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KHAWAJA AND THE 'AMAZING BROS': A TEST OF CANADA'S ANTI-TERRORISM LAWS AS A RESPONSE TO THE CHALLENGES OF TRANSNATIONAL TERRORISM

By/par

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ABSTRACT

Mohammad Momin Khawaja was the first person in Canada to be charged with offences, under the anti-terrorism provisions of the Criminal Code which were proclaimed into law on December 24, 2001. He was convicted, on October 29, 2008, of participating in a terrorist group that was based in the United Kingdom, and whose members Khawaja referred to as the 'amazing bros'. On March 12, 2009, he was sentenced to 10 ½ years in a penitentiary.

Canada's national security is sufficiently threatened by transnational terrorism to necessitate robust criminal offence provisions and procedures to prosecute terrorism cases. The Khawaja case demonstrates that current Canadian legal means are sufficient to handle the twin challenges of meeting international obligations to suppress terrorist activity, and maintaining the values and principles of Canadian liberal democracy and its justice system.

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> *Life in the west is a veil over ones eyes; you never really see through till u leave…I made my intention then to leave the west permanently, that was 2 weeks ago in Pakistan…I'm not from the States, but from Canada. We've got blue passports, tall skyscrapers, a really long street, and a messed up Society too. Except we pay our allegiance to the queen, not bush. But who cares, they're all on the same boat*
>
> - Mohammad Momin Khawaja in an email, 8 August 2003[1]

INTRODUCTION

Mohammad Momin Khawaja was the first person in Canada to be charged with offences under the anti-terrorism provisions of the Criminal Code which were proclaimed into law on December 24, 2001. The *Anti-Terrorism Act* (ATA) was passed by Parliament in direct response to the terrorist attacks in New York and Washington on September 11, 2001.[2] This legislation defined Canada's notion of terrorism, created criminal offence and punishment provisions for the commission and support of terrorist activity in the *Criminal Code*, and was intended to bring Canada in compliance with the obligations imposed by United Nations Security Council Resolution 1373.[3]

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[1] *R.* v. *Khawaja* [2008] O.J. No. 4244 (S.C.J.), [Reasons for Judgment], paragraph [32].
[2] *Anti-Terrorism Act*, SC 2001, c. 41.
[3] UN Security Council Resolution 1373, 28 September 2001, available from http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement; Internet; accessed 12 May 2009; Ronald J. Daniels et al., Editors, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), 438; Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law, 2007), 262. UN SCR 1373 created a universal obligation to criminalize and punish terrorist acts, and is discussed further **at p. 17 of this paper.**

Khawaja was convicted on October 29, 2008 of participating in a terrorist group whose members he referred to in email as the 'amazing bros,'[4] and facilitating terrorist activity following a criminal trial in Ottawa, presided over by Justice Douglas Rutherford of the Ontario Superior Court of Justice. On March 12, 2009, he was sentenced to 10 ½ years for his crimes, in addition to the five years he had already spent in custody, having been denied bail.[5] Eight years after 9/11, the outcome of the first criminal prosecution for terrorist activity under the terrorism offence provisions marks an occasion to examine the actions taken within the Canadian criminal justice system to counter transnational terrorism. Typically perceived to be shrouded in secrecy or not otherwise well understood, state actions in response to terrorism were revealed through a public and transparent court process. The case has also provided an opportunity to reflect on the nature of the terrorist threat facing Canada.

Canada's national security is sufficiently threatened by transnational terrorism to necessitate robust criminal offence provisions and procedures to prosecute terrorism cases. The Khawaja case demonstrates that current Canadian legal means are sufficient to handle the twin challenges of meeting international obligations to suppress terrorist activity, and maintaining the values and principles of Canadian liberal democracy and its justice system.

Terrorism poses a challenge to Canada directly and indirectly. Al Qaeda and other transnational terrorist networks still exist and are active, inspiring homegrown terrorist activity within Canada and elsewhere, and attacking allied forces in Afghanistan. Just as importantly, in defending its national security from transnational terrorism,

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[4] *R.* v. *Khawaja*, Reasons for Judgment, [126].
[5] *R.* v. *Khawaja* [2009] Court file no. 04-G30282 (S.C.J.) [Reasons for Sentence]. The sentence is under appeal by the Prosecution and Defence.

Canada is challenged to ensure that its responses are effective, accountable, and consistent with its democratic values and system of government, and in compliance with our *Charter of Rights and Freedoms (Charter).* Canada's parliament enacted the ATA, setting out a definition of terrorist activity, creating terrorism offences, and providing investigative tools in order to bring terrorists to justice in this country. In doing so, Canada also brought itself in compliance with international obligations to criminalize terrorism and cooperate in the prevention of terrorist acts and prosecution of terrorists.[6] Concerns have arisen about the complex nature of international terrorism investigations, and the risks of cooperating with states that do not share our respect for human rights.

Decisions made by the executive, and investigations carried out by effective law enforcement and security intelligence efforts typically take place away from the public eye. Since the passage of the legislation by Parliament in 2001, the evaluation of the effectiveness of the ATA as a tool to respond to terrorism and its impact on our democracy has largely fallen to the judicial branch, which makes the study of terrorism cases before the courts, as few as there have been, one of the most effective means of evaluating the true impact of anti-terrorism efforts.

The Khawaja case was considered to be a "test" of Canada's anti-terrorism laws, and particularly, of the effectiveness of law enforcement and security intelligence efforts in the investigation of transnational terrorism cases vice a military response[7], and of the criminal justice system's ability to handle often complex and massive international

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[6] See UN Security Council Resolution 1373, 28 September 2001, available from http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement; Internet; accessed 12 May 2009.

[7] Canada responded militarily following the 9/11 attacks when NATO invoked Article V of the *Treaty of Washington*, requiring that any attack on a NATO member be interpreted as an attack on all. However, unlike the US, which initially viewed terrorism as a military problem, and favoured military trials over criminal trials, our principal effort and domestic commitment has been one of criminal law enforcement.

terrorism trials.[8] It was also a test of Canada's ability to meet its international obligations to share information with other states and assist in the conduct of investigations and prosecutions of individuals for terrorist acts, wherever they might occur.

The prosecution provided an opportunity for Canadians and others to obtain information about the nature of terrorist activity that affects Canada and is perpetrated within its borders. One case, however, does not make a sample, and it can only be used here for illustrative purposes. In democratic systems, criminal prosecutions are typically conducted in open courts and in a transparent manner. This enables researchers, who study news reports of an investigation, the documentary and surveillance evidence called and challenged at trial, and the findings of judges, to gain insight and make reliable assessments about terrorist activity and the state's response to terrorism. This information is thought by Marc Sageman, a counter-terrorism consultant, forensic psychiatrist and author, to be more reliable than anecdotes, government statements about the terrorist threat, or scrubbed and unsourced intelligence reports.[9]

It must be acknowledged however, that criminal trials take a long time, and policy choices about the best way to respond to the challenges of transnational terrorism cannot await their outcome. The Khawaja investigation and prosecution proceeded over five years amid a swirl of other national security related case and events: the Arar Inquiry, the security certificate litigation under Canada's immigration laws, the Air India Inquiry, ever-thickening security measures along the Canada-US border, and the arrest of 18 individuals in Toronto for alleged terrorist activity, to name just a few. A chronological

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[8] Jim Brown, "Ottawa gets passing grade in prosecution," *The Canadian Press*, 29 October 2008; "Khawaja verdict is test for anti-terror law," *The Canadian Press*, 29 October 2008; C. Freeze, "Khawaja to be sentenced under terror law," *The Globe & Mail*, 11 March 2009.

[9] Marc Sageman, *Leaderless Jihad: Terror Networks in the 21st Century* (Philadelphia: University of Pennsylvania Press, 2008), 26.

list or timeline of relevant events, including significant milestones in the Khawaja prosecution is attached as **Appendix 1** to this paper. The case of Momin Khawaja demonstrated how the anti-terrorism laws worked and were adapted in practice, and helps to illustrate Canada's practical criminal law enforcement approach to the challenges of protecting its national security from the threat of terrorism.

This paper will first attempt to set the Khawaja case in the context of other significant terrorism related cases and events in Canada, beginning before 9/11, with the bombing of Air India Flight 182 and the case of Ahmed Ressam, also known as the Millenium Bomber. Post 9/11, the paper will look briefly at the use of the security certificate process under Canada's immigration laws to deal with individuals suspected of terrorist activity, and following the passage of the ATA, the case of Maher Arar who came to be of interest to Canadian police in one of the first terrorism investigations under the new anti-terrorism legislation.

The second part of the paper will focus on the ATA and the "made in Canada" approach to countering transnational terrorism through the criminal justice process.

The third part of this paper will examine the Khawaja investigation, including his links to a terrorist group in the United Kingdom, and the ensuing cooperation and information sharing between Canadian, UK and US law enforcement and prosecution authorities. Some of the challenges to investigating and prosecuting the case will be explored, based on a review of court rulings dealing with the constitutionality of the definition and offence provisions of the ATA, and the need to reconcile the requirement for disclosure to ensure the accused's right to full answer and defence and a fair trial, and

the need for secrecy to protect investigative methods and operations, and intelligence sources and caveats on the use of foreign intelligence.

The paper will then consider the reasons for the conviction and sentence of the first person in Canada to be charged with terrorism offences. It will conclude by identifying issues and cases for further consideration as Canada continues to deal with allegations of terrorist activity with its criminal law enforcement and justice system approach.

I BACKGROUND/CONTEXT

Canada's response to terrorism pre 9/11

Canadian legislators had refrained from enacting offences specifically referring to terrorism prior to the attacks on September 11, 2001, although the *Criminal Code* had largely kept up with international commitments to ratify and implement some ten UN conventions that dealt with terrorist acts such as hijacking, hostage taking, and offences against aviation infrastructure and marine platforms.[10] Prosecutors relied on other serious criminal code offence provisions such as murder and organized crime to conduct prosecutions and to respond to extradition requests.[11] Both the 1985 bombing of Air India Flight 182 and the Ahmed Ressam cases would bring transnational terrorism to Canada, and raise questions, within Canada, and among its allies, about Canada's ability

[10] There are now 13 UN conventions against terrorism, and a description of each may be found on the UN's website, UN Action to Counter Terrorism, at http://www.un.org/terrorism/instruments.shtml; Internet; accessed 15 May 2009.

[11] See for example *Germany (Federal Republic) v. Ebke* (2001) [2001] 6 W.W.R. 517 (N.W.T.S.C.). Ebke was wanted for terrorism offences in Germany for his involvement in a group known as the Revolutionary Cells which carried out explosions and kneecappings of judges in the 1980s. Canadian courts relied on the organized crime provisions to meet the double criminality requirement that the act be criminal in both the requesting and requested state.

to deal with terrorism using a traditional criminal law justice approach, with all the constraints of due process. These questions would continue after 9/11.

Air India Bombing

The twenty year investigation of the bombing of an Air India flight, believed initially to be the manifestation of a political struggle taking place outside of Canada, revealed that individuals within Canada were capable of massive terrorist attacks on Canadians, which were international in scope. The struggle to prosecute the case continued after 9/11 and raised many concerns about the effectiveness of Canada's security intelligence and law enforcement efforts in response.

On June 23, 1985, Air India Flight 182 exploded over the Atlantic en route from Montreal to London and carrying luggage loaded in Vancouver, killing 329 people. A related explosion killed two baggage handlers at an airport in Tokyo. The alleged perpetrators had been under surveillance by the newly created Canadian Security Intelligence Service (CSIS). A criminal investigation followed, and three prosecutions were conducted in Canada. In 1991, Inderjit Reyat Singh was convicted of manslaughter in relation to the Tokyo bombing, and sentenced to 10 years in prison. In 2003, he plead guilty to manslaughter and aiding in the preparation of the explosive device used in Flight 182, and was sentenced to a further five years. The 2005 prosecution of Ripudaman Singh Malik and Ajaib Singh Bagri ended in acquittal on 331 charges of first degree murder.[12]

The case raised a host of issues concerning the effectiveness of security operations in Canada, including: the nature of the relationship between CSIS and the

[12] *R.* v. *Malik & Bagri*, 2005 BCSC 350.

Royal Canadian Mounted Police (RCMP) and its impact on effective cooperation in terrorism cases, the use of intelligence as evidence, and the ability of the criminal justice system and administration to handle a major terrorism case. In May 2005, the Harper government ordered a public inquiry, under Justice John Major. The terms of reference asked Justice Major to make findings and recommendations as to whether there were deficiencies in the assessment by Canadian officials of the threat posed by Sikh terrorism, and whether changes in practice or legislation are required to prevent problems of cooperation in the investigation of terrorism offences in the future, and address challenges in prosecuting terrorism cases. In a paper written for the Inquiry,[13] Kent Roach examined some challenges unique to Canadian terrorism prosecutions, analyzed difficulties reconciling fair trial rights and legitimate secrecy, and made recommendations for amendments to current legislation and procedures. The Commission finished hearing evidence in the summer of 2008, and has yet to produce its report.

The Ressam Investigation and Prosecution

On December 14, 1999, US border officials chased and captured Ahmed Ressam, an Algerian and Canadian refugee claimant, at the Port Angeles, Washington ferry crossing. He was carrying explosives and bomb making equipment in the trunk of his rental car, and was intending to attack the Los Angeles Airport. Ressam had been under surveillance by CSIS and the RCMP, but left Canada undetected. Evidence collected in Canada, was entered at his US trial.

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[13] Kent Roach, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation Between Intelligence and Evidence*, Vo14. of the Research Studies of the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (Ottawa: Supply and Services), 42.

The Ressam case shook American authorities. Their investigation determined Ressam had undergone terrorist training in Afghanistan, and had joined a cell of Algerians who had planned attacks on the US on behalf of Al Qaeda.[14] Canadian authorities learned he had obtained a Canadian passport using false identity and supported himself by criminal activity. The significance of the incident is the lasting impression it left with US authorities that Canadian immigration and security policies are lax. It is the basis for the myth that the 9/11 hijackers entered the US from Canada, as uttered by Hilary Clinton in 2001, and repeated in 2009 by Janet Napolitano, Secretary of Homeland Security for the Obama Administration. Even when corrected, the Head of DHS continued to suggest that unknown to the public, terrorists had been detected crossing the border, thus justifying ever thickening security measures put in place along the northern border.[15]

The terrorism threat post 9/11

Security Certificates and the case of Adil Charkaoui

The *Immigration and Refugee Protection Act* (IRPA) contains procedures for detaining and removing non-Canadians seeking entry to Canada who present a risk to Canada's national security, either by way of inadmissibility proceedings, or through the security certificate process.[16] The latter has generated controversy and intense litigation. Under this process, the Minister of Immigration and the Minister of Public Safety sign a certificate declaring a foreign national or non-permanent resident inadmissible to Canada

[14] Wesley Wark, "Learning lessons (and how) in the war on terror: The Canadian experience," *International Journal*, Vol. 60, Iss. 1 (Winter 2004/2005), 71.
[15] "Napolitano's comments about Canada's border spark diplomatic kerfuffle," *The Canadian Press*, 21 April 2009.
[16] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 77.

on grounds of security, usually based on an intelligence brief from the Canadian Security Intelligence Service (CSIS). A suspected terrorist may then be held in detention, pending removal proceedings. The prospect of lengthy or indefinite detention, hearings conducted in secret and on the basis of limited disclosure, and concerns about removal to countries that practiced torture or cruel and unusual treatment, led to constitutional challenges to the process.

In 2007, the Supreme Court of Canada (SCC), considering the case of Adil Charkaoui, an Algerian suspected of terrorist activity, declared the procedure under the *IRPA* for determining whether a certificate is reasonable, and the detention review procedures, infringed s. 7 of the ***Charter,*** which guarantees the right to life, liberty and security. The SCC found the IRPA's procedures were not in accordance with the principles of fundamental justice, and suspended its declaration for one year to allow Parliament time to devise a new process.[17] Amendments to the IRPA now provide for a process whereby a special advocate may be appointed to protect the interests of the subject of security certificate hearings *in camera* where the subject and his or her counsel are not allowed to be present or to have access to information which is being protected for reasons of national security confidentiality.[18]

In 2008, the SCC again ruled on the Charkaoui immigration proceedings, applying s. 7 of the *Charter* to the duty of CSIS to preserve and disclose its investigation notes, akin to the requirements of police in criminal proceedings, saying that the

[17] *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2007 SCC 9.
[18] *Immigration and Refugee Protection Act*, 2008, S.C. c. 3 s. 4. See section 83.

consequences of security certificate procedures are often more severe than the outcome of many criminal prosecutions.[19]

Although the IRPA procedures had existed prior to the ATA, critics of the security certificate process considered the two acts in tandem. The security certificate litigation, especially as it related to the use of information that the state wished to keep secret, would inform, and be informed by, litigation in the criminal courts on how to proceed with a fair trial, while protecting information from disclosure.

Maher Arar

Criminal trials provide a window into the nature of the transnational terrorism threat and how well the state is able to cope with that threat. But it must be kept in mind that it still provides only a limited view. Not all criminal and security intelligence investigations result in charges and public trials. The Khawaja investigation followed an earlier Ottawa RCMP investigation of Canadian citizens believed to be affiliated with Al Qaeda. This was Project AOCanada, which came under scrutiny of not one but two public inquires.[20] Project Awaken was proceeding just as Justice Dennis O'Connor was beginning his Inquiry into the actions of Canadian officials, including RCMP, CSIS and the Department of Foreign Affairs (FA) in relation to the detention of Maher Arar. Arar was a person of interest in an RCMP investigation that focused on two other individuals, suspected of procurement activity on behalf of terrorist groups and alleged to have been part of plot to blow up Parliament Hill.

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[19] *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2008 SCC 38.

[20] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar *Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006); Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki Ahmad Abou-Elmaati and Muayyed Nureddin. *Report* (Ottawa: Public Works and Government Services Canada, 2008).

Although Justice O'Connor concluded that there was no evidence that Canadian officials participated or acquiesced in the American authorities' decisions to detain and depart him to Syria, it was "very likely" that, in making their decisions, Americans had relied on information about Arar provided by the RCMP, "some of which portrayed him in an inaccurate and unfair way."[21] It was against this backdrop that information was being exchanged during the investigation of Momin Khawaja among states including Canada, the UK and the US.

Thus the Khawaja case represented a significant challenge for Canada. The Air India and Ressam cases had raised concerns about the effectiveness of terrorism investigations and prosecutions. The Courts continued to emphasize fundamental rights and due process in all terrorism related proceedings. Canada needed to assure multinational partners and especially the US that it was a capable security partner.

One month after Khawaja's arrest, the Canadian government published Canada's first national security policy, entitled "Securing an Open Society," which set out three national security objectives: protecting Canadians at home and abroad, ensuring Canada was not used as a base for terrorist acts against other states, and contributing to international security. Those objectives were prefaced, however, with statement that Canada's approach to security issues was "crafted to balance the needs for national security with the protection of core Canadian values of openness, diversity and respect for civil liberties."[22]

II THE ANTI-TERRORISM ACT

[21] *Analysis and Recommendations*, 14.
[22] Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy* (Ottawa: April 2004), vii.

The ATA was enacted as much to ensure Canada's ability to participate in international efforts to combat terrorism, as to be able to cope with terrorism within its borders. At the end of the Cold War, new approaches to relations among states on security matters were required, as well as within states as to how to manage threats such as terrorism which are transnational in nature. Though international crime and cross border terrorism existed during the Cold War, they were not the direct focus of security discussions.

Unlike traditional military threats, criminal acts of terrorists are more diffuse, and less confined to a single geographic area thanks to conveniences of international travel and the Internet, which enable like-minded individuals to form networks and move money and resources easily. Terrorists that were largely non-state actors were emerging, using new weapons to attack civilians and intimidate governments. The methodology and motivation of Al Qaeda were starkly different from that of a terrorist group like the Irish Republican Army for instance, as observed by Peter Clarke, Deputy Assistant Commissioner of the London Metropolitan Police. The IRA had been tightly structured, was essentially domestic in its scope of operations, used largely conventional weapons – bombs and bullets, avoided capture, and, although with great difficulty, could be negotiated with. In contrast, the characteristics of the new threat from transnational terrorism were almost the reverse:

> It is global in origin, reach and ambition. The networks are large, fluid, mobile and incredibly resilient. Arrested leaders or key players are quickly replaced, and the group will reform quickly. There has certainly been little in the way of determination to avoid capture, at least post-attack, and of course suicide has been a frequent feature of attack planning and delivery. There is no evidence of looking to restrict casualties. There are no warnings given and the evidence available to us suggests that, on the contrary, the intention is frequently inflict mass casualties. We have seen both conventional and unconventional weaponry,

> and to date – although perhaps this is not for me to judge – there has not been an obvious political agenda around which meaningful negotiations can be built.[23]

States were now challenged to determine which instruments would work best to respond effectively to this new threat.

The use of the military was one way to respond, and the multi-faceted 'war on terror' brought to bear in the US every instrument of national power, including military, intelligence, economic, law enforcement, diplomatic pressure and influence.[24] Canada has seen its border with the US subjected to increasing security measures, due to perceptions on the part of the US of lax security and a threat from the north.

Instruments such as intelligence collection, law enforcement and judicial means are more relevant and useful for preventing transnational terrorism and to hold terrorists to account, but to be effective must be coordinated internationally.[25] States must have legal and institutional frameworks in place that permits them to engage effectively with other states in efforts to combat terrorism. Criminal justice systems are usually structured on the basis of nation-states with primarily domestic effect, but stopping terrorists requires the ability to pursue criminals across boundaries, co-operate and exchange information with foreign law enforcement and intelligence agencies, and even conduct prosecutions on a multinational basis.[26] Government institutions needed to develop greater agility and responsiveness, and inhibitions on information sharing and certain

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[23] Peter Clarke, "Lessons Learned from Terrorist Investigation in the United Kingdom," *RUSI Journal*, Vol. 151, Iss. 2 (April 2006), 22.
[24] Phil Williams, "Strategy for a new World: Combating Terrorism and International Organized Crime," in *Strategy in the Contemporary World*, ed. John Baylis et. al., 192-208 (New York: Oxford University Press, 2007), 203.
[25] Wyn Rees, *Transatlantic-Counter Terrorism Cooperation: The new imperative* (New York: Routledge, 2006), 6-7.
[26] Ibid., 8.

kinds of investigation due to privacy concerns, inherently difficult and controversial, had to be resolved.[27]

Accordingly, responses to terrorism can "blur the distinction between international and external security" and "tend to merge domestic and foreign policy concerns."[28] Terrorist activity may originate outside the state, it may link in part to criminal activity within the state, or arise entirely as a domestic concern. But because states are measured by the extent to which they can cope with terrorist threats, since a state weakened by terrorism is a threat to other states, pressure exists to persuade states to adopt common measures. Transnational terrorism cooperation initiatives were added to the agendas of existing security regimes such as the United Nations, NATO and the G8, as well as other multinational and regional bodies in which Canada participates. The thrust of most of these efforts is to define terrorism as a common problem, although a common definition of terrorism has proven elusive, to encourage states to implement complimentary or at least similar prevention and enforcement measures to inhibit the financing, training, and movement of terrorists, and to cooperate in their efforts.[29]

For example, at the 2008 Hokkaido Toyako Summit, the G8 Leaders Statement on Counter-Terrorism reiterated these principles, confirmed the G8 states' commitment to strengthening the role of the UN and encouraged states to implement the UN's Global Counter-Terrorism Strategy and relevant Security Council resolutions. "[W]e reaffirm our commitment to countering terrorism with every means at our disposal, while ensuring the rule of law and respect for human rights and international law." The Leaders

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[27] Williams, "Strategies for a new World," 207.
[28] Rees, *Transatlantic-Counter Terrorism Cooperation*, 7.
[29] Karen Mingst and Margaret Karns, "The United Nations and Conflict Management," in *Leashing the Dogs of War*, ed. Chester A. Crocker et al., 497-520 (Washington: United States Institute of Peace Press, 2007) 513.

Statement also stressed the need to build capacity in states requiring assistance to meet their international obligations.[30]

Resolution 1373, passed by the Security Council on September 28, 2001, created a universal obligation to criminalize and punish terrorist acts by requiring states to "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts, or in supporting terrorist acts is brought to justice", and to "ensure that the punishment duly reflects the seriousness of such legal acts."[31] The Resolution also required that states take steps to prevent the commission of terrorist acts, including by providing warnings to other states through exchanges of information, and to "afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorists acts, including assistance in obtaining evidence in their possession necessary for the proceedings." States are obliged by the Resolution to report on their progress in implementation of its provisions. The UN also strives to develop best practices in counter-terrorism efforts.[32]

Resolution 1373 did not define "terrorist", and no universally agreed upon definition exists to this day[33]. It was observed by human rights groups that some states relied on the Resolution's anti-terrorism obligations to justify discriminatory and abusive practices and strategies that ran counter to human rights obligations. Since then, Security

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[30] G8 Leaders Statement on Counter-Terrorism 2008; http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080709_07_en.html; Internet; accessed 15 May 2009.
[31] S/RES/1373 (2001) http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement
[32] See for example United Nations Counter-Terrorism Implementation Task Force, *First Report of the CT Working Group on Radicalisation and Extremism that Lead to Terrorism: Inventory of State Programmes* (New York: UN, 2008).
[33] Cohen , *Privacy, Crime and Terror*, 164.

Council resolutions are careful to acknowledge that anti-terrorism measures be compliant with human rights obligations.[34]

Tensions arise within and between states where co-operation efforts are carried out by unequal actors,[35] due to the fact that actors have different priorities and capabilities. The US has seen terrorism as its foremost priority, and has taken extraordinary measures domestically and internationally, including the extraordinary rendition of suspects from one state to another, denying detainees due-process rights, and limiting the application of human rights conventions to its interrogation methods.[36] Some states have poor human rights records in relation to their detention and treatment of detainees, and approaches to them for assistance in investigations must be undertaken with this awareness.

This presents dilemmas for Canada as it seeks to carry out its obligations to cooperate internationally, some of which were highlighted in the Report of the Arar Commission of Inquiry, and in its recommendations for security officials investigating terrorist activity. "Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability."[37] Canadian investigators also need to have information sharing practices with other countries that ensure information provided and received is fair and accurate, and bears caveats as to permissible use.

The Canadian Approach

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[34] Forcese, *National Security Law*, 25.
[35] Rees, *Transatlantic Counter-Terrorism Cooperation*, 9.
[36] Jonathan Mahler, "After the Imperial Presidency," *New York Times Magazine*, 9 November 2008, 44.
[37] See Recommendation 14 of *Analysis & Recommendations*, at page 345.

A multitude of domestic and international factors influenced Canada's response to transnational terrorism. As Roach has argued:

> Policy-makers in this area must grapple with difficult issues that involve liberty, security, equality, privacy and Canada's international relationships. In addition, they must also respond to a seemingly overwhelming array of policy drivers including United Nations edicts, varying assessments of the threat environment, predictions about the restraints that will be imposed by courts under the Canadian Charter of Rights and Freedoms, recommendations by public inquiries, rights watchdogs and parliamentary committees, the experience of other countries and input from interest groups. The policy environment is dynamic and the issues are multifaceted. There are no easy answers. At the same time, there is a danger that the issues will be simplified, sensationalized and politicized in a partisan manner.[38]

The 'made in Canada' approach to transnational terrorism reflected all of these elements.

There was concern as to the speed in which Canada enacted the ATA. According to Department of Justice officials, while there was certainly intense activity between September 11 and December 24, 2001, which did not allow for the usual consultative process, portions of the Act were 'in the can' before 9/11.[39] For example, legislation to de-register charities out of concern they might be illicitly involved in diverting charitable contributions to terrorist financing had been drafted and was already before Parliament as Bill C-16 as Canada sought to comply with the 1999 UN Convention for the Suppression of Terrorist Financing.[40] Canada had also been working on the implementation of the UN Convention on the Suppression of Terrorist Bombing.[41] Canada had signed these two treaties, but legislation to implement them was required before Canada could become a party to them. The international reaction to 9/11 and the increased perception of threat

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[38] Kent Roach, "Better Late than Never: The Canadian Parliamentary Review of the Anti-Terrorism Act," *IRPP Choices*, Vol. 13, no. 5 (September 2007), 3.
[39] *The Security of Freedom*, 436.
[40] United Nations General Assembly, *Convention for the Suppression of Terrorist Financing* (New York: UN, 1999); http://untreaty.un.org/english/Terrorism/Conv12.pdf; Internet; accessed 15 May 2009.
[41] United Nations General Assembly, *Convention for the Suppression of Terrorist Bombings* (NewYork: UN, 1999); http://untreaty.un.org/English/Terrorism/Conv11.pdf; Internet; accessed 15 May 2009.

both expanded the scope of this legislation and added to the demand for a fast yet comprehensive response.

As a result, the ATA is a massive omnibus bill that not only creates new offence and enforcement provisions in the Criminal Code, but also significantly amended other security legislation including:

- the *Security of Information Act*, an update of parts of the old Official Secrets Act,
- the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*,
- the *Canada Evidence Act*, by codifying a procedure for determining whether information may be prohibited from disclosure by reason that its release would be injurious to Canada's national security, national defence or international relations,
- and the *National Defence Act*, acknowledging the Canadian Security Establishment and authorizing the provision of assistance to law enforcement.

The implementation of the ATA, and the use of its provisions by security officials would be scrutinized closely by academics, the media and Parliament, and eventually, the Courts.

While Courts were prepared to defer to Ministers and Parliament on matters of national security, and reliance was placed on the integrity and professionalism of law enforcement and the security intelligence service in times of crisis and in response to terrorism, it was predicted as inevitable that governments would overreact, and preemptive action results in privacy being invaded and innocent people being swept up

on baseless suspicion.[42] However, the ATA was not created as extraordinary or emergency legislation.[43] It was an ordinary act of Parliament, subject to the *Canadian Charter of Rights and Freedoms*, that brought about a series of national security related amendments related to existing laws and grafted new offence provisions and some investigative powers onto the existing procedural and substantive criminal law regime. It did not create new or special courts although it did provide procedures for handling sensitive information in judicial proceedings.

While terrorism cases were to be tried in the Superior Courts of the provinces and territories, government claims of immunity from disclosure of certain information for reasons of national security confidentiality would be heard in the Federal Court. This would provide challenges for the Khawaja prosecution, as will be discussed further below, as litigation proceeded in two courts at once.

The ATA does not define "terrorist", however it does define "terrorist activity"[44] to include a number of indictable or serious offences implementing criminal acts identified in ten UN anti-terrorism conventions; and provides a more general definition recognizing as terrorist activity acts committed for a political, religious or ideological purpose that are designed to intentionally intimidate the public or compel a government to act or refrain from acting a certain way, and are intended to kill, seriously harm or endanger people, or substantially damage property or disrupt essential services to be terrorist activity. In addition, the Act created offences of participation in, facilitation of, instructing or support of terrorist activity.[45]

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[42] Stanley Cohen, *Privacy, Crime and Terror*, 542.
[43] Forcese, *National Security Law*, 263.
[44] *Criminal Code*, R.S.C. 1985, C-46; as am. by S.C. 2001, c. 41, s. 83.01.
[45] *Criminal Code*, Part II.1.

Parliamentary Review vice Judicial Oversight

It was understood by those working on the legislation that the provisions of the Bill would be subject to Parliamentary scrutiny and debate.[46] However, the quality of Parliament's review of Bill C-36, as the ATA was known under Parliamentary consideration, and in the mandated three-year review of the Act, which saw the controversial preventative arrest and investigative hearing provisions allowed to expire, despite recommendations from House and Senate Committees with respect to their renewal, left some wondering if Parliament was up to the task.[47] The monitoring of the effect of the legislation and how it is implemented by the national security apparatus of the country has largely been left to Courts through judicial authorization of investigative acts, review of government claims of national security confidentiality and now the adjudication of terrorism cases.

Facing the challenge of transnational terrorism in turn presents the state with the challenge of how to 'loosen constraints on state power without precipitating significant collateral damage to other rights and social values."[48] Canadians expect there to be safeguards in place to ensure excesses and abuses of power do not happen. The *Canadian Charter of Rights of Freedoms* is employed by Courts to balance interests of security and liberty. Section 1 of the *Charter* provides however, that fundamental rights and freedoms are not guaranteed absolutely and may sometimes be infringed, but requires that this be done as necessary and "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[49]

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[46] *The Security of Freedom*, 439.
[47] Roach, "Better Late Than Never," 29.
[48] Forcese, *National Security Law*, 13.
[49] *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

On a reference case to determine the constitutionality of the controversial investigative hearing provisions of the ATA, the Supreme Court of Canada would express the dilemma this way:

> "Although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Yet at the same time, while respect for the rule of law must be maintained in the response to terrorism, the Constitution is not a suicide pact…
>
> Consequently, the challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism."[50]

This is wholly consistent with Canadian constitutional adjudication from the earliest *Charter* cases to the present day.

Canada's anti-terrorism measures and their implementation by Canadian officials are under scrutiny by allies and critics. The constitutionality of various terrorism provisions of Criminal Code and other related statutes has frequently been the subject of review by Courts. There have been three public inquiries recently looking into the conduct of Canadian officials and how they have carried out their counter-terrorism responsibilities, conducted by members of the judiciary.[51]

The Canadian Government's 2004 National Security Policy (NSP) identified terrorism as a security threat to Canada both directly and indirectly.[52] Religious extremism including that practiced by a network of groups known as Al Qaeda was one type of terrorism. The NSP noted the issuance of a taped message from Osama bin

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[50] *Application under s. 83.28 of the Criminal Code (Re*), [2004] SCJ. No. 40, [2004] 2 SCR 248 at 260-261.
[51] Justice D. O'Connor (Arar Inquiry), Justice F. Iaccobucci (Internal Inquiry), Justice F. Major (Air India Inquiry).
[52] *Securing an Open Society*, 3.

Laden identifying Canada as a target of attack.[53] Another type of terrorism said to affect Canada was domestic extremism, which "while not very prevalent in Canada" had resulted in violence and threatened immigrant communities and religious minorities.[54] At the same time, neither at the time of issuance nor through to the present, there have not been direct attacks on Canada by Al Qaeda.

However, the Supreme Court of Canada had recognized two years earlier, in a case that concerned whether an alleged fundraiser for the Liberation Tamil Tigers of Eelam could be deported to a country where he would likely be tortured, that the support of terrorism abroad raised the possibility of adverse repercussions to Canada's national security:

> "First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for 'danger to the security of Canada' is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct, rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security."[55]

Distant events, in the UK and Pakistan, and eventually events in Canada, would implicate Momin Khawaja in terrorist activity, call on Canada to cooperate internationally to investigate his crimes, and those of his 'bros', and Canada's new laws would be tested.

III THE KHAWAJA INVESTIGATION AND PROSECUTION

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[53] Ibid, 6.
[54] For example, Sikh extremism, Liberation of Tamil Tigers of Eelam.
[55] *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2002] SCJ No. 3, [2002] 1SCR 3, 50-51.

Momin Khawaja was arrested by the RCMP in Ottawa on March 29, 2004, pursuant to an investigation dubbed Project Awaken that had been initiated less than two months before. His arrest was coordinated with the arrests of nine individuals in the United Kingdom by the London Metropolitan Police whose own investigation, Operation Crevice, had lead British law enforcement and security intelligence agencies to believe the men were part of an Islamic extremist group plotting to bomb London targets, including a shopping centre, night club and power utility. One member of the group had purchased 600 kilograms of ammonium nitrate rich fertilizer. Later it would emerge that there were links between this group and those responsible for the suicide bombings of the London Subway on July 7, 2005. Seven of the individuals arrested in Operation Crevice stood trial for terrorist acts, and five were convicted and sentenced to life imprisonment.[56]

British investigators shared information with Canadian authorities about communications between Khawaja and the group, trips that Khawaja made to Pakistan in 2002 and 2003 with members of the group to attend training camps, as well as visits he made to London to discuss with them his development of a remote detonator, designed to trigger the detonation of an improvised explosive device (IED). He was working on the device in the basement of his parent's home in Orleans, Ontario and he had named it the "hifidigimonster".[57]

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[56] See the UK decision on appeal which upheld the life sentences and dismissed an appeal as to conviction: *R.* v. *Omar Khyam, Salahuddin Amin, Jawed Akbar, Anthony Garcia and Waheed Mahmood*, [2008] EWCA Crim 1612 (C.A.).

[57] Reasons for Judgment, [39].

Operation Crevice, as well as the high profile arrests of the 'Toronto 18' on June 3, 2006,[58] were two of the cases that Marc Sageman, author of *Leaderless Jihad*, examined in attempting to explain why people become terrorists, what drives them to ideological violence, how terrorist networks radicalize, mobilize and militarize their recruits, and what was the nature of the continuing threat posed by Al Qaeda. He concluded in his 2008 book that since the allied attacks on Afghanistan in 2001, Al Qaeda as an organization (Al Qaeda Central) seemed to be gaining new ground in the Afghanistan and Pakistan border area, through close collaboration with the Taliban, but that it had been neutralized operationally and its ability to communicate had "degraded to the point that there was no meaningful command and control between the Al Qaeda leadership and its followers."[59]

The threat to the West from terrorist violence now comes, according to Sageman, from loose networks of "Western wannabes" made up of young men who join terrorist groups knowing little about Islam, who are inspired by Al Qaeda but have no direct or significant contact with Al Qaeda Central, and conduct operations within their own borders. This homegrown phenomenon has come to be known as "the bunch of guys theory."[60] Through local contact and communication over the Internet they are radicalized within their own countries. Most are self-trained and self-financed, they lack expertise, and their activities have been for the most part unsophisticated, making them susceptible to detection by law enforcement and intelligence agencies.

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[58] "Alleged Toronto Bomb Plot, Timeline: Key Events in the case," *CBC*, September 25, 2008; http://www.cbc.ca/canada/story/2008/06/02/f-toronto-timeline.html; Internet; accessed 14 May 2009.
[59] Sageman, *Leaderless Jihad*, 126-143.
[60] Marc Sageman & Bruce Hoffman, "Does Osama Still call the shots," *Foreign Affairs* (July/August 2008).

Some of these "wannabes" have been successful in travelling to Pakistan for training, but based on his study of the Operation Crevice trial, Sageman found the training they received was not very substantive, and its real value may have been to provide an opportunity to build and reinforce their cohesiveness. Their activities were restricted to short periods spent at houses in northern Pakistan, where they studied and learned to make bombs, but it is unclear whether they actually got to test them. The trainer was often a 'fellow traveler' who had a similar outlook to Al Qaeda.[61]

This view and the method by which he arrived at it prompted a vigorous exchange between Sageman and another writer on the nature of the terrorist threat to the West, Bruce Hoffman, author of *Inside Terrorism*.[62] Hoffman, cited US government intelligence sources as authority for the view that Al Qaeda was resurging and posed a significant threat from its safe haven in Pakistan's Federally Administered Tribal Areas (FATA).

The *New York Times* covered the very public debate between Sageman and Hoffman, both of whom seemed to have the ear of different components of the US National Security apparatus and policy makers. If the threat came from just a "bunch of guys", radicalized at home, then a law enforcement approach, that might involve cooperation with partner agencies abroad, and the use of undercover informants was the preferred approach. But if the threat necessitated thwarting terrorist plots concocted abroad, and taking out Al Qaeda leaders, then resources should go to intelligence agencies and Special Forces.[63]

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[61] Sageman, *Leaderless Jihad*, 128.
[62] Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1999).
[63] Elaine Sciolino and Eric Schmitt, "A not very private feud over terrorism," *New York Times*, 8 June 2008.

Both criticized each others methodologies, and disagreed as to the nature of the leadership of current movements in the West, but in the end seemed to recognize it was important to look at the threat posed by Al Qaeda from both vantage points. Both agreed "that the American invasion and occupation of Iraq has intensified anti-American sentiment and bolstered both al Qa'eda and its affiliates by supplying ideological motivation and ammunition to militants." [64] The influence of such studies on national security policy may be evidenced by recent revelations of secret US executive orders authorizing military attacks on Al Qaeda in Syria, Pakistan and elsewhere.[65] Sageman, and also Richard Barrett, Coordinator of the Al Qaeda/Taliban Monitoring Team for the UN Security Council,[66] fear that such attacks perpetuate feelings of resentment, and that low key law enforcement rather than a 'war on terror' approach might see a gradual fading away of such groups, although the threat will never be totally eradicated.

Khawaja was charged with seven counts of terrorism relating to his participation in and support of a terrorist group through his activities in Canada, Pakistan and the UK. Three of the counts are punishable by life imprisonment. The ATA calls for consecutive sentencing where convictions are entered on more than one terrorism count.[67]

Khawaja seemed to fit Sageman's profile of the wannabe jihadist. Justice Rutherford quoted from his email indicating that the American invasion of Afghanistan had motivated Khawaja to travel to Pakistan with some UK 'bros' in 2002 with a view to fighting in Afghanistan. In 2003, he made several trips to training camps, and on his

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[64] Farwaz Gerges, "The nature of the threat," *The National Newspaper*, 31 July 2008.
[65] Eric Schmitt, "Secret Order Lets US Raid Al Qaeda," *New York Times*, 10 November 2008.
[66] See also Richard Barrett, "Seven Years After 9/11: Al-Qaida's Strengths and Vulnerabilities" *International Centre for the Study of Radicalisation and Political Violence* (September 2008).
[67] *Criminal Code*, s. 83.26.

return maintained contact with the group. In an earlier ruling, the Judge stated his understanding of the significance of Khawaja's training to be as follows:

> Khawaja saw his modest and meager 2 or 3 days small arms training at the ill-equipped little tent camp in northern Pakistan as a symbolic gesture towards his overall jihad-related goals, and hardly likely to ready him in any real way to be taken into armed combat in Afghanistan or anywhere else. Indeed, Khawaja's brief training camp experience might well be seen more as a 'retreat' for like-minded jihadists for common bonding, reinforcing and planning than as a serious military combat training exercise.[68]

Thus, the judge found that Khawaja, "a 'wannabe front line Mujahideen according to his own words," had revealed his mindset through his emails. Although the prosecution was unable to show that Khawaja had specific knowledge of the London fertilizer bomb plot, the Judge rebuffed a defence argument that he merely intended to engage in armed combat in Afghanistan, and found Khawaja to have been involved in support of a group he knew to be engaged in terrorist activity.[69]

Investigation and Prosecution Challenges

Four and a half years elapsed from the time of Khawaja's arrest to the start of his trial. A lot happened in that period of time. Even before the any evidence was called against him at trial, his case was making law. An annotated list of the significant rulings of the Ontario Superior Court of Justice, where the criminal charges proceeded to trial, and of the Federal Court of Canada, where litigation proceeded over the government's attempts to limit disclosure of relevant documents to Khawaja for reason of national security confidentiality, is attached as **Appendix 2** to this paper. The list also refers to

[68] *R.* v. *Khawaja*, , [2008] O.J. No. 04-G30282 (S.C.J.) [Ruling re Motion for Directed Verdicts of Acquittal],[24].
[69] Reasons for Judgment, [130].

two occasions when the case was appealed to the Supreme Court of Canada, but the appeals were dismissed.

Meanwhile, in the UK, the trial of seven members of the terrorist group whose activities Khawaja was alleged to have participated in got underway on March 21, 2006. Despite the fact that the trial took fourteen months, involved a massive quantity of evidence, and nearly a month of jury deliberations, it was completed on April 30, 2007, well before Khawaja's trial got underway in Canada. Five men were found guilty of offences which included conspiracy to cause explosions under the *Explosive Substances Act* 1883, and possession of fertilizer containing ammonium nitrate, and aluminum powder, for the purposes of terrorism, pursuant to the *Terrorism Act* 2000. All were sentenced to life imprisonment, and their sentences were upheld on appeal.[70]

It was equally important to security officials in the UK to run a successful terrorism prosecution which, whether it ended in conviction or not, would show the public that the counter-terrorism strategy was working. Speaking shortly before the commencement of the Project Crevice trial, Peter Clarke, Deputy Commissioner of the London Metropolitan Police, was restrained in what he could say, but acknowledged the significance of the case in the UK.

> This is an important point, in that much of the debate and comment about counter-terrorism in the UK has been either skewed, or lacking in important detail because of the length of time it is taking cases to reach the point of trial. It is obviously vital that all parties should have time to prepare thoroughly for these important cases, and nothing must be said or done which might prejudice the ability of a defendant to receive a fair trial. But there has nevertheless been a price to pay. And that price, put simply, is that the British public have not been able to make fully informed judgments.[71]

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[70] *R.* v. *Omar Khyam et al.*
[71] Clarke, "Lessons Learned," 3.

In the UK, as in Canada, while security officials wrestled with an increasingly complex terrorist threat, the level of public discourse about the appropriateness and effectiveness of security measures remained shallow, polarized and focused primarily on a debate between protecting citizens from terrorist attack vice protecting their civil rights.

It was not lost on law enforcement officials that trust and confidence of the community, from whom they required support and intelligence, was critical to their success. In very practical terms, measures taken in the name of public safety or evidence gathering that alienated the citizenry would compromise overall public safety and police effectiveness in the long term. A criminal trial, conducted in public view, was an opportunity to inform the public and allow a measured assessment of security actions.

Assistant Commissioner Bob Paulson, head of the RCMP's National Security Criminal Investigations Unit, has acknowledged that the evidentiary, legal and constitutional complexity of investigations is an enormous challenge for police:

> The scrutiny that this program receives when we got to court is fine. The more significant and risky the allegations are for the individual, the more scrutiny ought to be brought to it. But those are the stakes and because of the nature of our evidence collection, because of the nature of the involvement of (domestic and foreign) intelligence services and the international complexion of some cases, there's a lot at stake.[72]

The Khawaja case would provide an opportunity for fulsome scrutiny in Canada, not to mention the UK, the US, and the world.

The UK trial featured evidence from the RCMP, whose explosive expert had examined and tested the detonation devices built by Khawaja in the basement of his parents' home in Orleans, Ontario. Another key witness was 'supergrass' Mohammed Babar, arrested and convicted for his involvement in the fertilizer bomb blot in the US.

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[72] Ian Macleod, "Homegrown terror rising, RCMP security boss warns," *The Ottawa Citizen*, 12 February 2009.

He was flown to London and testified before the UK jury that he had plead guilty, and agreed to testify in return for a reduced sentence. Babar also testified at Khawaja's trial, and his role in the plot will be discussed below.

The UK trial took place within a year of the London bombings on July 7, 2005, which killed 52 people and injured hundreds. Following the Operation Crevice trial, one of the longest UK trials ever, the British public would learn that two of the men involved in the subway bombing had been observed meeting with the accused in the fertilizer bomb plot. The link had not been revealed to the UK jury for fear it would be prejudicial to a fair trial.[73] Questions arose as to whether police and intelligence officials should have known about the plot to bomb the subway, and had instead devoted more resources to Operation Crevice.

Defining "terrorist activity"

As a first step in his defense, Khawaja challenged the constitutionality of the terrorism provisions. Justice Rutherford found the offence provisions constitutional, but took exception to the motive clause in the definition of terrorist activity, that is with the requirement that the prosecution prove that the terrorist act was "committed in whole or in part for a political, religious or ideological purpose, objective or cause."[74] The motive clause, unusual in Canadian criminal law, was included in order to limit the application of the terrorism provisions to certain situations and distinguish terrorism from other crimes.

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[73] For a website featuring a news account of the Operation Crevice investigation and trial, see "UK fertilizer bomb plot," *BBC News/In Depth*; http://news.bbc.co.uk/2/shared/spl/hi/guides/457000/457032/html/nn5page1.stm; Internet; accessed 14 May 2009.

[74] See the definition of terrorist activity at s. 83.01(1) of the *Criminal Code*, and in particular ss. 83.01(1)(b)(i)(A).

In his ruling issued October 2006, Justice Rutherford indicated his concern that the clause would "focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad." This would have a chilling effect and thus was in conflict with the *Charter* guarantee of freedom of conscience, religion and thought.[75] He ordered that the phrase be struck and the definition read as if these words did not appear.

The implications of this decision were twofold. Technically, the burden of proof on the Prosecutor was lessened, as the Crown no longer had to prove motive. But as a consequence, the scope of activity that could be considered terrorist activity was now widened. An act that created a risk of death or serious bodily harm or which could cause serious interference to an essential service would amount to terrorist activity if done to compel someone to do or refrain from doing something, regardless of motive.[76]

It is interesting to note that in extradition case decided March 5, 2009, another Judge of the Ontario Superior Court of Justice ruled that the definition of terrorist activity, including the motive clause, was constitutional. The case concerned a US request to extradite two individuals from Canada suspected of being involved with and assisting the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers), a terrorist group. The persons sought for extradition challenged the constitutionality of the terrorism offence provisions and the definition of terrorist activity, citing the Khawaja ruling.

Justice L. Pattillo found that "while the sections are complex, they are intelligible and capable of judicial application."[77] Contrary to the view of Justice Rutherford that the

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[75] R. v. Khawaja [2006] O.J. No. 4245 (S.C.J.) [58].
[76] Forcese, *National Security Law*, 271.
[77] *United States of America* v. *Piratheepan Nadarajah and Suresh Sriskandarajah*, 2009 Can LII 9482 (ON S.C.), [16]

provision gave rise to concerns of increased police intervention based on racial or ethnic profiling, Justice Patillo was of the view that if such activity occurred, such conduct would of course be improper and contrary to the *Charter*, but improper police conduct did not operate to invalidate an otherwise valid law.

> No particular group of set of beliefs have been identified or targeted by the legislation. Terrorist acts by there very nature are routed in political, religious or ideological purposes or objectives. The fact that Parliament has elected to make motive an element of the definition is within its jurisdiction. Parliament is entitled to explicitly identify the nature of the activity targeted. The fact that it does so does not support the inference that the government is involved in profiling or discrimination or interfering with free expression.[78]

The issue no doubt arises in the prosecution of the accused arrested in Toronto ('the Toronto 18' case), and will likely be determined one day by the Supreme Court of Canada.

International co-operation and information sharing

The Khawaja case was challenging to investigate and prosecute given its transnational dimensions, even though the Canadian investigation was remarkably short in duration. All transnational criminal investigations present difficulties but there are some unique features to terrorism cases. What constituted criminal activity, the stage at which police began their investigation, and their relationship with security intelligence agencies, domestic and foreign, had all changed. Deputy Commissioner Clarke described the impact on the terrorist investigations of the London Metropolitan Police as follows:

> There are various stages of terrorist activity: flowing from the underlying causes and supporting ideology, it moves on to the planning the raising of finance, the gathering of logistical support, the hostile reconnaissance, and finally the execution of the attack. Counter-terrorist law enforcement used to operate at the final end of that scale. The ambition was to arrest the terrorist at or near the point

[78] Ibid., [41].

> of attack, with the bomb or the bullet. This gave the best evidence for use in prosecutions. It also meant that the investigator was often brought in at quite a late stage – in effect, the case would drop into his or her lap from the intelligence world, and he/she might be in complete ignorance of many parts of the background of the case. This is no longer a sustainable position for all sorts of legal reasons, but neither is it desirable from the point of view of protecting the public.[79]

Accordingly, there has been a shift in police focus from overt or preparatory acts, to acts in support of terrorist groups or conspiracies, so that plots are never realized. Only in this way can criminal law be proactive rather than reactive, and an effective counter-terrorist measure.

A level of trust and co-operation was required between law enforcement and intelligence agencies, because the gathering of intelligence and evidence was now often running in tandem. According to Clarke, "There is no longer a sequence where intelligence material becomes mysteriously translated into a product that is admissible in court as evidence."[80] All information needed to be shared, and then hard choices would have to be made as to whether to protect it or use it to further an investigation, and eventually disclose it as evidence.

Justice O'Connor's report recognized the imperatives of law enforcement co-operation and information sharing to Canada's national security, in particular with the US:

> …nothing in this report should be taken to indicate that Canadian agencies should not share information with American agencies. On the contrary, I strongly endorse the importance of information sharing. Sharing information across borders is essential for protecting Canada's national security interests, in that it allows more complete and accurate assessments of threats to our security. The importance of information sharing has increased in the post 9/11 era, when it is clear that the threats that need to be addressed are globally-based and not confined

[79] Clarke, "Lessons Learned," 2.
[80] Ibid.

> within national borders. However, information must be shared in a principled and responsible manner.[81]

Indeed, the Khawaja case required co-ordination among Canadian, UK and US law enforcement and security intelligence agencies, each of which had essential pieces of evidence.

The UK investigation uncovered the core evidence, with its audio probe and video surveillance of the group's UK activities, and obviously produced the largest trove, but the US held a material witness, Babar, who had acted essentially as a tour guide for the group's visits to training camps in Pakistan, was in regular communication with some members of the group and understood their mindset and intentions. Born in Pakistan, but raised in New York, he had gone to Pakistan to fight jihad following the events of 9/11. He was arrested by US authorities following the arrests in Operation Crevice and pleaded guilty to five terrorism related charges including "conspiracy to provide material support or resources" to Al-Qaida. His sentencing awaited his appearances as a cooperating witness in the UK and Canadian proceedings. He testified in the U.K. and Canadian trials. His evidence was not seriously challenged by defence.[82]

The facts as to what Khawaja actually did were not much in dispute. The Judge found ample evidence of the existence of a terrorist group. The central issue was whether or not Khawaja's actions were undertaken 'knowingly,' that is with knowledge of the group's terrorist activity, and in order to support that activity. In other words, what inferences of knowledge and intent on the part of Khawaja could reasonably be inferred

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[81] *Analysis & Recommendations*, 22.
[82] Reasons for Judgment, [11].

from his doing what he did, and what legal culpability arose as a result?[83] As in a murder case, the Prosecutor was required to prove *mens rea* or intent. This was necessary given the severity of the charge and wholly consistent with the fundamental principles of Canadian criminal law.

Disclosure and the open court principle

Fair trial rights in Canada and internationally are based on a presumption that proceedings will be conducted in an open, not secret or closed, court. Further, as a matter of constitutional and criminal law,[84] an accused is entitled to full disclosure of the state's evidence against him. Subject to legitimate claims of privilege, the prosecution has a duty to provide all relevant information to defence counsel. Together, these principles make for an open and transparent system of adjudication in criminal matters.[85] This provides an opportunity for the public, the media and researchers like Sageman to learn the details of terrorism cases and the intricacies of state actions in its anti-terrorism efforts. These same rules apply in a prosecution of terrorist offences.

In 2006, the Attorney General of Canada (AG) applied for a prohibition on disclosure of portions of approximately 506 documents that were to be provided to Khawaja as part of the prosecution's disclosure obligations. The application was made pursuant to s. 38 of the *Canada Evidence Act*, another piece of legislation amended by the ATA, to provide the AG with authority to manage how sensitive information could be used in judicial proceedings and prevent its disclosure when necessary. In this case, the

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[83] Ibid., [3],[86].
[84] *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326. The SCC held that the Prosecutor has a legal duty to disclose all relevant information in the Crown's possession to the defence, regardless of whether the Prosecutor intends to rely on it as evidence, subject to the rules of privilege and the protection of informants.
[85] Forcese, *National Security Law*, 400.

AG sought to protect from regular disclosure classified information provided to Canada by foreign government agencies in confidence. These agencies did not consent to its release. Disclosure of such information in these circumstances, it was feared, would be injurious to national security, national defense and international relations.

International cooperation can only go so far. States have legitimate interests in protecting their sources, their own ongoing investigations and prevention efforts, and in preserving evidence for their own criminal trials. Evidence in support of these assertions is often introduced in such proceedings because Canada is a "net importer" of intelligence. Here is a typical example of the type of evidence provided by Foreign Affairs officials:

> Canada is not a great power. It does not have the information gathering and assessment capabilities of, for instance, the United States, the United Kingdom or France. Canada does not have the same quantity or quality of information to offer in exchange for the information received from the countries which are our most important sources. If the confidence of these partners in our ability to protect information is diminished, the fact that we are a relatively less important source of information increases our vulnerability to having our access to sensitive information cut off.[86]

However, this imposes limitations on the use of both international and domestic intelligence as evidence in criminal proceedings involving transnational terrorism, and distracts from and inhibits the efficiency of the trial process when steps must be taken to prevent disclosure. The Canadian process is unusually protracted in that applications for prohibitions on disclosure are made not before the trial judge, but to the Federal Court of Canada, causing further delay.

The AG's application lead to several rounds of litigation in Federal Court. Rulings of the Court recognized the importance of sharing information in confidence

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[86] Roach, *The Unique Challenges of Terrorism Prosecutions*, 42.

between states: "the third party rule is premised on the originator control principle, which is why the consent of the originating agency or state must be sought before any information exchanged is released." The Court noted that the importance of this principle has in fact been recognized by NATO in setting out the Security System for the North Atlantic Treaty Organization (Brussels: NATO Archives, December 1, 1949, DC 2/1), and was a feature of the UN Convention for the Suppression of the Financing of Terrorism at article 12, paragraph 3.[87]

The Federal Court largely agreed with the AG's claims that disclosure of information contained in the 506 documents would be injurious. However, given that the information was to be disclosed in the context of a criminal trial, and to ensure disclosure of as much information as possible without compromising the government's valid security concerns, Justice R. Mosely ordered that a carefully vetted summary of the information be provided to Khawaja for his defence.[88]

Disclosure in a criminal trial is an ongoing process. When further documents came into the possession of the Crown for disclosure that contained sensitive information, another application had to be made by the AG to Federal Court. The list of rulings in Appendix 2 shows the back and forth nature of the litigation that ensued, including a constitutional challenge by Khawaja as to the secret hearing procedures under the *Canada Evidence Act*. This two court system, or bifurcated process, is unique to Canada. In the UK, the trial judge ruled on matters of national security confidentiality. During the hearing of the second application, the Court appointed an *amicus curiae* to

[87] *Canada (Attorney General)* v. *Khawaja* (F.C.), 2007 FC 490 [142][143]
[88] Ibid.

perform the role of protecting the interests of the accused *in camera*, much like the role of the special advocate contemplated in the *IRPA*.

The Federal Court of Appeal upheld the lower courts rulings on constitutionality, and in regards to the protection of information from disclosure. The Federal Court proceedings were conducted with remarkable dispatch. Once again, the Supreme Court of Canada dismissed Khawaja's application for leave to appeal. However, the bifurcated process had nonetheless contributed to delay. The Air India Inquiry is expected to make recommendations on the existing *Canada Evidence Act* procedure when it makes its final report.

IV THE CONVICTION AND SENTENCING OF KHAWJA

The Court was satisfied that the evidence called at trial had established that between 2002 and 2004, while in the UK and Pakistan, Khawaja not only became involved in a terrorist group, but that he was "clearly aware and knowledgeable of some of the terrorist activities and objectives the group had among its purposes."[89] He was found guilty of participating in the activities of a terrorist group by receiving paramilitary and weapons training in Pakistan for the purpose of enhancing the ability of the group to carry out terrorist activity, and taking part in its discussions to build an explosives device intended to endanger life or cause serious damage to property (s. 83.18(1) CC x2). He was also found guilty of instructing another person to conduct financial transactions on his behalf for the benefit of a terrorist group (s. 83.21(1) CC) and providing property and financing to a terrorist group by making available his uncle's house in Pakistan for their use (s. 83.03(a) CC).

[89] Reasons for Sentence, [2].

While he was found guilty of working on the development of the explosive device he named the 'hifidigimonster' with intent to cause an explosion (s. 81(1)(a) CC), and with its possession intending to endanger life or property (s. 81(1)(d) CC), which are *Criminal Code* offences that predate ATA, the Judge found that the Crown had not proven that Khawaja had worked on the device with knowledge of the specific terrorist objective that it was to be used in relation to the group's foiled plot to detonate 600 kilograms of ammonium nitrate fertilizer at public places in London. Nevertheless, it was clear that in working on the device, the remote trigger for an IED (he had agreed to build thirty of them), he knew he was "assisting his terrorist associates in a way that could only result in serious injury, death and destruction to people and property somewhere," although the evidence was unclear as to whether he either knew or cared where they would be used.[90] Accordingly, he was found guilty of facilitating terrorist activity (s. 83.19 CC).

In total, Khawaja was convicted of five terrorism offences, and two explosives offences under the Criminal Code.[91] Each count, and the evidence to support it, related to a separate transaction that demonstrated his involvement with and support for a terrorist group. A table listing the offences for which Khawaja was charged, the convictions, and the sentence for each, may be found at **Appendix 3** of this paper.

Somewhat ironically, given the ruling that motive was not an element of the offence, it proved easy to divine Khawaja's religious ideology from his own emails. Khawaja's email traffic and visits to Pakistan and the UK, and his financial contributions to the group illustrate a phenomenon that Ted Robert Gurr has described in his analysis

[90] Ibid., [4].
[91] Ibid., [92-107], [13-139].

of how the capacity, incentive and opportunity of a group to create conflict or engage in terrorist activity can be amplified through contagion and communication. Networks of communication, political support and material assistance develop among similar groups that face similar circumstances, and their connectivity is facilitated by international meetings, transcontinental travel by activists, and internet exchanges. Through these networks they get access to expertise on leadership, ideological appeals, communication and mobilization. According to Gurr, "Their appeals gain plausibility because they resonate with sentiments held by similar peoples elsewhere."[92] The proliferation and sophistication of Internet communication continues to grow. There are now believed to be 5,600 websites operating in the name of Al Qaeda, with 900 new sites appearing each year. Investigators have noted that these sites increasingly target women and children.[93]

Khawaja would also be the first Canadian to be sentenced for terrorist activity under the ATA. Wesley Wark considered the occasion to be historic, and described the Judge's task as follows: "Rutherford has to define for Canadians the judiciary's view of the nature of terrorism offences, and the relevant sentencing regime that goes with them."[94] The Judge would do so by applying the new sentencing provisions, along with traditional principles of sentencing, to carve out the appropriate term of incarceration.

The ATA added a provision to the Criminal Code (s. 83.26) which provides that a sentence, other than one of life imprisonment, imposed for a terrorism offence, shall be served consecutively to a sentence imposed for an offence arising out of the same event

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[92] Ted Robert Gurr, "Minorities, Nationalists, and Islamists: Managing Communal Conflict in the Twenty-First Century," in *Leashing the Dogs of War*, 131-160 (Washington: United States Institute of Peace Press, 2007), 149.
[93] Gabriel Weimann, "Narrowcasting: The trend in online terrorism," *RCMP Gazette*, Vol. 70, No. 3, (2008), 22-23.
[94] "Khawaja to be sentenced this week under terror law," *The Canadian Press*, 8 March 2009.

or series of events. In other words, Khawaja had been convicted of seven offences, arising out of his involvement with the terrorist group in the UK, and the Judge was required to impose consecutive sentences for each offence. Ordinarily, a judge has discretion whether to impose sentences concurrently or consecutively. In the case of convictions for terrorist activity, Parliament had determined that due to the seriousness of these offences, the usual judicial discretion should be eliminated.

Since there were no precedents in Canadian law, Justice Rutherford reviewed sentencing case law from Australia and the UK, including the decision meting out life sentences to 'the bros.' He determined that denunciation, deterrence and the protection of society were key considerations in his decision.

> Canada values its history of multi-cultural and multi-ethnic tolerance. Canadians are proud that people of many languages, religions and backgrounds can co-exist in a peaceful and orderly society In a world where in so many, many places, tribalism, generations of hostility and hatred, and religious and ideological differences lead to violence and bloodshed, Canada's albeit short history of relative peaceful co-existence is a beacon of hope for the future. We must jealously guard our individual freedoms, the respect for the worth of every individual, and our peaceful social order. To this end, sentencing in cases of terrorist activity must strongly repudiate activity that undermines our core values. Canada must certainly not accept the exportation of terrorism from within its borders to victimize innocent people in other parts of the world.[95]

However, Justice Rutherford was also mindful of the other principles of sentencing that he was obliged to apply to Khawaja.

The *Criminal Code* also requires that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.[96] This is known as the 'totality principle'. Further, a court may take into account the time spent in pre-trial

[95] Reasons for Sentence, [25].
[96] *Criminal Code*, s. 718.2(c).

detention.[97] Judges had usually awarded credit at a ratio of 2 for 1 for 'dead time', but Justice Rutherford declined to specify a particular formula. He stated that giving 10 years credit for 5 years time served seemed incompatible with the need to impose a denunciatory sentence for terrorist activity. On the other hand, he took into account the fact that Khawaja had already spent five years confined in a detention centre, which amounted to a significant punitive, denunciatory and deterrent impact.[98]

The Judge considered that Khawaja was still a young man, but acknowledged that he knew nothing about Khawaja's potential for reformation, whether Khawaja felt remorse, or whether he was likely to reoffend. Until his sentencing, there was little known about Khawaja personally aside from what he had revealed in the emails that were entered as evidence, and the fact that he had been working under contract fixing computers for the Department of Foreign Affairs at the time of his arrest. He did not testify at his bail hearings or at trial, as was his right, and neither he nor his parents had participated in the preparation of a court-ordered pre-sentence report.

The Judge gave short shrift to the suggestion that Khawaja's lack of knowledge of the UK fertilizer plot significantly minimized the seriousness of his support for the terrorist group.

> While his building of the detonating device, and promise to build some 30 more for Khyam and company was not shown to be knowingly or specifically part of the mayhem to flow from the UK fertilizer plot, it was intended to unleash fireworks at other as yet unspecified places in aid of the jihad…Fortunately, effective security and law enforcement work, particularly in the United Kingdom, intervened before the group's objectives were achieved.[99]

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[97] Ibid., s. 719(3).
[98] Reasons for Sentence, [45][47].
[99] Ibid., [32].

Nor was the fact that that hifidigimonster was an amateurish effort considered to be mitigating, given the dangers of such devices failing or blowing up prematurely. The religious ideology revealed in Khawaja's emails , and the fact that his device had been built to achieve death and destruction, was a relevant and aggravating factor on sentencing.

Nevertheless, all things considered, Justice Rutherford was not persuaded that Khawaja deserved to be sentenced to life imprisonment. He wrote in his reasons "I appreciate that there will be those who argue that I have been reading too much 'John Updike,' but that is my view."[100] He proceeded to sentence Khawaja to a further term of 10 and a half years in a penitentiary, which he divided and attributed among the seven offences for which Khawaja had been convicted, as described in Appendix 3. He also ordered that Khawaja serve at least five years of his sentence before being eligible to apply for parole.

An appeal of the sentence is pending.

V CONCLUSION

The Khawaja case is just one case. This paper has argued that in the course of this investigation and prosecution, and in the resulting verdict, the terrorism laws 'passed the test.' When the trial actually got going in June 2008, it proceeded relatively quickly. The evidence was all in by the end of July, and very little of it had been in dispute. The case was really a test of the new laws, the actions of Canadian law enforcement and security officials, and their international partners, and of the justice system's ability to handle a terrorism case. The laws will be tested again.

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[100] Ibid., [37]. John Updike is the American author of *Terrorist*, a novel he published in 2006.

According to security analyst Wesley Wark, "the verdict showed the flexibility of the anti-terrorism legislation allows judges to find defendants guilty of terrorist activities even if their involvement was peripheral."[101] The decision on sentence was a 'made in Canada' determination of the appropriate level of denunciation for terrorist activity, and with the appeal ongoing, that discussion continues. All levels of court considered the constitutionality of the terrorism offence provisions and the definition of terrorist activity, as well as the constitutionality of the procedures under the Canada Evidence Act as they apply to protect from disclosure information subject to disclosure in a criminal trial.[102]

What are the threats today? Khawaja's terrorist activities date back to 2003 and 2004 and they may no longer represent the current 'wave.' RCMP Assistant Commissioner Paulson confirmed in a media interview recently that "Historically, it's always been the threat from somewhere else in the world coming over here. But it's no secret to anyone that a larger part of the threat is the so-called homegrown threat and that's certainly the lion's share of the threat that we're dealing with." [103] However, the criminal litigation of the Khawaja case helped define what is terrorist activity in Canada, the scope of terrorism laws, how sensitive information is shared with other countries and how it can be protected while still affording an accused a fair trial, and the level of scrutiny such cases require, if Canadians are to remain confident that the fight against terrorism is not eroding our democratic values.

There have since been other terrorism charges laid. On June 3, 2006, the RCMP arrested 4 youths and 14 adults for their alleged participation in a terrorist plot. The case

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[101] Joanna Smith, "Khawja guilty of terrorism," *The Star.com*, 30 October 2008.
[102] Note Toronto 18 ruling that s. 38 procedures unconstitutional
[103] Ian Macleod, "Homegrown terror rising, RCMP security boss warns," *The Ottawa Citizen*, 12 February 2009.

of the 'Toronto 18' will no doubt provide more insight about the kind of terrorism Canada faced in 2006, and will further test the resiliency of our laws to respond. Charges were stayed by the prosecution against one adult and one youth early in the proceedings. Three adults and two youths have acknowledged their involvement in terrorist activity by agreeing to be placed on a recognizance, or peace bond, with conditions, pursuant to s. 810.01 of the Criminal Code based on fears they might commit a terrorism offence. Accordingly, charges against these individuals have been stayed. Ten adults remain in custody awaiting trial, having been denied bail.

On September 25, 2008, one month before the Khawaja verdict, one of the youths, now 20, was found guilty in a Brampton courtroom of participating in the activities of a terrorist group. A decision on the appropriate sentence for a young person, now an adult and convicted of terrorist activity, is expected shortly. There is a ban on publication of any information that would identify the youth or his associates, in order to protect the fair trial rights of the ten adults whose cases have yet to come to trial.

Based on what is publicly known about the 'Toronto 18' case, it may fit more with Sageman's third wave homegrown terrorism profile. It is alleged that the group plotted to attack government buildings and politicians in protest of Canada's involvement in Afghanistan, undertook training activities in Northern Ontario, and had acquired a large quantity of fertilizer.[104] Several of those involved were just kids, and their plans sound as improbable and fanciful as plotting to hijack four planes on the same morning.

[104] CBC Timeline.

In Quebec, a trial is underway for a man who is charged with supporting, over the Internet, the Global Islamic Media Front, the propaganda arm of Al Qaeda,[105] and in British Columbia another individual is charged with terrorist financing on behalf of the LTTE.[106] With so few actual prosecutions of terrorist activities, some may wish to see the glass half full and believe that enforcement and prevention efforts are working, or alternatively that there is simply no terrorism threat in Canada that cannot be handled using domestic criminal provisions already in existence. At the same time, it must be recognized that the waxing and waning of transnational terrorism as a threat may be due to forces well outside of Canada's borders.

Still, the Khawaja case proves that terrorism cases can be handled in Canada within the domain of domestic law enforcement and the criminal justice system.

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[105] Stewart Bell, "Quebec man urges Al Qaeda to attack Canada," *National Post*, 16 October 2008; Ian Macleod, "Homegrown terror rising, RCMP security boss warns."

[106] Lori Culbert and Neal Hall, "Man faces Canada's first charges of terrorist financing," *Vancouver Sun*, 18 March 2008. http://www.canada.com/vancouversun/story.html?id=995bbcbc-239b-4a60-83b7-152779524263&k=77631

Appendix 1 R. v. Khawaja – Timeline

December 24, 2001	Anti-Terrorism Act comes into force
January 28, 2004	Government orders public inquiry into actions of Canadian officials concerning Maher Arar (O'Connor Inquiry)
March 29, 2004	**Momin Khawaja arrested in Ottawa & charged with terrorism offences (Project Awaken); 9 individuals (R. v. Khyam et al.) arrested in UK (Operation Crevice); 1 person (Amin) detained in Pakistan and arrested on his return to London February 8, 2005; 1 person (Babar) arrested by FBI in US April 6, 2004**
April 2004	Martin Government publishes National Security Policy "Securing an Open Society"
March 16, 2005	Accused acquitted of 331 counts of murder in Air India trial (R. v. Malik, Bagri)
May 1, 2005	Government orders public inquiry into investigation of bombing of Air India Flight 182 (Major Inquiry)
June 3, 2005	Babar pleads guilty in the US to participating with Omar Khyam, Khawaja and others in terrorist conspiracy and agrees to provide evidence in London, and later in Ottawa
July 7, 2005	London Bombing – 52 people killed, hundreds injured
March 21, 2006	Commencement of jury trial in the UK in R. v. Omar Khyam et al (Operation Crevice). Khawaja named as unindicted co-conspirator
June 4, 2006	Toronto 18 arrested & charged with terrorism offences (R. v. Ahmad, Amara et al.)

September 18, 2006	O'Connor Commission issues Arar Report, making factual findings and 23 recommendations
December 2006	Justice O'Connor issues Part II of his Report, recommending a review mechanism for RCMP national security activity, as well as that of other departments
December 11, 2006	Government orders internal inquiry into the actions of Canadian officials in relation to Abdullah Almalki, Ahmad Abou-Elmaati, Muayyed Nureddin (Iacobucci Inquiry)
October 19, 2006	Ontario Superior Court declares s. 4 of the Security of Information Act unconstitutional, in the case of Ottawa Citizen reporter Juliet O'Neill, and quashes search warrants for her home & office
October 24, 2006	**Trial judge upholds constitutionality of terrorism offence provisions of CC, strikes motivation provision of definition of terrorist activity (s. 83.01(1)(b)(i)(A))**
November 2006	**Attorney General applies to Federal Court for protect information from disclosure to Khawaja per s. 38 Canada Evidence Act (CEA)**
February 23, 2007	Supreme Court of Canada declares security certificate provisions of Immigration Refugee Protection Act unconstitutional
April 30, 2007	R. v. Khyam et al. – UK Jury finds 5 of 7 guilty, and all sentenced to life
May 2007	**Federal Court rules some information should be protected from disclosure; Khawaja appeals**
Fall 2007	**Federal Court of Appeal dismisses Khawaja's appeals re s. 38 CEA rulings**
February 2008	**AG applies to Federal Court again for protection of further information from disclosure**
March 25, 2008	**Trial Judge writes to counsel expressing concern as to delay of trial pending s. 38 CEA litigation**
March 25, 2008	Trial of N.Y. (a youth, and one of the Toronto 18) for terrorism offence begins
April 3, 2008	**SCC dismisses Khawaja's application for leave to appeal Federal Court of Appeal rulings**
June 23, 2008	**Khawaja's Trial begins, and continues to July 22, 2008**
June 26, 2008	Supreme Court of Canada decides Charkaoui's s. 7 Charter rights infringed by CSIS destruction of notes of investigation
September 25, 2008	N.Y. (a youth, and one of the Toronto 18) found guilty of participating in terrorist activity
October 29, 2008	**Khawaja found guilty of 5 terrorism offences, 2 criminal code offences**
March 12,	**Khawaja sentenced to 10.5 years, in addition to time served**

2009	

Source: Author.

Appendix 2 R. v. Khawaja – Annotated Chronology of Major Rulings

October 24, 2006	**Ontario Superior Court of Justice (2006), 214 C.C.C. (3d) 399**	***Re Khawaja and the Queen*** **Judgment (Rutherford J.)** **Motivation portion of definition of terrorist activity (s. 83.01(1)(b)(i)(A) CC) held of no force and effect and severed; offence provisions upheld**
April 5, 2007	Supreme Court of Canada 2007 CanLII 11625 (S.C.C.)	*Mohammed Momin Khawaja v. Her Majesty the Queen* (Ont.) (Crim.) (31776) Coram: Bastarache J., LeBel J., Fish J. Dismissing Defence application for leave to appeal OSCJ ruling on constitutionality of terrorism provisions of the Criminal Code.
April 30, 2007	Federal Court DES-2-06 2007 FC 463	*Canada (Attorney General)* v. *Momin Khawaja* Reasons for Order and Order of the Court (Lutfy, C.J.) Dismissing Defence application challenging the constitutional validity of the secret hearing (s. 38.11(2)) provisions of the CEA
May 7, 2007	Federal Court DES-2-06 2007 FC	*Canada (Attorney General)* v. *Momin Khawaja* (*Khawaja I*) Reasons for Order, Public Order and Private Order w/Schedule (Mosely, J.)

	490	Ruling on the first Application by the AG for a statutory prohibition on disclosure of portions of approx. 506 documents per s. 38.02(1)(a) CEA. The Court confirmed the prohibition on disclosure of most of the information, but ordered a summary be produced to Khawaja. Information inadvertently disclosed to Counsel for Khawaja was ordered protected from further disclosure.
October 31, 2007	Federal Court of Appeal DESA-1-07 2007 FCA 342	*Canada (Attorney General)* v. *Khawaja* Judgment and new Schedule (Richard C.J., Letouneau J.A., Pelletier J.A.) Allowing the AG's appeal against the decision of Mosely J. (May 7, 2007) to the extent of substituting a new Schedule for the one prepared by the Judge, and dismissing Khawaja's cross- appeal on the statutory prohibition on disclosure
December 6, 2007	Federal Court of Appeal DESA-2-07 2007 FCA 388	*Khawaja* v. *Canada (Attorney General)* Judgment on Defence Appeal (Richard C.J., Letourneau J.A., Pelletier J.A.) Dismissing Khawaja's appeal of Federal Court's ruling on constitutionality of s. 38 CEA
April 3, 2008	Supreme Court of Canada 2008 CanLII 18970 (SCC)	*Mohammad Momin Khawaja v. Attorney General of Canada* (FC) (Civil) (By Leave) (32397) Coram: McLachlin C.J., Fish J.,Rothstein J. Khawaja's Motion to expedite the application for leave to appeal the Federal Court of Appeal ruling on constitutionality of s. 38 CEA was granted; application for leave to appeal was dismissed.
April 3, 2008	Federal Court DES-2-08	*Canada (Attorney General)* v. *Khawaja* Order (Mosely J.) Appointing amicus curiae to participate in secret hearings re AG's 2nd application for statutory prohibition on disclosure of documents to Khawaja
April 30, 2008	Federal Court DES-2-08 & DES-2-06 2008 FC 560	*Canada (Attorney General)* v. *Khawaja* Reasons for Order & Order; Private Reasons for Order & Order w/Annex (Mosely J.) Ruling on the AG's 2nd application for a statutory prohibition on disclosure of portions of a further 23 documents per s. 38.02(1)(a) CEA; prohibition was confirmed on basis the information at issue was not relevant to Khawaja's defence, and the Court declined to

		produce a summary.
September 8, 2008	**Ontario Superior Court of Justice**	***R.* v. *Khawaja* Ruling re Motion for Directed Verdicts of Acquittal (Rutherford J.) Dismissing Khawaja's application to direct verdict of acquittal on all counts; And that the exception of armed conflict does not apply to Khawaja**
October 29, 2008	**Ontario Superior Court of Justice O.J. No. 4244**	***R.* v. *Khawaja* Reasons for Judgment (Rutherford J.) Khawaja found not guilty on two counts of participating in a specific terrorism plot, but guilty of 2 explosives offences, and 5 terrorism offences (participation x2, facilitation, financing, instruction)**
March 12, 2009	**Ontario Superior court of Justice O.J. No.**	***R.* v. *Khawaja* Reasons for Sentence (Rutherford, J.) Khawaja sentenced to a total of 10.5 years, with no eligibility for parole for 5 years**

Source: Author.

Appendix 3 R. v. Khawaja – Charges, Convictions, Sentence

CHARGES Direct Indictment December 2004	**CRIMINAL CODE offence provision(s) & maximum sentence**	**CONVICTION October 29, 2008**	**SENTENCE March 12, 2009** **Total: 10 ½ years**
Count 1 Intent to cause an explosion (s. 81(1)(a)CC) for the benefit of a terrorist group (s. 83.2CC)	s. 81(1)(a)CC max. s. 83.2CC max. life	Not guilty as charged, but guilty of the included explosives offence with intent to cause an explosion likely to cause serious bodily harm, or death, or substantial property damage	4 years
Count 2 Possess explosives (s. 81(1)(d)CC) for the benefit of a terrorist group (s. 83.2CC)	s. 81(1)(d)CC max. s. 83.2CC max. life	Not guilty as charged, but guilty of the included offence of possessing an explosive with intent to enable another person to endanger life or cause serious damage	No further proceedings.
Count 3 Participate in the	s. 83.18(1)CC within the	Guilty as charged	2 years

activity of a terrorist group by receiving training	meaning of s. 83.18(3)(a)CC max. 5 years		
Count 4 Instruct to carry out activity for a terrorist group	s. 83.21(1)CC max. life	Guilty as charged	2 years
Count 5 Provide property for terrorist purposes	s. 83.03CC max. 5 years	Guilty as charged	2 years
Count 6 Participate in the activity of a terrorist group	s. 83.18(1)CC max. 5 years	Guilty as charged	3 months
Count 7 Facilitate terrorist activity	s. 83.19CC max. 10 years	Guilty as charged	3 months

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