

# The Dangers of *Charter*-Proofing the Toronto 18's Prosecution

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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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\* Professor of Law, University of Toronto.

## I. INTRODUCTION

**C**harter 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.<sup>1</sup> 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.<sup>2</sup> For others, it may be a sign of a Canadian indulgence in due process that “seems never due to end.”<sup>3</sup> There is some truth in both of these

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<sup>1</sup> *Toronto Star Newspapers Ltd v. Canada*, 2010 SCC 21; *R v. Ahmad*, 2011 SCC 6.

<sup>2</sup> 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).

<sup>3</sup> 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*.<sup>4</sup> 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,<sup>5</sup> *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,<sup>6</sup> 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.<sup>7</sup> 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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<sup>4</sup> Re Section 83.28 of the Criminal Code, 2004 SCC 42; R v. Khawaja, 2012 SCC 69.

<sup>5</sup> 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).

<sup>6</sup> See, for example, the chapters on sentencing and corrections by Michael Nesbitt and Reem Zaia, respectively.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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 Toronto 18's *Charter*-related claims about bail failed and how many of the accused spent years in pre-trial detention.

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<sup>8</sup> *Toronto Star*, SCC.

<sup>9</sup> 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.

<sup>10</sup> 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).

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*.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

The next two sections will examine specific *Charter* challenges to police and prosecutorial action. In a number of cases, the courts found that the

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<sup>11</sup> Canadian Civil Liberties Association v. Canada, 2019 ONCA 243; British Columbia Civil Liberties Association v. Canada (Attorney General), 2019 BCCA 228.

<sup>12</sup> 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).

<sup>13</sup> 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.

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*.<sup>14</sup> 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.<sup>15</sup> 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*<sup>16</sup> 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*.

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

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<sup>14</sup> 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.

<sup>15</sup> *R v. Ansari*, 2015 ONCA 575.

<sup>16</sup> *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*.

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*.<sup>17</sup> In 2019, the Justin Trudeau government retained these threat reduction powers while taking some steps to ensure consistency with the *Charter*.<sup>18</sup> 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.<sup>19</sup> 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 more restrained than the American response or the Australian response that was not subject to any Bill of Rights.<sup>20</sup>

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<sup>17</sup> 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).

<sup>18</sup> National Security Act, S.C. 2019, c. 13.

<sup>19</sup> [2004] UKHL 56 aff'd app 3455/05 European Court of Human Rights Grand Chamber.

<sup>20</sup> See generally Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge, 2011).

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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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 facilitate or carry out a terrorist activity.<sup>24</sup> This was patterned after a 1997 offence of participation in the activities of a criminal organization.<sup>25</sup> The

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<sup>21</sup> *Re Section 83.28 of the Criminal Code*, SCC; *Re Vancouver Sun*, 2004 SCC 43.

<sup>22</sup> Doreen McBarnet, *Conviction* (London: MacMillan, 1981); Richard Ericson, *The Constitution of Legal Inequality* (Ottawa: Carlton University Press, 1983).

<sup>23</sup> Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto, 1999), 11-50.

<sup>24</sup> Criminal Code, R.S.C. 1985, c. C-46, s. 83.18.

<sup>25</sup> Criminal Code, s. 467.11.

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*.<sup>26</sup>

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.<sup>27</sup> 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"<sup>28</sup> 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 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

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<sup>26</sup> R v. N.Y., 2012 ONCA 745; R v. Ansari, 2015 ONCA 575; *Khawaja*, SCC.

<sup>27</sup> International Relief Fund for the Afflicted and Needy v. Canada, 2015 FC 435.

<sup>28</sup> Criminal Code, s. 83.01(1.1).

evidence.<sup>29</sup> 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<sup>30</sup> 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,"<sup>31</sup> and others questioned why Canada could not simply convict the Toronto 18 of disloyalty to the state in the form of treason.<sup>32</sup> These critiques, however, did not account for the almost 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*.

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<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> Christie Blatchford, "There's no *Charter* right to jihad... at least not yet," *Globe and Mail*, April 26, 2008.

<sup>32</sup> 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.

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.”*<sup>33</sup>

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.”<sup>34</sup>

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:

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<sup>33</sup> 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.

<sup>34</sup> 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/>.

“[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.”<sup>35</sup> The father of one of the accused, Mohammed Abdelhaleem, observed, “[t]he damage is already done.”<sup>36</sup>

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.”<sup>37</sup> 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.<sup>38</sup> 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.”<sup>39</sup> 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 fair trial.<sup>40</sup> 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

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<sup>35</sup> Michelle Sheppard and Isabel Teotonio, “Bombing making material delivered in police sting,” *Toronto Star*, June 4, 2006.

<sup>36</sup> Sheppard and Teotonio, “Bombing making material delivered in police sting.”

<sup>37</sup> Isabel Teotonio, “A tale of two trials,” *Toronto Star*, September 29, 2007.

<sup>38</sup> *R v. Ghany*, 2006 CanLII 24454 at para 65 (Ont Sup Ct) [*Ghany* (ONSC)].

<sup>39</sup> *R v. Ahmad*, Transcript, June 12, 2006, 30, 49.

<sup>40</sup> *R v. Toronto Star Newspapers Ltd*, 2006 CanLII 25418 at para 125 (ON SC).

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”<sup>41</sup> 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.”*<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup> 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

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<sup>41</sup> *Khawaja*, SCC.

<sup>42</sup> *Toronto Star Newspapers*, CanLII at para 130.

<sup>43</sup> *Toronto Star Newspapers*, CanLII at para 126.

<sup>44</sup> *Toronto Star Newspapers*, CanLII at paras 117-24.

show hosts.<sup>45</sup> 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.<sup>46</sup> 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."*<sup>47</sup>

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.<sup>48</sup> These questions attempted to deal with the extensive and almost universally negative pre-trial publicity surrounding the case.

A particularly egregious example of such pre-trial publicity – one that flirted with religious stereotypes, if not religious hatred – was published by

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<sup>45</sup> 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.

<sup>46</sup> *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.

<sup>47</sup> Christie Blatchford, "Ignoring the biggest elephant in the room," *Globe and Mail*, June 5, 2006.

<sup>48</sup> *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, "Juries, Miscarriages of Justice and Bill C-75: Superficial or Radical Reform?," *Canadian Bar Review* 98, no. 2 (2020).



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.<sup>49</sup>

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 struck the mandatory publication ban subject to a 12-month suspended declaration of invalidity.<sup>50</sup> 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,

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<sup>49</sup> 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.

<sup>50</sup> *Toronto Star Newspapers Ltd v. Canada*, 2009 ONCA 59.

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.<sup>51</sup>

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.<sup>52</sup> 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 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."<sup>53</sup> The Court expressed concerns that bad character evidence from the bail hearing might be published.<sup>54</sup> This downplayed that some of the

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<sup>51</sup> Factum of Ahmad Ghany and Amin Durrani to the Supreme Court of Canada, October 2009.

<sup>52</sup> 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.

<sup>53</sup> "A loss for open courts," *Toronto Star*, June 11, 2010.

<sup>54</sup> *Toronto Star v. Canada*, 2010 SCC 21 at para 52.

Toronto 18, such as Ahmad Ghany, the McMaster health sciences graduate, had been granted bail in part on the basis of good character evidence.<sup>55</sup>

*“[A]lthough not a perfect outcome, the mandatory publication ban is a reasonable compromise.”*<sup>56</sup>

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.<sup>57</sup>

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.<sup>58</sup>

*“[A] profound interference with the open court principle.”*<sup>59</sup>

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.

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

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<sup>55</sup> “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.

<sup>56</sup> *Toronto Star*, SCC.

<sup>57</sup> *Toronto Star*, SCC at para 37.

<sup>58</sup> *Toronto Star*, SCC at para 38.

<sup>59</sup> *Toronto Star*, SCC at para 38.

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.<sup>60</sup>

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.<sup>61</sup> The *Charter* and the courts would ensure 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.<sup>62</sup>

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<sup>60</sup> “Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention,” Canadian Civil Liberties Association, July 2014, <https://ccla.org/cclanewsites/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf>.

<sup>61</sup> *Ghany* (ONSC), CanLII at para 38.

<sup>62</sup> Teotonio, “A tale of two trials.”

“What we've learned over the last 19 months is that 'innocent until proven guilty' is a phrase. It has no weight.”<sup>63</sup>

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.”<sup>64</sup>

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.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup>

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.”<sup>68</sup> This mirrored the name of those who protested

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<sup>63</sup> Isabel Teotonio, “Give us a trial or let us go,” *Toronto Star*, December 26, 2007, quoting Shareef Abdelhaleem.

<sup>64</sup> *R v. Ansari*, 2006 CanLII 42261 at para 27 (ON SC).

<sup>65</sup> *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.

<sup>66</sup> *R v. Hall*, 2002 SCC 64.

<sup>67</sup> See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, 2nd ed. (Toronto: Irwin Law, 2016), 285–325, 335–83.

<sup>68</sup> Teotonio, “Give us a trial or let us go.”

the conditions of pre-trial detention who called themselves “the presumption of innocence project.”<sup>69</sup> 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.<sup>70</sup> 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.”*<sup>71</sup>

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.<sup>72</sup> 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 segregation – also known as solitary confinement – should any “threat, behaviour or new information” warrant it.<sup>73</sup> 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

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<sup>69</sup> James Bradshaw, “Protesters decry treatment of bomb suspects,” *Globe and Mail*, April 23, 2008.

<sup>70</sup> June 12 transcript, on file with author.

<sup>71</sup> “Toronto 18 deserve better treatment,” *Toronto Star*, April 24, 2008, written by 17 organizations opposing the Toronto 18’s conditions of detention.

<sup>72</sup> *R v. Ahmad*, 2007 CanLII 28750 at para 2 (ON SC) [*Ahmad* 2007].

<sup>73</sup> *R v. Ahmad*, [2007] O.J. No. 2891 at paras 9, 77 (Ont Sup Ct).

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.<sup>74</sup> 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*.<sup>75</sup> 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 may be unpopular.”<sup>76</sup> 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.”<sup>77</sup>

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<sup>74</sup> 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).

<sup>75</sup> *Ahmad* 2007, CanLII.

<sup>76</sup> “Toronto 18 deserve better treatment,” *Toronto Star*, April 24, 2008, allegation by a lawyer for Steven Chand.

<sup>77</sup> “Toronto 18 deserve better treatment,” *Toronto Star*.

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.”<sup>78</sup> Jamal had been imprisoned from his arrest in June 2006 to when he was granted bail in November 2007.

“*abu Ghraib lite?*”<sup>79</sup>

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.<sup>80</sup> There were also allegations that the prisoners had been fed pork and experienced delays in receiving dental treatment.<sup>81</sup> 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 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.”<sup>82</sup> At the same time, he attached scare quotes around Durrani’s claims of torture stating: “I

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<sup>78</sup> Tobi Cohen, “4 ‘terror suspects’ go free,” *Waterloo Record*, April 16, 2008; Isabel Teotonio “So-called terror zealot vindicated,” *Toronto Star*, April 16, 2008.

<sup>79</sup> Isabel Teotonio, “Terror suspected persecuted in jail, says lawyer,” *Toronto Star*, May 8, 2008.

<sup>80</sup> Teotonio, “Terror suspected persecuted in jail.”

<sup>81</sup> “Terrorist suspects troubling tales,” *Toronto Star*, April 9, 2008.

<sup>82</sup> *R v. Ahmad*, 2008 CanLII 54312 at para 10 (ON SC) [*Ahmad* 2008].



conclude that the so called ‘Torture’ application should not proceed until the conclusion of the trial.”<sup>83</sup> 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.”<sup>84</sup> 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* 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.

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<sup>83</sup> *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.

<sup>84</sup> *Ahmad* 2008, CanLII at para 11.

Nevertheless, scholars influenced by legal realism have predicted that judges will avoid strong remedies that may threaten social interests.<sup>85</sup> 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.<sup>86</sup> 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."<sup>87</sup> 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.<sup>88</sup> 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.

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".<sup>89</sup> Canada has a broad right of disclosure under the *Charter* that responded to concerns that non-disclosure of relevant material had caused

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<sup>85</sup> 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.

<sup>86</sup> *Ansari*, ONCA at paras 53–57, 73–82.

<sup>87</sup> *R v. Ahmad et al.*, 2010 ONSC 123 at para 30.

<sup>88</sup> *R v. N.Y.*, 2008 CanLII 24542 (ON SC).

<sup>89</sup> 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.

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.<sup>90</sup>

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.<sup>91</sup> 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.<sup>92</sup> The Toronto 18 had *Charter* rights, but not *Charter* remedies.

## 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.<sup>93</sup> The prosecutors used an

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<sup>90</sup> Ontario v. Ahmad, 2007 CanLII 21968 (ON SC).

<sup>91</sup> R v. N.Y., 2008 CanLII 15908 (ON SC).

<sup>92</sup> 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.

<sup>93</sup> Thomas Walkom, "Terror trial proceedings troubling," *Toronto Star*, September 25, 2007.

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.”<sup>94</sup>

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?”<sup>95</sup>

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 discretion.”<sup>96</sup> 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

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<sup>94</sup> “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.

<sup>95</sup> CTV Television, “One of the so-called ‘Toronto 18’ laments his legal limbo.”

<sup>96</sup> *R v. Ahmad*, 2008 CanLII 54311 at para 57 (ON SC).

deliberations leading to the decision to stop the preliminary inquiry.<sup>97</sup> 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<sup>98</sup> – security-cleared special advocates who see and challenge the secret information – was not used in the Toronto 18 prosecution.<sup>99</sup> 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.”<sup>100</sup> 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.<sup>101</sup> Again, my point is not to suggest that these *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.

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<sup>97</sup> R v. Ahmad, 2008 CanLII 27470 (ON SC).

<sup>98</sup> Charkaoui v. Canada, 2007 SCC 9.

<sup>99</sup> For proposals for such use, see Forcese and Pelletier in this volume.

<sup>100</sup> R v. Ahmad, 2008 CanLII 34268 at para 34.

<sup>101</sup> The operation of this latter privilege will be examined in part VIII of this chapter.

## 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.”<sup>102</sup>

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.”<sup>103</sup> 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.”<sup>104</sup> 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.<sup>105</sup> 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 eventually the Supreme Court would defer to Parliament’s preventive purpose in enacting the ATA.

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<sup>102</sup> R v. Ahmad, 2009 CanLII 84774 at para 55 (ON SC) [*Ahmad* (ONSC)], quoting then-Minister of Justice Anne McLellan.

<sup>103</sup> *Ahmad* (ONSC), CanLII at para 52.

<sup>104</sup> *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

<sup>105</sup> 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.

“[C]learly, the net is broadly cast.”<sup>106</sup>

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,”<sup>107</sup> it was not constitutionally overbroad in part because of the harm of “the preparatory acts criminalized in s. 83.18(1)”<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

It also raised concerns that the legislature could “make a terrorist out of nothing”.<sup>111</sup> 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 of new evidence of innocence.<sup>112</sup> Broad post-9/11

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<sup>106</sup> *Ahmad* (ONSC), CanLII at para 11.

<sup>107</sup> *Ahmad* (ONSC), CanLII at para 11.

<sup>108</sup> *Ahmad* (ONSC), CanLII at para 87.

<sup>109</sup> On sentencing, see Michael Nesbitt in this volume.

<sup>110</sup> 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).

<sup>111</sup> 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).

<sup>112</sup> 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).

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”.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup> For example, Thomas Walkom observed in the *Toronto Star* after the first conviction of a young offender among the Toronto 18<sup>116</sup> that:

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

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<sup>113</sup> *Ahmad* (ONSC), CanLII at para 73.

<sup>114</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

<sup>115</sup> 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).

<sup>116</sup> 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., 6495 at para 21 (Ont Sup Ct). The Ontario Court of Appeal upheld the conviction in *R v. N.Y.*, 2012 ONCA 745.



that under anti-terrorism laws, the government need not supply incontrovertible, direct evidence of a person's guilt.<sup>117</sup>

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."<sup>118</sup> 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."<sup>119</sup> 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*.<sup>120</sup>

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 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."<sup>121</sup> The Court of

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<sup>117</sup> "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.

<sup>118</sup> Thomas Walkom "Terror verdict bad news for rest of Toronto 18," *Toronto Star*, September 26, 2008.

<sup>119</sup> *Ansari*, ONCA at para 154.

<sup>120</sup> As quoted in Allison Jones, "Accused Toronto 18 member did not know of plot, did nothing criminal, lawyer says," *Canadian Press*, June 7, 2010.

<sup>121</sup> *Ansari*, ONCA at para 34.

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.<sup>122</sup> 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.<sup>123</sup> *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*.<sup>124</sup> 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.<sup>125</sup>

## 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

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<sup>122</sup> *Ansari*, ONCA at para 122.

<sup>123</sup> For additional discussion, see Aver Emon and Aaqib Mahmood in this volume.

<sup>124</sup> *Ansari*, ONCA at paras 187–89.

<sup>125</sup> *Khawaja*, SCC at paras 51–52.

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.”*<sup>126</sup>

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.”<sup>127</sup>

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 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 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

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<sup>126</sup> R v. Ahmad, 2009 CanLII 84788 at para 7 (ON SC) [Ahmad 84788].

<sup>127</sup> Ahmad 84788, CanLII at para 7.

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*.<sup>128</sup> 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.<sup>129</sup> 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,<sup>130</sup> 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 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.

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<sup>128</sup> R v. Ahmad, 2009 CanLII 84776 (ON SC).

<sup>129</sup> R v. Ahmad, 2009 CarswellOnt 10015 (Ont Sup Ct).

<sup>130</sup> R v. Ahmad, 2009 CanLII 84782 (ON SC).

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.<sup>131</sup>

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.<sup>132</sup>

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

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<sup>131</sup> For more discussion of these issues, see Craig Forcese and Croft Michaelson in this volume.

<sup>132</sup> For further arguments, see Kent Roach, "Constitutional Chicken': National Security Confidentiality and Terrorism Prosecutions," *Supreme Court Law Review* 54, no. 13 (2011): 357.

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.<sup>133</sup> 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.<sup>134</sup>

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

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<sup>133</sup> 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.

<sup>134</sup> 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.

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 overconfidence 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”<sup>135</sup> 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 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

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<sup>135</sup> *Khawaja*, SCC.



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.