stripping citizenship from bad citizens and stripping niqabs from Muslim women as the price of citizenship advanced no practical policy objective. They played entirely in the register of symbolic politics where ideas of patriotism, codes of belonging, rituals of allegiance, and spectacles of retribution find a receptive audience. And, of course, symbolic politics often broadcast at their loudest and shrillest pitch during elections. Ironically, Zunera Ishaq (who challenged the niqab policy) grasped this in her remarks to a journalist during the election campaign:

> I don't understand how this issue has taken so much attention… They have so many other things to take care of… We have a crisis of jobs right now. There is the big global issue of refugees. We are not paying attention to these issues and just focusing on a single person. It's ironic to me. How can a government have so much time to pay so much attention to a single person's choice?[55]

The Conservatives chose the timing of the citizenship revocations with precision, but not so with the niqab controversy. Prior to the election call of August 2, 2015, the Federal Court of Appeal scheduled its hearing in the

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[55] Richard Warnica, "Woman at the heart of niqab debate set to take citizenship oath in next few days," *National Post*, October 8, 2015, https://nationalpost.com/news/canada/woman-at-the-heart-of-niqab-debate-set-to-take-citizenship-oath-in-next-few-days.

niqab ban case. It set down the case for September 15, 2015, which happened to fall in the middle of the election campaign. The FCA heard the appeal and took the unusual step of ruling from the bench in Ishaq's favour, with the explicit direction that the government enable Ishaq to swear the oath of citizenship (while wearing her niqab) before election day.

In response to the judicial rebuke from the FCA, the Conservatives decided to double down on both the niqab ban and citizenship revocation. Prime Minister Harper drew the niqab policy into the ambit of securitization by insinuating that women wearing niqabs deliberately sought to conceal their identity from the state. He then upped the ante by hinting that the Conservative government would consider introducing legislation barring niqab wearers from employment as civil servants and from receipt of public services, a move calculated to appeal especially to Quebec voters.[56] Next, the Minister of Citizenship and Immigration announced a 'barbaric cultural practices' tip line that incited Canadians to report Muslims and other minorities whose [alleged] practices they found objectionable or suspicious.[57]

But in the end, the Conservatives seemed to overplayed their hand. Despite the lack of sympathy for Muslims convicted of terrorism offences, or for Muslim women wearing niqabs, the relentless vilification by Conservatives seemed to alienate some margin of voters. The barbaric cultural practices snitch line was widely mocked and devolved into parody almost instantly. Prime Minister Harper's wooden response to the photo of Alan Kurdi was seen as callous, especially when it was revealed that the Prime Minister's Office had secretly blocked the arrival of Syrian refugees (including Kurdi's relatives), despite public commitments to resettle Syrian and Iraqi refugees. The Liberals won a comfortable majority.

Analysts and commentators differ on the ultimate impact of the Conservative's citizenship strategy on the election outcome. But more interesting for present purposes is the nature of the Conservatives'

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56 Warnica, "Woman at the heart of niqab debate."

57 "Tories promise RCMP tip line for people to report neighbours for 'barbaric cultural practices,'" *National Post*, October 2, 2015, http://news.nationalpost.com/news/tories-promise-rcmp-tip-line-for-people-to-report-neighbors-for-barbaric-cultural-practices.
Earlier in 2015, the Conservative government passed the *Zero Tolerance for Barbaric Cultural Practices Act*, S.C. 2015, c. 29. The Act consisted mostly of gratuitous amendments to existing criminal and immigration law to prohibit the immigration of persons practicing polygamy, forced marriage, the defence of provocation in so-called "honour killings". It also legislated 16 as the minimum age for marriage across Canada.

miscalculation. From the time they held a majority in Parliament, the Conservatives pursued policies and enacted laws with apparent indifference, if not disdain, toward the rule of law and the *Charter*. This was certainly true of the citizenship revocation law. The operative principle seemed to be that if the policies were popular with voters, their legality mattered little. If the government prevailed in court, so much the better. If the government was defeated in court (as it was in several instances), the Conservatives could blame an unelected, unaccountable judiciary for thwarting the democratic will of the people, as embodied by the Conservative government. According to this calculus, even when the Conservatives lost legally, they won politically. The Conservative government had pursued this strategy with apparent success over several years and many laws. But with the niqab ban and possibly with citizenship revocation, the strategy failed them at the moment when it counted most.

V. CONCLUSION

On November 2, 2015, Federal Court Justice Zinn adjourned *sine die* the constitutional challenge to the 2014 *Strengthening Canadian Citizenship Act*. The Liberal government eventually fulfilled its campaign promise to reverse the harshest aspects of the 2014 legislation enacted by their Conservative predecessors, including citizenship revocation.[58] The transitional provisions restored citizenship to anyone whose citizenship was revoked under the national security or foreign fighter provisions. Zakaria Amara's citizenship was reinstated.[59]

By the time the Liberal government amended the *Citizenship Act* in 2017 to repeal security-related citizenship revocation, the focus in Canada and elsewhere had already pivoted from 'homegrown terrorists' to their mobile cousins, the 'foreign fighters.' An estimated 5000–6000 young men – and a few teenage girls and women – from the U.K., Australia, Canada, the United States, and EU member states, had travelled to Syria or nearby

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58 An Act to amend the Citizenship Act and make consequential amendments to another Act, S.C. 2017, c. 14. The amendments also restored the residency period back to 3 years (from 4) and the partial credit toward residency for international students and others holding temporary status. The new Bill also introduced a new process governing revocation for fraud or misrepresentation.

59 "Would-be Canadian terrorists are often made in Canada," *Hill Times*, September 3, 2018, https://www.hilltimes.com.

regions to fight with or alongside ISIS.[60] An estimated 185 were Canadian.[61] One was Ali Mohammad Dirie, a convicted member of the Toronto 18. About a year after his 2011 release from prison, he flew to Syria (reportedly on a passport that was not his) to join an extremist group. He reportedly died in Syria in 2013.[62] Today, men like Ali Mohammad Dirie preoccupy policymakers more than Zakaria Amara and the other members of the Toronto 18.

In 2014, the United Nations Security Council passed Resolution 2178, calling on member States to, *inter alia*, dedicate resources and adopt laws designed to constrain the international mobility of actual or potential foreign fighters.[63] For several years, lawmakers have concentrated their efforts on expanding the catalogue of terrorist-related crimes and on criminalizing each step in a sequence that begins with domestic radicalization and culminates in participation in ISIS (or comparable groups) abroad.[64] Intelligence and law enforcement agencies formulated or adapted ancillary measures to monitor and restrain the mobility of suspects. If they were still on the territory, the state sought to surveille and interdict them before departing. If they had already left the country, the goal shifted to preventing their return. As the military defeat of ISIS grew imminent and increasing numbers of foreign fighters were captured and detained by actors or states that refused to assume responsibility for them indefinitely, the

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60 Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (New York, NY: The Soufan Center, October 2017), https://thesoufancenter.org/wp-content/uploads/2017/11/Beyond-the-Caliphate-Foreign-Fighters-and-the-Threat-of-Returnees-TSC-Report-October-2017-v3.pdf.

61 Barrett, *Beyond the Caliphate*, 12.

62 "'Toronto 18' member Ali Mohamed Dirie reportedly died in Syria," *CBC*, September 25, 2013, https://www.cbc.ca/news/world/toronto-18-member-ali-mohamed-dirie-reportedly-died-in-syria-1.1868119.

63 UN Security Council, Resolution 2178, S/RES/2178 (September 24, 2014), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/547/98/PDF/N1454798.pdf?OpenElement. For an evaluation of national foreign fighter regulatory mechanisms as of 2014, see The Law Library of Congress, Global Legal Research Center, *Treatment of Foreign Fighters in Selected Jurisdictions* (Washington, DC, December 2014), https://www.loc.gov/law/help/foreign-fighters/treatment-of-foreign-fighters.pdf.

64 For a description and critique of the Canadian regime for restraining mobility, see Craig Forcese and Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015), 175–201. For a description of the U.K. regime, see Clive Walker, "6 Foreign Terrorist Fighters and UK Counter Terrorism Laws," in *The Asian Yearbook of Human Rights and Humanitarian Law*, eds. Javaid Rehman and Ayesha Shahid, vol. 2 (Leiden, Netherlands: Brill Academic Publishers, 2018), 177–204.

prospect of their return raised alarm in countries of origin. Within this frame, politicians are no longer coy about using citizenship revocation opportunistically to prevent re-entry.[65] But the viability of citizenship revocation as a means of excluding returning foreign fighters is diminishing now that many are in the custody of states or forces opposed to ISIS. Blocking citizens seeking re-entry on their own initiative was politically feasible, if legally unscrupulous. Refusing to admit citizens deported by another state would be politically untenable as a matter of international relations. All Western states are under political pressure to re-admit their foreign fighters, and their ability to evade that pressure through denationalization is limited, though that may not deter them in the short term.

Importantly, citizenship revocation is not the only mechanism for controlling the mobility of people who are considered risky. States can also interdict exit or re-entry through passport cancellation and seizure, as well as through the application of no-fly lists.[66] These administrative measures are notionally temporary (unlike citizenship revocation) but also more pliable and less visible. They may or may not be accompanied by criminal prosecution for offences related to terrorism domestically or extraterritorially, including travel abroad to participate in foreign conflicts.[67] So even without citizenship revocation, Canada and other states possess the

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65 In 2019, the government stripped Neil Prakash of Australian citizenship after he was captured and held in a Turkish prison. In the same year, the U.K. Home Secretary deprived Shamima Begum of her citizenship while she was in a Syrian refugee camp. Begum ran away from her home in London to join ISIS in 2015. Her parents emigrated from Bangladesh, raising the possibility that she was a dual U.K.-Bangladeshi national. While the U.S. Constitution effectively precludes citizenship stripping, the U.S. disavowed U.S. born Hoda Muthana, another teenage "ISIS bride" detained in a Syrian refugee camp, by claiming she never actually possessed U.S. citizenship. The U.S. position is that she was born while her father was a Yemeni diplomat, which excludes her from jus soli citizenship. See Muthana v. Pompeo, Columbia, Dist Ct DC, 19-445 (RBW) (December 17, 2019). This argument is similar to the position of the Canadian government against Deepan Budlakoti. See Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2264/2013*, GE 18-14175 (E), UN Doc CCRP/C/122/D/2264/2013 (2018).

66 See Audrey Macklin, "Still Stuck at the Border," in Craig Forcese and François Crépeau, eds. *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2012), 261–306.

67 Beth Van Schaack, "National Courts Step Up: Syrian Cases Proceeding in Domestic Courts," *SSRN* (February 2019): 1–39.

legal means to disrupt exit, delay entry, and criminally prosecute an expansive range of actions in Canada and abroad. These options are instrumental techniques explicitly organized around the objective of constraining or exploiting mobility. They neither invoke nor require the distended rhetoric that accompanies citizenship revocation as an (putative) end in itself.

The global context framing citizenship revocation has changed since 2014. Today, an opportunistic, politically conservative government with little regard for the rule of law may yet hesitate to revoke the citizenship of a man convicted in the Toronto 18 prosecution. If that government took guidance from its policing and security services, it might expend less effort in trying to denationalize and deport him and invest instead in preventing his exit. Of course, a sensible government would also devote resources to prevention and de-radicalization.

States like Canada, the U.K., Australia, and the EU Member States that find citizenship revocation attractive invariably presume that they will be the ones using it to dispose of undesirable citizens. They do not imagine themselves as the disposal site. One way of testing the wisdom of a national policy of citizenship revocation is to suppose a world in which states contemplate themselves on the receiving end of the transaction.

The 2019 controversy around 'Jihadi Jack' provides an interesting case study.[68] British-born Jack Letts converted to Islam as a teenager and travelled to Syria in 2014 at age 18. He was captured by Kurdish forces in 2018. Like Shamima Begum, a British teenager who left to join ISIS in Syria in 2015, Britain refuses to re-admit him. The Home Secretary deprived Begum of her U.K. citizenship, claiming that she would not be left stateless because she is also a Bangladeshi citizen, and the Special Immigration Appeal Commission (SIAC) upheld the decision. In mid-2020, the English Court of Appeal set aside the SIAC decision on the basis that the government's refusal to permit her to enter the U.K. to appeal the revocation order violated principles of procedural fairness, but the U.K. Supreme Court reversed the Court of Appeal and restored the original SIAC decision.[69]

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68 My discussion of Jack Letts draws substantially from Audrey Macklin, "Jihadi Jack and the Folly of Revoking Citizenship," *The Conversation*, August 20, 2019, https://theconversation.com/jihadi-jack-and-the-folly-of-revoking-citizenship-122155.

69 R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant) [2021] UKSC 7 On appeal from: [2020] EWCA Civ 918. In early 2021, the Special Immigration Appeals Commission set aside the citizenship deprivation of three other UK citizens who were similarly situated to Begum, but over

Sometime in July 2019, the U.K. government under Prime Minister Theresa May deprived Jack Letts of his U.K. citizenship. A British newspaper broke the story on August 17, 2019.[70] Letts is a dual British-Canadian citizen because his father is Canadian. In an interview, he stated that "I feel British, I am British. If the U.K. accepted me, I would go back to the U.K., but I don't think that's going to happen."[71]

Until Letts, post-9/11 citizenship deprivation in Britain traded on a tacit understanding that British Muslims with brown skin inherently "belong" less to the U.K. than to some other country where the majority of people are Muslims with brown skin — even if they were born in Great Britain and have never even visited the other country of nationality. On this view, stripping citizenship merely sends the targets back to where they "really" come from. Citizenship deprivation thus delivers an exclusionary message to all non-white, non-Christian British citizens that their claim to U.K. membership is permanently precarious, however small the literal risk of citizenship deprivation. Indeed, legal scholar John Finnis invoked the essential foreignness of Muslims to Britain when he proposed the "humane" expulsion of all Muslim non-citizens from Britain.[72]

But Letts is white, his parents are middle class, and Christian in upbringing (though secular in practice). His other country of citizenship, Canada, is also predominantly white, Christian in origin and a former colony of Britain. Canada is a staunch British ally, an important diplomatic and trading partner and a G7 member. Queen Elizabeth remains the formal head of state in Canada. Denationalizing Letts cannot trade on implicit

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21 when stripped of UK citizenship (and therefore ineligible for Bangladeshi citizenship). *C3, C4, C7* v Secretary of State for the Home *Department,* 18 March 2021, http://siac.decisions.tribunals.gov.uk/Documents/outcomes/documents/C3,C4%20&%20C7%20-%20Open%20Judgment%20-%2018.03.2021%20-%20JA.pdf.

70 Harry Cole, "ISIS fighter Jihadi Jack is stripped of his UK passport sparking furious diplomatic row with Canada where he has joint citizenship," *Sunday Daily Mail,* August 17, 2019, https://www.dailymail.co.uk/news/article-7367565/ISIS-fighter-Jihadi-Jack-stripped-UK-passport-sparking-furious-diplomatic-row-Canada. May resigned as Prime Minister on July 24, 2019.

71 Kevin Rawlinson, "Second Briton says he wants to be allowed back to UK from Syria," *The Guardian*, February 22, 2019, https://www.theguardian.com/uk-news/2019/feb/22/jihadi-jack-pleads-to-be-allowed-back-to-uk-from-syria.

72 John Finnis, "Endorsing Discrimination between Faiths: A Case of Extreme Speech?," in Ivan Hare and James Weinstiein, eds., *Extreme Speech and Democracy*, (Oxford: OUP 2009), 440.

appeals to racism, Islamophobia and colonial arrogance. Letts is no more or less a risk to national security in Canada than the U.K. In no sense does Letts "belong" more to Canada than to the U.K., the country where he was born, raised, and which formed him. And, of course, global security is not advanced when the U.K. disposes of their unwanted citizens in Canada, Bangladesh or anywhere else. The very phenomenon of foreign fighters testifies to that.[73]

The Canadian government greeted the news of Letts' denationalization with displeasure. Minister of Public Safety and Emergency Preparedness, Ralph Goodale, stated that "Canada is disappointed that the United Kingdom has taken this unilateral action to offload their responsibilities."[74] In almost the same breath, the government also disavowed any obligation to assist Letts or any of the dozens of Canadian men, women, and children held in makeshift prison camps in Syria.[75]

As a thought experiment, consider a scenario where Canada retained the citizenship revocation law enacted by the Conservative government: both the U.K. and Canada would have the option of stripping Jack Letts of citizenship as a dual citizen. The only question would be who would do it first because once denationalized, the individual is a mono-citizen who cannot be deprived of the remaining citizenship without rendering him stateless. And so, denationalization would devolve into a race to revocation, where the loser gets the citizen.

Citizenship deprivation inflicts grave human rights violations on those deprived of citizenship, and the very phenomenon of foreign fighters evinces that global security is not advanced by 'dumping' risky people on other states. But beyond that, universal adoption of the U.K. model of citizenship revolution would be an international relations fiasco. Citizenship revocation for 'crimes against citizenship' is a state practice that flunks the Kantian imperative: its putative viability as a counter-terrorism tool depends on other states *not* emulating the practice. The absurdity of a

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73 His parents were convicted of funding terrorism in 2019 for sending their son money while he was in Syria. See "Jack Letts, Islamic State recruit: 'I was enemy of UK,'" *BBC News*, June 21, 2019, https://www.bbc.com/news/uk-48624104.

74 "Canada 'disappointed' after UK reportedly strips Jihadi Jack of citizenship," *CBC News Online*, August 18, 2019, https://www.cbc.ca/news/world/jihadi-jack-citizenship-uk-canada-1.5251437.

75 Justin Giovanetti, "Canada criticizes UK move to strip Jihadi Jack of British citizenship," *Globe and Mail*, August 18, 2019, https://www.theglobeandmail.com/canada/article-canada-criticizes-uk-move-to-strip-jihadi-jack-of-british/.

race to denationalize buttresses the legal, normative and pragmatic reasons for rejecting denationalization, which I have explored elsewhere.'[76]

Compared to other states on the receiving end of U.K. citizenship deprivation, Canada is uniquely well placed on the global stage to confront and challenge the practice as inimical to inter-state cooperation in countering terrorism. In so doing, Canada could bolster and champion efforts already underway among human rights organizations to discredit the practice as contrary to international human rights norms.[77] Unfortunately, Canada has not seized this opportunity. Meanwhile, citizenship stripping persists, even as its pretensions to principle and to utility have been stripped away.

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[76] See Macklin, "Citizenship Revocation."

[77] See e.g., *Principles of Deprivation of Nationality as a National Security Measure,* Institute on Statelessness and Inclusion, March 18, 2020, https://files.institutesi.org.pdf.

Conclusion

MICHAEL NESBITT, KENT ROACH, AND DAVID C. HOFMANN*

The Toronto 18 remains the largest and most complex terrorism plot, investigation, and prosecution in Canada's history. This special issue has provided multidisciplinary case studies about the people and events that surrounded the formation, operation, prosecution, and incarceration of the Toronto 18. These interlinked case studies have, among other things, traced the Toronto 18 from its formation to consider the group dynamics, social networks, and perceptions of those that were involved, critically assessed the investigation by CSIS and the RCMP, and examined the group's financing, prosecution, sentencing, and even the ultimate parole of the individual members. Each chapter has turned a critical eye to lessons learned, both looking back to the events as they were documented by the media and court cases, as well as looking forward to what the Toronto 18 cases and Canada's reaction thereto portends for the future of law, terrorism, and counterterrorism.

To tell this story and draw out each of these lessons, the chapters in this special issue have accessed a range of previously neglected material, including the trial transcripts and decisions, a collection of thousands of media reports, a social network analysis, and the memory and experiences of some of the actors. Together, they tell a more fine-grained and nuanced story of the Toronto 18 than has previously been told. In our view, such a story needed to be told in no small part because the authors herein were able to identify some deficiencies and dangers in Canadian counterterrorism that still need to be remedied, while also identifying many lessons learned. But we also recognize that this will not be the final word on the Toronto 18. We hope that others from various disciplines and professions – including, but not limited, to law-makers – will take note of

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and build on the findings of the authors of the previous 16 chapters. The Toronto 18 cases deserve further reflection and analysis.

Some insights into the Toronto 18 case remain as salient as ever, perhaps more so. Homegrown threats have continued to dominate Canada's terrorism landscape – as well as that of Canada's closest and Western allies. Since the Toronto 18 were first arrested on June 2, 2006, Canada has experienced the so-called Via Rail plot, a host of Canadian citizens travelling or attempting to travel to countries such as Syria, Somalia, and elsewhere to participate in terrorist activities or engage with terrorist groups, the October 22, 2014 killing on Parliament Hill of Cpl. Nathan Cirillo by Michael Zehaf-Bibeau, and two days earlier, the murder of Warrant Officer Patrice Vincent whose car was rammed by lone wolf, ISIS-motivated, Martin Couture-Rouleau. Canada has charged over 60 individuals with terrorism offences, a significant increase of course from the time of the arrest of the Toronto 18 when only those 11 individuals and Momin Khawaja (currently serving a life sentence on various terrorism offences) had been so charged.

But though the Toronto 18 were "homegrown" in the sense that they were Canadians that came together and plotted within Canada, the context also had overt international dimensions: weapons were procured from the United States by Ali Dirie, and the plotters were Canadian, but their ideas were viewed as foreign due to the association with al-Qaeda and its ideology. As Dawson and Amarasingam, as well as Davis and Gaudette, Davies, and Scrivens, discuss in their chapters in Part I of this special issue, extremist websites that reach across national boundaries such as "Clear Guidance" served as influential forms of instruction to the Toronto 18, and such web forums are only more common today. In addition, institutional racism and Islamophobia of "othered" Canadian citizens formed a critical part of the story from the investigation through to the initial press conference and coverage, to the trials and subsequent attempts to strip some of those convicted of their Canadian citizenship.

Although al-Qaeda – and now ISIS – inspired terrorism remains the greatest terrorism threat according to Canada's national security agencies at the time of writing this conclusion,[1] we are also currently seeing the rise of

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[1] Canadian Security Intelligence Service, *2018 CSIS Public Report*, Catalogue No PS71-2018 (Ottawa: Public Works and Government Services Canada, June 2019), 19; Canadian Security Intelligence Service, *2019 CSIS Public Report* (Ottawa: Public Works and Government Services Canada, April 2020), 4, 12.

other strains of ideological terrorism, most prominently far right and "Incel" (Involuntary Celibate) extremism. Examples include the horrific attack on a Quebec City Mosque by Alexandre Bissonnette, killing six worshippers and injuring 19 others; Justin Bourque's 2014 planned gunfight with Canada's RCMP, killing three police officers; the Toronto van attack by the self-described Incel Alek Minassian, whose misogyny and sexual frustration was his justification for running down a crowd of people in downtown Toronto, killing ten people while injuring 19 more on April 23, 2018; and the murder of a woman and attempted murder of another by a Toronto youth (unnamed) on February 24, 2020, who became the first self-identified Incel or far right actor charged with terrorism in Canada, and the first Incel so-charged in the Western world.[2]

As with the Toronto 18, each of these attacks were homegrown in the sense that the perpetrators were Canadians planning and executing attacks entirely within its borders. At the same time, the ideology and broader landscape of the far right and Incel threat extends well beyond Canada, to the United States, and across the Atlantic and Pacific oceans to countries such as New Zealand, Australia, Germany, and the United Kingdom. The actors are at home, but the ideas behind far-right extremism and anti-misogynist Incel ideology are equally as international as the ideas behind the Toronto 18's brand of al-Qaeda-inspired terrorism.

Although we cannot treat Islamist and far-right terrorism as completely analogous in terms of their respective goals, ideologies, methods, and radicalization trajectories, there are still lessons that can be learned from the Toronto 18 that can be used to better understand how and why far-right terrorist groups – and other groups in the future – emerge within Canada and abroad. At least to date, both far-right and al-Qaeda (and ISIS) inspired perpetrators in Canada consist primarily of citizens who see their ways of life under attack by outside forces, who choose their targets symbolically in order to punish, intimidate, or cause fear among their perceived enemies and who typically operate with little to no outside support from other terror organizations. Even as things change, many underlying fundamentals remain the same.

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2 Stewart Bell, Andrew Russell, and Catherine McDonald "Deadly attack at Toronto erotic spa was Incel terrorism, police allege," *Global News*, May 19, 2020, https://globalnews.ca/news/6910670/toronto-spa-terrorism-incel/.

One fundamental issue discussed in this collection is the inability of radicalization scholars to explain why so few individuals escalate towards terrorist violence when so many individuals experience the same sorts of pressures and grievances associated with violent acts. This and related issues have been discussed in Part I of this special issue from different theoretical, epistemological, and empirical standpoints.

Another fundamental issue is the difficulties of transitioning from the more secretive intelligence mindset of CSIS to the more public demands of disclosing evidence as often required in terrorism prosecutions, including those related to the financing of terrorism. Different practitioner and academic perspectives on this enduring and difficult issue have been discussed in Part II of this special issue.

Whether the public or security scholars like it or not, terrorism prosecutions will continue to be burdened by a range of legal issues discussed in Part III of this book including *Charter* and entrapment challenges by the accused, the role of lay and expert evidence on controversial and contested subjects often related to the political, religious, or ideological objective requirements that must be established in Canadian terrorism law, and the role of possibility bias by jurors and perhaps other participants in the trial process.

A final fundamental issue – one that will continue to present challenges in Canada and beyond – is what to do with those convicted of terrorism offences both on sentencing and beyond. Part IV of this special issue deals with the legacy of long terrorism sentences left by the Toronto 18 prosecutions. Even with the use of long sentences, only two of the 11 men convicted in the Toronto 18 trials remain in jail. This fact, that even with long sentences for terrorism offences many convicted planners will be released (well) before they have "aged out" of the risk range for terrorism,[3] raises questions about rehabilitation and programming offered to "convicted terrorists" in prisons. Putting the chapters in this section together, one sees in the result a series of long prison terms based on fear of terrorism as a general phenomenon coupled with the inability of the individuals that perpetrate the discrete terrorism offences to access needed interventions. For society, this means the risk of depriving an individual of their liberty for longer than might strictly be necessary where the offender was young, repentant, and largely uninvolved in the planning and certainly

[3] See Nesbitt, Chapter 14 of this book.

execution of a plot (a serious rights concern), while also eventually releasing terrorist offenders that have never received assistance in addressing their underlying grievances and ideologies (a serious safety concern). One is left to question how both rights and safety are best served by such a system.

Undoubtedly, the terrorism landscape – within Canada and across the world – will continue to change in the decades ahead. Perhaps it will continue to be dominated by homegrown threats, or perhaps physical threats from abroad will once again increase. Invariably, the ideologies, the groups, the grievances, the size, and the complexity of the plots will all shift with the times. But even as all this transpires, the lessons from the Toronto 18 investigation and prosecutions will endure. Canada will still struggle with issues such as why some actors radicalize to violence while others do not, the relation of intelligence to evidence, legal claims of entrapment, the role of police informers and electronic surveillance in terrorism investigations, the difficulties of ensuring that trials are both fair and reasonably efficient, and the dilemmas encountered in sentencing those who pled or are found guilty of broadly defined terrorism offences. As a result, scholars and practitioners who read this volume may be able to apply certain ideas and lessons to future threats to Canadian public security, including far-right terrorism.

Appendix A: Cast of Characters

The Toronto 18

Listed here are short descriptions of the members of the Toronto 18, their involvement in the group, and the particular significance of their cases. They are organized into the two plots that eventually emerged once the group splintered in March 2006.

The Parliament Hill Plot (Scarborough Group)

The members of this group intended to storm Parliament Hill with guns and behead prominent politicians including then-Prime Minister Stephen Harper. The groups' activities consisted primarily of military-style training camps and attempts to procure funding and weapons. The group was infiltrated at an early stage by a confidential informant named Mubin Shaikh, who provided much of the insight and testimony about the inner workings of the group.

Fahim Ahmad

The leader of the Parliament Hill plot, Ahmad, was a young father and ideologue who created and led the original Toronto 18. He organized two training camps where he attempted to radicalize his young recruits with propaganda videos and teach combat skills. After Zakaria Amara broke with the main group, Ahmad continued to act as the leader of his plot, though he struggled to obtain funds and weapons. He pled guilty partway through his trial and was sentenced to 16 years in prison.

Steven Vikash Chand

As a former Canadian Armed Forces (CAF) reservist, Chand was the only member of the Toronto 18 with military experience. He helped Fahim Ahmad set up and oversee the training camps and served as a "sniper" during paintball exercises. He was consulted for his opinion on a potential safe house. When money became an issue, he introduced Ahmad to a friend who ran bank fraud schemes as a potential source of revenue for the group. He pled guilty and was sentenced to ten years.

Mohammed Ali Dirie

Dirie was originally arrested at the U.S. border trying to smuggle handguns into Canada and sentenced to two years. He used his time in prison to seek out new recruits and weapon suppliers. Dirie was committed to the cause and concerned about the motivation of other recruits. Ahmad planned to hand leadership over to Dirie on his release. He pled guilty to his terrorism charges and was sentenced to seven years. After his release, he breached his peace bond and travelled to Syria to join ISIS, where reports indicate that he was killed.

Amin Durrani

Durrani attended both of Ahmad's camps and served as a secondary leader. He led marching drills and posed alongside Ahmad in a video recorded at the second camp. When Ahmad scouted a potential safe house with Shaikh and Chand, Durrani was also present. He also offered to recruit new members to the group, though there is little evidence that he actually did. He pled guilty and was sentenced to seven years and six months.

Asad Ansari

A former University of Toronto Student, Ansari attended the camps and offered to provide his computer expertise to help the group. He struggled with the physical tasks at the camps but helped Ahmad with video editing and computer service. He was convicted by a jury and sentenced to six years and six months. He lost an appeal of his conviction in 2015.

Jahmaal James

James spent little time with the rest of the group. In November 2005, he travelled to Pakistan, where he intended to meet up with a contact and receive training at a terrorist camp so that he could return to Canada and train the others. However, he became ill and remained that way for most of his trip. He returned to Canada in March 2006 and was disappointed with Ahmad's leadership, so he distanced himself from the group. He pled guilty and was sentenced to seven years.

Nishanthan Yogakrishnan (N.Y.)

The youngest member of the group to serve time, Yogakrishnan turned 18 in January 2006, between the two camps. In fact, his name was originally

hidden from publication, and he was tried as a youth. He was considered an enthusiastic and able recruit after physical trials at the first camp and came under Ahmad's wing. His primary involvement was a string of shoplifting, stealing camping equipment and supplies for the group. He was arrested at least twice for this behaviour. He was found guilty and sentenced to two years and six months, which he appealed unsuccessfully.

Qayyum Abdul Jamal, Yasin Abdi Mohamed, Ahmad Ghany, and Ibrahim Aboud

Charges were stayed against the four other adults in the Parliament Hill Plot on April 15, 2008, nearly two years after the arrests, in exchange for signing peace bonds. Jamal was a janitor at the mosque attended by most of the members and by far the most senior member at 43 years old. Mohamed accompanied Dirie on his trip to buy guns in the U.S. but was reportedly far less fanatical than Dirie. Ghany attended only part of the first camp. Aboud was barely 18 at the time, and he was arrested two months after the other 17.

The Youth

There were three youth in the Toronto 18 whose names have never been released. The youngest was 15 years old. Their activities varied, but mostly they attended the training camps and accompanied Nishanthan Yogakrishnan on shoplifting missions. The charges against each of them were stayed.

The Bomb Plot (Mississauga Group)

The four members of this group planned to plant a series of bombs in and around Toronto, targeting CSIS headquarters, the Toronto Stock Exchange building, and a military base. They gathered materials to build fertilizer-powered shrapnel bombs and assembled them in a rented warehouse. The operation was infiltrated by an informant named Shaher Elsohemy, who supplied them with inert material instead of fertilizer.

Zakaria Amara

The leader of the bomb plot, Amara, was a young father who worked at a Canadian Tire gas bar. Originally Fahim Ahmad's second-in-command, he split with Ahmad and the main group around March 2006 over concerns

about Ahmad's efficacy and credibility as a leader. He was arguably the most effective member of the group, successfully building a remote detonator out of cell phone parts and obtaining three tonnes of (inert) ammonium nitrate for explosives. He was sentenced to life in prison, and his sentence was upheld on appeal.

Shareef Abdelhaleem

Uniquely among those found guilty, Abdelhaleem had a stable career and a substantial income. A computer engineer with a six-figure income, he served as a connection point between Amara and the fertilizer supplier (a police informer-turned-agent named Shaher Elsohemy). His plan was to profit from the bombings, taking advantage of the stock market chaos that would result from a terrorist attack. Abdelhaleem pleaded entrapment in his defence on the grounds that Elsohemy was a former friend of his with whom he had a turbulent relationship and who received compensation to act as an agent.[1] The Court rejected this argument, and ultimately, he was sentenced to life in prison.

Saad Khalid

Khalid was a high school friend of Zakaria Amara and only 19 years old when he was arrested. The industrial unit where the group planned to store their bomb-making material was rented under his name. Along with Gaya, he was to be the driver of a van carrying the explosives to their target on the day of the attack. Khalid was reportedly a foot soldier rather than a leader: he was not even aware that Abdelhaleem was involved in the plot. He pled guilty and was sentenced to 14 years. The Crown appealed the sentence, and the Ontario Court of Appeal increased his sentence to 20 years.

Saad Gaya

At age 18, Gaya was the youngest member of the bomb plot. His role was similar to that of Khalid, taking orders from Amara and performing various tasks. He helped build crates for holding ammonium nitrate and was arrested unloading the fertilizer truck. He gained attention for his clothing, which had the words "Student Farmer" printed on them as a cover story for

1 R v. Abdelhaleem, (2010) O.J. No. 5693 at paras 60–63.

the purchase. He pled guilty and was initially sentenced to 12 years, which was increased to 18 years on appeal.

Supporting Cast and Other Key Figures

Mubin Shaikh

Shaikh was inserted into the Toronto 18 at a banquet hall dinner, first acting as a confidential human source for CSIS and then becoming a confidential police informant for the RCMP. He attended the first camp as well as many key meetings between Ahmad and Amara. Shaikh's testimony was the most complete picture of the inner workings of the group, and it was relied upon extensively throughout the Toronto 18 trials. He later wrote a book about the experience.

Shaher Elsohemy

Elsohemy was a former friend of Shareef Abdelhaleem and was approached by the latter in early 2006. Elsohemy's uncle owned a chemical business, and Abdelhaleem considered him a possible fertilizer supplier for Amara's explosives. CSIS and the RCMP approached Elsohemy about acting for them, and Elsohemy became a human source for CSIS, a police informer for the RCMP and finally, on May 10, 2006, a police agent so that his electronic communications could be wiretapped. He provided testimony and information against the members of the bomb plot.

"Talib"

A self-identified fraudster, Talib offered Ahmad advice on how to defraud banks in a mortgage scheme to raise money for the group. The proposed plan involved using "strikers" – people with good credit ratings to apply for loans which could then be cashed out. Talib claimed to have run this con successfully in the past using "white girls" – blonde women with addiction issues who looked presentable but were sufficiently desperate to engage in such activity.

Appendix B: Key Events in the Toronto 18