The Terrorism Offences and the Charter: A Comment on R. v. Khawaja

Kent Roach*

Introduction

The recent decision by Justice Rutherford of the Ontario Superior Court in R. v. Khawaja 1 produced a mixed verdict on the constitutionality of key provisions in the Anti-Terrorism Act 2 enacted by Parliament at the end of the 2001. Justice Rutherford’s decision made headlines by holding that the political and religious motive requirement in the definition of terrorist activities constituted an unjustified violation of freedom of expression, religion and association and should be struck down and severed from the rest of the definition. The other parts of Justice Rutherford’s decision were, however, equally important because he rejected arguments that the offences were unconstitutionally vague or overbroad and that they had constitutionally inadequate fault requirements.

In this case comment, I will first outline the various charges faced by Mr. Khawaja including their complex legislative framework. I will next outline Justice Rutherford’s rulings on 1) vagueness and overbreadth, 2) fault and 3) religious and political motive. Finally, I will critically evaluate Justice Rutherford’s conclusions in light of the jurisprudence and possible future judicial and legislative developments of Canadian anti-terrorism law.

I. The Terrorism Charges and their Complex Legislative Framework

Mohammed Momim Khawaja faces multiple charges in connection with an alleged conspiracy to engage in a terrorist bombing. Seven men in England face charges of conspiring to cause explosions likely to endanger life and three face charges of possession of an article in relation to terrorism, namely 600 kg of ammonium nitrate. 3 Mr. Khawaja faces the following charges in Canada:

1) working in Canada and the United Kingdom on an explosive device with intent to cause an explosion likely to cause serious bodily harm or death or to cause serious damage to property under s.81(1)(a) of the Criminal Code and charged as an indictable offence committed for the benefit of, at the direction of, or in association with a terrorist group under s.83.2 of the Criminal Code. 4

* Professor of Law, University of Toronto. I thank Michael Code, Anil Kapoor, Michael Plaxton, Hamish Stewart and Wesley Wark for helpful and challenging comments on an earlier draft and my colleague Lorraine Weinrib for allowing me to present a preliminary version of this comment at a Constitutional Roundtable.

1 Unreported October 24, 2006.
2 S.C. 2001 c.41 adding Part II.1 Terrorism to the Criminal Code.
3 “Bomb suspect halts evidence” Sept 18, 2006 at http://news.bbc.co.uk/1/hi/uk/5355976.stm
4 The terrorist group that is alleged in the indictment is not a group proscribed by the Governor in Council under s.83.05 of the Criminal Code but rather is an ad hoc group of men charged in the parallel proceeding in the United Kingdom.
Draft: Not for citation

2) making or having explosives in Canada and the United Kingdom with the intent to endanger life or cause serious damage to property or to enable another person to do so under s.81(1)(d) of the Criminal Code, also charged as an indictable offence committed for the benefit of, at the direction of, or in association with a terrorist group under s.83.2 of the Criminal Code.

3) two counts of knowing participation in Ottawa, the United Kingdom and Pakistan in the activities of a terrorist group for the purpose of enhancing its ability to facilitate or carry out a terrorist activity under s.83.18 of the Criminal Code. One count relates to receiving training under s.83.18(3)(a) and another relates to participating in meetings or exchanges of information relating to the development of explosive devices.

4) knowingly instructing a person in Ottawa and the United Kingdom to open a bank account and conduct financial transactions on behalf of a terrorist group under s.83.21 of the Criminal Code.

5) providing in Canada, the United Kingdom and Pakistan property and financial services intending or knowing that they would be used to facilitate or carry out a terrorist activity under s.83.03 of the Criminal Code.

6) knowingly facilitating a terrorist activity in Canada, the United Kingdom and Pakistan under s.83.19 of the Code.

The case is significant because it constitutes the first criminal charges under the terrorism provisions added to the Criminal Code in 2001. It also features multiple and broad ranging charges that involve most of the major charges available under the 2001 amendments.

The first two offences faced by Mr. Khawaja combine existing explosive offences with a new provision in s. 83.2 that makes indictable offences committed for a terrorist group a distinct offence punishable by life imprisonment. The new s. 83.2 offence has also been charged in the Toronto terrorism arrests in relation to explosives and importing weapons offences. See Kent Roach “The Toronto Terrorism Arrests” (2006) 51 Crim.L.Q. 389.

5

81. (1) Every one commits an offence who
(a) does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property…

(d) makes or has in his possession or has under his care or control any explosive substance with intent thereby
(i) to endanger life or to cause serious damage to property, or
Draft: Not for citation

(ii) to enable another person to endanger life or to cause serious damage to property.

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

Mr. Khawaja also faces a charge under s.83.03 (a) which is one of the new terrorism financing offences added to the Code. This offence has also been charged in the Toronto case and incorporates the definition of terrorist activities defined elsewhere in the Code. The relevant offence provides:

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services
(a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity…

The accused also faces two counts of the new offence of participating in a terrorist organization. This offence has also been charged in the Toronto terrorist arrests. Its full import requires consideration of not only the offence under s.83.18(1), but the interpretative provisions under s.83.18(2)(3)(4). The interpretative provisions in the offence widen it by resolving interpretative ambiguities in a manner that benefits the prosecution and by deeming in law that certain forms of evidence are admissible. The relevant offence provides.

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

The relevant interpretative provisions provide:

(2) An offence may be committed under subsection (1) whether or not
(a) a terrorist group actually facilitates or carries out a terrorist activity;
(b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
(c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

(3) Participating in or contributing to an activity of a terrorist group includes
(a) providing, receiving or recruiting a person to receive training;
(b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;
Draft: Not for citation

(c) recruiting a person in order to facilitate or commit
(i) a terrorism offence, or
(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;
(d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and
(e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit
(i) a terrorism offence, or
(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.

(4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused
(a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;
(b) frequently associates with any of the persons who constitute the terrorist group;
(c) receives any benefit from the terrorist group; or
(d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

The accused also faces a charge of instructing activities for a terrorist group. As with the participation offence, this offence contains an important interpretative subclause that broadens the offence. The offence provides:

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

The interpretative clause provides:

(2) An offence may be committed under subsection (1) whether or not
(a) the activity that the accused instructs to be carried out is actually carried out;
(b) the accused instructs a particular person to carry out the activity referred to in paragraph (a);
(c) the accused knows the identity of the person whom the accused instructs to carry out the activity referred to in paragraph (a);
(d) the person whom the accused instructs to carry out the activity referred to in paragraph (a) knows that it is to be carried out for the benefit of, at the direction of or in association with a terrorist group;
(e) a terrorist group actually facilitates or carries out a terrorist activity;
(f) the activity referred to in paragraph (a) actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or
(g) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

Finally, Mr. Khawaja faces a charge of facilitation of terrorist activities under s.83.19(1). This offence was not charged in the Toronto case. Section 83.19(2) is of particular importance because it qualifies the fault requirement of knowingly facilitating a terrorist activity. This offence provides:

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

The controversial interpretative clause provides:

(2) For the purposes of this Part, a terrorist activity is facilitated whether or not (a) the facilitator knows that a particular terrorist activity is facilitated; 
(b) any particular terrorist activity was foreseen or planned at the time it was facilitated; or 
(c) any terrorist activity was actually carried out.

All of the above offences, with the exception of the first two explosives offences charged under s.83.2 of the Code, incorporate the phrase terrorist activities which is defined in s.83.01(1)(b) of the Code as:

(b) an act or omission, in or outside Canada, 
(i) that is committed 
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

---

6 Section 83.01(a) contains an alternative definition that incorporates other offences committed outside of Canada to the extent that they implement various international anti-terrorism conventions. Although the accused faces charges in relation to various activities in the United Kingdom and Pakistan and the reference in the charges to terrorist activities refers to the whole of s.83.01, this alternative definition is not considered in the judgment because the accused raised no objections to it. R. v. Khwaja Oct 24, 2006 at para 14. For arguments that s.83.01(a) raises issues of vagueness in relation to the precise ambit of the offence that is necessary to implement the international conventions and the indirect incorporation of international law into Criminal Code offences, but also that the courts are unlikely to invalidate this part of the definition on this basis see Kent Roach “The New Terrorism Offences in Canadian Criminal Law” in David Daubney et al eds. Terrorism, Law and Democracy How is Canada Changing Following September 11? (Montreal: EditionsThemis, 2002) at 117-120.
Draft: Not for citation

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,
(B) endangers a person's life,
(C) causes a serious risk to the health or safety of the public or any segment of the public,
D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

The above definition of terrorist activities and in particular the reference in s.83.01(b)(i) (A) to acts being committed in whole or part for a political, religious or ideological purpose, objective or cause, should also be read in light of s.83.01(1.1) of the Code which was added after Bill C-36 was originally introduced and is a rare example in the legislation of an interpretative clause that attempts to narrow the terms of the act. It provides:

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

This interpretative clause was designed to respond to concerns that the inclusion of religious or political motive as an essential element of a terrorist activity might encourage a process of religious or political profiling in which investigators and others paid undue attention to the politics or religion of suspects or accused persons. Justice Rutherford concluded that despite this interpretative clause the political or religious motive requirement still was an unjustified violation of fundamental freedoms in the Charter.

Most of the above offences also incorporate the term “terrorist group” which is defined in s.83.01 as:

"terrorist group" means
Draft: Not for citation

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
(b) a listed entity,
and includes an association of such entities.

The terrorist group that is alleged to have existed in the Khawaja case is not one of the 40 groups such as al Qaeda that have been listed as terrorist groups by the Governor-in-Council under s.83.05 of the Criminal Code, but rather an ad hoc group compromised of Mr. Khawaja and those facing similar charges in England. The advent of home-grown terrorism and groups that may be inspired but not directed by al Qaeda may diminish the utility of the listing device as a short cut in terrorism prosecutions. As in the Khawaja case, the use of non-listed groups will require the prosecution to establish beyond a reasonable doubt the existence of the alleged ad hoc terrorism group.

As can be seen, Mr. Khawaja faces numerous charges under the 2001 anti-terrorism amendments to the Criminal Code. Although the multiple offences may not violate the rule against multiple convictions because they require proof of somewhat different elements, multiple charges could make the trial more complex, particularly if a jury must be charged on all the factual and legal elements of the multiple charges. Mr. Khawaja has, however, elected trial by judge alone. Nevertheless all of the new offences charged will be quite complex even for a judge because they contain extensive interpretative clauses and they incorporate within them Parliament’s definitions of both terrorist activities and terrorist groups. In addition, the charges under s.83.2 combine existing indictable offences with an enhanced crime and punishment for offences committed for terrorist groups. Any final judgment on these matters is likely to present fertile sources for grounds of appeal.

II. Justice Rutherford’s Judgment

A) Vagueness and Overbreadth

Justice Rutherford considered and dismissed vagueness and overbreadth challenges under s.7 of the Charter to both the definition of terrorist activities and to the various offences. He concluded that the reference to actions being committed “in whole or part” for political and religious objectives was not vague and that the intended harms defined in s.83.01(1)(b)(ii)A-E are “all clearly undesirable, adequately comprehensible and not at all surprising objectives of criminal sanctions.” Citing a case upholding a somewhat similar organized crime offence, Justice Rutherford indicated that the

---

7 Note that the shortcut approach in which the Cabinet’s decision that a group is a terrorist group is deemed to be conclusive proof that the group is a terrorist group and is effectively substituted for proof beyond a reasonable doubt in the criminal trial that the group is a terrorist group may violate s.11(d) of the Charter and have to be justified under s.1 of the Charter. See David Paciocco “Constitutional Casualties of September 11” (2002) 16 S.C.L.R.(2d) 185.
10 Justice Fuerst has concluded in reference to s.467.11 of the Criminal Code that “the word "facilitate" also has a clear meaning. It is defined in The Concise Oxford English Dictionary (10th ed.) to mean, "make easy or easier". Black's Law Dictionary (7th ed.) indicates that the word "facilitation" has a recognized meaning.
reference to facilitation in s.83.19 was not overbroad. Following the Supreme Court’s jurisprudence which has so far not struck down one offence on pure vagueness grounds, Justice Rutherford concluded that the legislative provisions provided fair notice to the accused and sufficiently restrained law enforcement discretion. The law provided an intelligible standard for legal debate and complete precision was not an achievable goal.

Justice Rutherford devoted less time to the accused’s alternative argument that the law was overbroad. The Supreme Court has in fact relied more on overbreadth than vagueness in the cases where it has struck down laws under s.7. In R. v. Heywood for example, the Court held that a vagrancy law that applied to all convicted sex offenders and to all public places regardless of the presence of children was overbroad to the state objective of protecting children from sexual crimes. In R. v. Demers, the Supreme Court held that a law that denied an absolute discharge to a person when there was no evidence of a significant threat to public safety “makes the law overbroad because the means chosen are not the least restrictive of the unfit person’s liberty and are not necessary to achieve the state’s objective.” In response to the accused’s argument that the offences and the definition of terrorist activities were overbroad because they could be applied to lawyers or those providing necessary services, Justice Rutherford concluded that “a good lawyer can almost always create a hypothetical circumstance that might arguably be caught within the reach of a provision and that arguably should not be caught”, but that such cases should be left to “case-by-case determination…with a view to avoiding absurd results.”

B) Fault

Justice Rutherford rejected arguments that the various terrorism offences under s.83.18, 83.19 and 83.21 violated s.7 of the Charter by not providing for sufficient levels of subjective fault. The accused argued that the interpretative subsections found in ss.83.18(2), 83.19(2) and 83.21(2) undermined the fault requirements of knowledge of a terrorist activity or the purpose of enhancing the ability to carry out a terrorist activity by not requiring that the knowledge or purpose relate to any particular or specific terrorist activity. The government argued that these provisions were necessary given the realities of modern cell based terrorism in which members of the cell may not know the particular nature of the terrorist acts that they will perform until the last minute. Justice Rutherford accepted the government’s justification and concluded that “it is unnecessary that an accused be shown to have knowledge of the specific nature of terrorist activity he intends

in the context of criminal law, as follows: “The act or an instance of aiding or helping; esp., in criminal law, the act of making it easier for another person to commit a crime,” R. v. Lindsay (2004) 182 C.C.C.(3d) 301 at para 58 (Ont. Sup Ct.) This reading equates facilitation with the traditional concept of aiding criminal activity. For the contrary argument, also drawing on dictionary meanings of the word facilitate, that the new facilitation offence requires less than aiding and abetting a known and specific crime and that “the intention in creating the facilitation offence was to capture the person who is prepared to assist a ‘martyrdom operation’ without knowing the specific objective.” See Richard Mosley “Preventing Terrorism Bill C-36: The Anti-Terrorism Act, 2001” in David Daubney et al eds. Terrorism, Law and Democracy How is Canada Changing Following September 11? (Montreal: Editions Themis, 2002) at 165

12 [1994] 3 S.C.R. 761
to aid, support, enhance or facilitate, so long as he knows it is terrorist activity in a
general way.”

The offence that received the most detailed consideration in the judgment was
section 83.19 which, unlike the other offences in sections 83.18 and 83.21, only requires
knowledge in relation to a terrorist activity and not the purpose of enhancing the ability
of a terrorist group to facilitate or carry out a terrorist activity. Section 83.19 (2)(b)
qualifies the knowledge requirement by providing that a terrorist activity can be
facilitated “whether or not…any particular terrorist activity was foreseen or planned at
the time it was facilitated.” Justice Rutherford rejected an argument I made in previous
work that s.83.19(2) by not requiring the accused to know that “any particular terrorist
activity was foreseen or planned at the time it was facilitated” obliterated the fault
requirement on the basis that “I see nothing wrong in asking, indeed expecting law-
abiding citizens to avoid any knowing activity that aids, supports or advances terrorist
activity or a group engaged in such activity.”

Although he did not clearly articulate this conclusion, Justice Rutherford seemed
to accept that terrorism offences because of their stigma and penalty will, like murder,
attempted murder and war crimes, require subjective fault under s.7 of the Charter and
that the relevant fault level is knowledge when he concluded that:

The subjective fault requirement of mens rea involves a knowing provision of
assistance, support or benefit to a person or group that the accused knows is
engaged in terrorist activity. This in my view amply meets the minimal
constitutional requirement to comport with the principles of fundamental justice
under the Charter.

At the same time, he rejected the idea that knowledge must relate to a particular terrorist
activity and suggested that knowledge of a terrorist activity “in a general way” is
sufficient to meet constitutional requirement.

C) Political or Religious Motive

The most publicized aspect of Justice Rutherford’s judgment was his decision
concerning the requirement that terrorist activities be committed in whole or part for a
political, religious or ideological cause. He held that the political or religious motive
requirement was an unjustified violation of fundamental freedoms and should be severed
from the other parts of the definition of terrorist activities. Justice Rutherford seemed
to accept that political or religious expression in the form of violence would not be
protected under s.2, but he held that the inclusion of non-violent activity such as serious

---

15 Ibid at para 39.
17 R. v. Khawaja at para 34
Justice Rutherford did not apply these cases or clearly conclude that terrorism offences constitutionally
require subjective fault. On the constitutional fault jurisprudence see Kent Roach Criminal Law 3rd ed
(Toronto: Carswell, 2005) at 73-81.
19 R. v. Khawaja at para 42.
20 Ibid at para 39.
21 The Supreme Court has commented that “The effect of s. 2(b) and the justification analysis under s. 1 of
the Charter suggest that expression taking the form of violence or terror, or directed towards violence or
terror, is unlikely to find shelter in the guarantees of the Charter.” Suresh v. Canada supra at para 107.
disruptions of essential services could have “an expressive component that comes within
the ambit of the Charter”. He was also not persuaded by the government’s argument
that political and religious speech would be exempted from the definition by s.83.01
(1.1). In the end, Justice Rutherford concluded “that the focus on the essential
ingredient of political, religious or ideological motive will chill freedom protected
speech, religion, thought, belief, expression and association, and therefore, democratic
life; and will promote fear and suspicion of targeted political or religious groups, and will
result in racial or ethnic profiling by governmental authorities at many levels.” Justice
Rutherford’s concerns under s.2 of the Charter are not so much with the effects of the
political and religious motive requirement on the accused, but on others who may share
religious and political beliefs with terrorists and who may be unfairly associated with
terrorism.

Once he concluded that the political and religious motive requirement violated s.2
of the Charter, Justice Rutherford then found that the government had failed to justify the
limitation under s.1 of the Charter. Although he expressed some concern about such a
legislative objective, he concluded that if the purpose of the provision was “to sharpen
the Canadian criminal law’s focus on existing crimes committed for political, religious or
ideological objectives or causes” this could have been done simply by recognizing such
motives as aggravating factors at sentencing. On the other hand, he concluded that if the
purpose of the impugned law was to prevent terrorism, then this purpose could be
satisfied without requiring proof of political or religious motive. He noted that the United
Nations, the United States and a number of European countries have defined terrorism
without a political or religious motive requirement, as did the Supreme Court of Canada in
Suresh when it read in a definition of terrorism to an otherwise undefined reference
to terrorism in immigration law. In short, Justice Rutherford considered two possible
objectives for justifying the political or religious motive requirement- 1) the desire to
punish politically or religiously motivated crimes and 2) the desire to combat terrorism.
In both cases, he concluded that less rights invasive alternatives existed and that the limit
that the political or religious motive requirement placed on fundamental freedoms was
not proportionate and had not been justified.

Finally, Justice Rutherford concluded that the political and religious motive was
not so inextricably bound up with the rest of the definition of terrorist activities that the
definition could not stand if the political and religious motive requirement was struck out
and severed from the rest of the definition. He did not delay the partial invalidation of
the definition of terrorist activities so, subject to the accused being granted leave to
appeal by the Supreme Court at the interlocutory stay, Mr. Khawaja’s trial will proceed

22 Ibid at para 50. He did not, however, examine whether the exemption of protest, strikes and advocacy
that were not intended to harm life or health or safety would preclude any violation of s.2 of the Charter.
23 R. v. Khawaja at para 50
24 Ibid at para 73. Elsewhere he similarly concludes the political or religious motive requirement will have
“chilling” effects on the expression of religious and political beliefs and will “focus investigative and
prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons
both in Canada and abroad.” Ibid at para 58
25 Ibid at para 75.
26 [2002] 1 S.C.R. 3
with terrorist activities being defined without the political or religious motive requirement.

III. Evaluation of Justice Rutherford’s Judgment

A) Vagueness and Overbreadth

Justice Rutherford’s conclusion that the definition of terrorist activities and the specific terrorist offences are not impermissibly vague is not surprising in light of the jurisprudence which has demonstrated a distinct reluctance to strike down offences on the grounds of vagueness. The Supreme Court’s jurisprudence has increasingly focused on whether legislation provides a basis for further interpretation of the law and not on whether the legislation itself provides fair notice or limits law enforcement discretion. Although the Court has expressed concerns about fair notice and the limitation of law enforcement discretion, it has not demanded that laws necessarily advance these values without the benefit of further judicial interpretation, even though such a deferential approach undermines the actual notice or limits on law enforcement discretion provided by the offence. Given that the Court in Suresh found an undefined reference to terrorism in Canada’s immigration law not to be unconstitutionally vague, it would be ironic and surprising if it found that attempts to define the term were vague. Indeed, it will be suggested below that the overbreadth challenge is stronger than the vagueness challenge and the Supreme Court’s decision to read in a much narrower definition of terrorism into the immigration law than found in the Criminal Code lends some support to the overbreadth arguments.

Although the decision that the law is not unconstitutionally vague is not surprising, there are some words particularly in the definition of terrorist activities that push the boundaries of vagueness and may cause trouble in the future. The prime example is the use of the word “security” in section 83.01(1) (b)(i)(B) that requires that acts be committed “with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security”. This provision is even more important in distinguishing terrorism from other crimes given Justice Rutherford’s decision to strike down the political or religious motive requirement. The intangible and subjective qualities of the word “security” raise concerns about vagueness. Such concerns are not in any way addressed by the expansion of security to include the even less tangible and broader concept of “economic security.” In addition, the reference to economic security must be read in conjunction with the idea that compelling persons, not just governments and international organizations, is included in the definition of terrorist activities. The Supreme Court has already in its investigative hearing cases expressed its unease with relying on the phrase “national security” as a justification for the Anti-Terrorism Act given that “courts must not fall prey to the rhetorical urgency of a

---

29 For an exceptional finding that a law was vague see Justice Ratushny’s judgment that the leakage offence under s.4 of the Security of Information Act was unconstitutionally vague because of a failure to define many key terms including what is caught by the prohibition of “secret official” and “official” information. O’Neil v. Canada (2007) 82 O.R.(3d) 241 at para 71. (S.C.J.) Justice Ratushny ruled that the offence was also overbroad because it “fails to define in any way the scope of what it protects” and as such went beyond what was required to satisfy the objectives of secrecy legislation. Ibid at paras 62-63.
perceived emergency or an altered security paradigm.”\(^{30}\)

Although reference to security and even economic security can be found in recent South African anti-terrorism legislation\(^{31}\), it is not found in the British *Terrorism Act, 2000* \(^{32}\) which provides the foundation for Canada’s law.

As suggested above, overbreadth has been a more potent ground for challenging laws under s.7 than vagueness. Justice Rutherford did not fully consider the accused’s overbreadth claims and reduced them to claims of hypotheticals that could be resolved by sensible case by case adjudication.\(^{33}\) This approach, however, avoided the central question of overbreadth analysis which is whether the legislature’s choice of means overshoots its objective and whether the legislature has restricted liberty in ways that are unnecessary to fulfill the objective of the law.\(^{34}\) If the objective of the law is to prevent acts of terrorism, then it is questionable that targeting serious disruptions of essential public or private services is necessary. Another area that may be vulnerable is Parliament’s inclusion of conspiracies, counselling and threats to commit a terrorist activity in its definition of terrorist activities. This could result in a process in which inchoate forms of liability are combined with crimes that punish acts of preparation for terrorism. In other words, inchoate forms of liability would be added to crimes that are in substance inchoate crimes in a way that the court has resisted with respect to other crimes such as attempted conspiracies.\(^{35}\)

At the same time, most of the other terrorism offences can probably withstand overbreadth scrutiny because of their relation to preventing terrorist activities.

**B) Fault**

Although the decision could have been clearer in finding that terrorism offences have sufficient stigma and punishment to require proof of subjective fault, Justice Rutherford’s apparent judgment that this is the case is to be welcomed. Although many have criticized the Supreme Court’s stigma jurisprudence as circular and question begging, it makes some intuitive sense to single out crimes of murder, attempted murder, war crimes and now terrorism as particularly serious and requiring offenders to have subjective fault. Justice Rutherford’s decision that knowledge is sufficient as the constitutional form of fault is also defensible given that knowledge is what is

---


\(^{31}\) Protection of Constitutional Democracy Against Terrorist and Related Acts Act 33 of 2004 s.1(1)(b).


\(^{33}\) In the different context of challenges under s.12 of the Charter, the Court has called for restraint in the use of far fetched hypotheticals. *R. v. Morrisey* [2000] 2 S.C.R. 90.

\(^{34}\) *R. v. Heywood* supra; *R. v. Demers* supra

\(^{35}\) For the Supreme Court’s recent rejection of the offence of attempted conspiracy on the basis that “the criminal law does not punish bad thoughts of this sort that were abandoned before an agreement was reached, or an attempt made, to act upon them” see *R. v. Dery* 2006 SCC 53 at para 51. Parliament has of course more clearly extended criminal liability with its definition of terrorist activity in s.83.01 that includes inchoate liability and threats to commit terrorist acts. In addition, the terrorist offences to which the inchoate liability apply are, unlike in *Dery*, defined as completed crimes in themselves. Nevertheless the Court’s reluctance at common law to accept inchoate forms of inchoate liability may represent principles that could apply to overbreadth analysis under the Charter. See *R. v. Hamilton* [2005] 2 S.C.R. 432 at para 72-74 where Charron J. in dissent relates definitional restraints in the criminal law to compliance with the Charter and the limits of the criminal law.
constitutionally required for murder and attempted murder. 36 At the same time, however, inchoate offences such as attempted murder and conspiracy to commit murder generally require the higher fault requirement of intent to commit the completed offence and this is arguably appropriate in the context where the ultimate objective of a terrorist act has not been achieved. Although the terrorism offences are defined as completed offences in their own right, they are in essence instances of various forms of preparation to commit complete crimes. Thus proof of something more than the Charter minimum of knowledge may be desirable. Indeed the offences in ss. 83.18 and 83.21 require in addition to guilty knowledge a higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity.

Section 83.19, however, does not require such a purpose or intent requirement, but only that there be knowing facilitation of a terrorist activity. In itself, this satisfies the constitutional minimum of knowledge, but I remain concerned about the effect of s.83.19(2)(b). That interpretative section qualifies the constitutionally required knowledge requirement by providing that a terrorist activity can be facilitated “whether or not…any particular terrorist activity was foreseen or planned at the time it was facilitated.” How can the accused know under s.83.19(1)(a) that he or she is facilitating a terrorist activity but not know under s.83.19(2)(b) that any particular terrorist activity was foreseen or planned? Any remaining knowledge of a terrorist activity would have to be extremely tenuous, abstract and hypothetical. It could amount to just reckless and angry talk. Indeed, there is a danger that knowledge of a terrorist activity could be nothing more than reckless talk and extreme political or religious views about past or future acts of terrorism. If this is true, the decision to uphold the highly qualified knowledge requirement in s.83.19 could be in some tension with Justice Rutherford’s decision to sever the political or religious motive from the definition of terrorist activity. Section 83.19 is more likely to be applied to those who are on the periphery of terrorist conspiracies who do not necessarily have the intent to assist the group in preparing for any particular terrorist act. The actus reus of s.83.19 is broad and can include facilitation of activities that have not yet been committed. Given the breadth of the offence, it is extremely important that the minimal fault requirement of knowledge in relation to the facilitation of terrorist activities not be diluted.

Although some accommodations may have to be made with respect to the fact that those in a terrorist cell may not know the specifics of their operation until the last minute, this is done in a better tailored manner in both s.83.18(1)(c) and 83.21(2)(g) which provide that it is not necessary to establish that “the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.” There is a difference between not knowing the specific nature of a planned terrorist activity (ss. 83.18(1)(c), 83.21(2)(g)) and between not knowing that any particular terrorist activity is planned or foreseen. In the former case, the accused know that an act

36 Note that a constitutionally required knowledge requirement for all terrorism offences may result in judicial invalidation of the little noticed s.83.231 which was added to the terrorism provisions in 2004. Under s.83.23(4) it is an offence subject to life imprisonment if death results from a terrorist hoax even though death may not have been intended or even foreseeable. All that the prosecutor is required to prove for any of the hoaxing offences is an “intent to cause any person to fear death, bodily harm, substantial damage to property or serious interference with the lawful use or operation of property.” Criminal Code s.83.231(1). See Roach “Ten Ways to Improve Canadian Anti-Terrorism Law” (2006) 51 C.L.Q. 102 at 109-110.
Draft: Not for citation

of terrorism is coming but does not know the details; in the latter case, the accused may only discuss terrorism in general and not know that any particular terrorist act will occur.

Finally, Justice Rutherford’s conclusion that s.83.19 satisfies constitutional fault standards on the basis that: “I see nothing wrong in asking, indeed expecting law-abiding citizens to avoid any knowing activity that aids, supports or advances terrorist activity or a group engaged in such activity” runs the risk of blurring the distinction between punishing a person as a terrorist for their subjective fault and for their negligence in not taking reasonable steps to avoid assisting terrorists. A conclusion that negligent involvement with terrorists would be sufficient would be inconsistent with any conclusion that there is a constitutionally required mens rea of knowledge for terrorism offences.

Despite these reservations about his ruling on s.83.19, Justice Rutherford’s judgment may well encourage reading down of that offence in the future because he suggests that “the provisions as to knowledge on the part of an accused should be read and construed in a manner consistent with constitutional norms.” The willingness to read in or enhance fault elements to ensure compliance with constitutional standards of fault may also have implications for other offences. For example it may be crucial with respect to another very important offence that is charged in both the Khawaja and Toronto cases, but is not considered by Justice Rutherford in his judgment. The offence is s.83.2 which provides:

Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

This is a broad and important offence because it applies to all indictable offences committed either for the benefit of, at the direction of, or in association with terrorist groups. It is also important because it carries a maximum sentence of life imprisonment unlike the maximum ten years imprisonment for s.83.03 and 83.18.

Unfortunately section 83.2 contains no explicit fault requirement leaving it to the judge to determine whether the accused must know he was committing the offence for a terrorist group and/or have intended to act for the benefit of the group or in association with the group or at its direction. Justice Rutherford’s ruling suggests that a fault level of knowledge that one is acting in association or at the direction of a terrorist group should be read into this offence in order to comply with the Charter. Knowledge that one is dealing with a terrorist group should not, however, be enough. There is a case that the higher fault element of an intent to benefit, follow the direction or act in association with a terrorist group should also be proven either though the offence does not make specific reference to intent. Given the stigma and penalty of this particular terrorism offence and the ambiguity that may arise about whether one is benefiting or associating with a terrorist group, a requirement of subjective intent better captures those who should be branded and punished as terrorists. It would also be consistent with the conspiracy cases

37 Ibid at para 34
38 ibid at para 38. This accords with the Supreme Court’s increased emphasis on reading down and interpretative remedies.
Draft: Not for citation

that Justice Rutherford cites in support of his ruling.\(^{40}\) That said, Justice Rutherford’s ruling, as well as the Supreme Court’s jurisprudence on fault under s.7, supports the less onerous knowledge requirement. In any event, it will be necessary for judges to read at least knowledge that one is dealing with a terrorist group and that one is benefiting a terrorist group or acting at its direction or in association with it into s.83.2 despite its failure to include any explicit fault requirements.

Another area in which courts should read in subjective fault requirements would be in relation to s.83.01(1)(b) (D) of the definition of terrorist activities that is incorporated into the definition of most of the terrorism offences. This section applies to the intentional causing of substantial property damage “if causing such damage is likely to result” in death, serious bodily harm, endangerment of life or serious risk to public health or safety. One reading of this clause is that the only fault required is the intent to cause substantial property damage; another more restrictive reading is to read in the additional fault requirement that the accused have subjective knowledge in relation to the threats to life and limb. Justice Rutherford’s judgment suggests that courts should in general read in knowledge with respect to all the prohibited acts in order to satisfy constitutional fault requirements.

C) Political or Religious Motive

1) The Section 2 Violation

It was not a foregone conclusion that the political or religious motive requirement would be found to violate s.2 of the Charter. The purpose of the political and religious motive requirement was not to infringe expression, so the finding of a violation depends on its harmful effects. Justice Rutherford’s judgment focuses on the somewhat speculative effects of the motive requirement on others, but it could also have been strengthened by examination of its more certain effects on the accused in mandating the admission of political and religious motive regardless of its possible prejudicial effects on the trial process.

Justice Rutherford’s decision that the political or religious motive requirement constituted an unjustified violation of the fundamental freedoms focused on possible harmful effects that the motive requirement could have on others who may have similar religious or political views to those who commit acts of terrorism with political or religious motives. In this sense the decision is informed as much by equality concerns as with concerns about chilling freedom of expression, religion and association.

Although Justice Rutherford made no reference to the findings of the Arar commission in his judgment and Justice Ratushny in the O’Neil case\(^ {41}\) rejected an attempt by the Crown to have the first report admitted on the basis that it was expert opinion evidence, the Arar report does constitute back of the social backdrop of the decision.

\(^{40}\) For example, he cites Martin J.A. that while it is not necessary that conspirators know each other or all of the details of their common scheme that “it must be shown that each of the conspirators were aware of the general nature of the common design and intended to adhere to it. R. v. Longworth et al (1982) 67 C.C.C.(3d) 554 at 555-6 (Ont.C.A.). See also R. v. Ancio (1984) 10 C.C.C.(3d) 385 at 402-403 (S.C.C.) (intent to commit the crime required for attempts); R. v. O’Brien (1954) 110 C.C.C. 1 at 3 (S.C.C.) (intent to commit the crime required for conspiring) But see R. v. Hamilton [2005] 2 S.C.R. 432 at paras 28-29 (knowledge or perhaps even recklessness sufficient for counselling a crime not committed)

\(^{41}\) O’Neil v. Canada supra at para 128
Justice O’Connor in the first Arar report commented:

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Muslim and Arab communities. There is therefore an increased risk of racial, religious or ethnic profiling, in the sense that the race, religion or ethnicity of individuals may expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada’s embrace of multiculturalism.  

Justice O’Connor added to these normative concerns about discrimination another very practical concern: “perceptions, whether founded or not, can have a serious impact on the level of co-operation members of communities give investigators.” In his second report issued after the Khawaja decision, Justice O’Connor discussed the political and religious motive requirement as one of the factors that merited increased review of the RCMP’s national security activities. Although designed to place an extra burden of proof on the state, the political or religious motive requirement could also contribute to a process in which investigators may “lean towards increased inquiry and investigation based on religious and political beliefs. This could raise concerns about profiling in addition to the concerns about privacy and freedom of religion and expression”. The political and religious motive provision required police to collect evidence about a terrorist suspect’s religion and politics and the Arar report illustrates how the police could use this information to make inaccurate and unfair assumptions about people such as Maher Arar and his wife Monia Mazigh. The removal of the political and religious motive requirement is, of course, no guarantee that profiling or unfairness will not occur, but it is a step in the right direction.

In addition to these somewhat speculative concerns about the effects of the motive requirement on third parties, the striking down of the political or religious motive requirement could have a more certain effect on the accused. The trial judge will no longer be required as a matter of law to admit evidence about Mr. Khawaja’s religious and political views into the trial. Before this decision, the trial judge would have been unable to rule such evidence inadmissible or irrelevant because it was required to establish one of the essential elements of a terrorist activity. Nevertheless, evidence of...
political and religious motive can distract and prolong a trial: turning it quite literally into a religious or political trial. There have been terrorism trials in other countries where both sides have called competing expert evidence on the meaning of a prayer or the writings of a religious scholar found in the possession of the accused.  

The striking down of the political and religious motive requirement does not, however, guarantee that the prosecutor or the accused will not seek to introduce evidence relating to political or religious motive. Motive is admissible evidence, albeit subject to the trial judge’s discretion to balance its probative value against its prejudicial effect. In the Air India conspiracy to commit murder trial, the trial judge determined that the probative value of motive evidence outweighed its prejudicial effect and allowed the Crown to introduce evidence of the accused’s motives to commit acts of terrorism directed at the state of India. In his judgment acquitting the accused, however, the trial judge found that the motive evidence was not helpful because so many Sikhs at the time had similar motives.

Concerns are being raised that a number of American trials in which trial judges have admitted evidence about the religious motives of the accused are being distracted and consumed with evidence from competing experts about the meaning of various prayers, scholars and other aspects of the Islamic faith. The Crown may often seek to introduce evidence of political or religious motive as circumstantial evidence in support of a terrorism charge, or as part of the narrative of the charges or in order to help establish a relation to a terrorist group, as is required in many of the terrorism offences. Nevertheless, Justice Rutherford’s decision striking down the political and religious motive requirement means that both the Crown and trial judges will no longer be required as a matter of law to introduce and admit such evidence. The Crown can make a decision on the facts of the case about whether such evidence is necessary. Even if the Crown decides to seek to introduce religious and political motive evidence, the judge can as a result of Justice Rutherford’s judgment now exercise the traditional discretion to exclude such evidence if its prejudicial effect outweighs its probative value.

Many will argue, however, that it is not realistic to expect that evidence about religious or political motive will not be collected and admitted in terrorism trials. They can argue with some justification that the distinction between motive and intent can be illusive at the best of times. Although motive may play some role in the administration of some defences and sentences, it is important to preserve as much as much of the

and American Anti-Terrorism Laws” (2003) 66 Sask.L.Rev. 419 at 444. They also create a risk of an unfair trial or a miscarriage of justice especially in jury trials by authorizing the admission of highly prejudicial evidence regardless of its probative value. On the risk of miscarriages of justice in terrorism cases especially when they involve juries and an accused with unpopular views see Kent Roach and Gary Trotter “Miscarriages of Justice in the War Against Terror” (2005) 109 Penn. State.L.Rev. 967.

Amy Waldman “Prophetic Justice” The Atlantic Monthly October, 2006 p.82ff.


Amy Waldman “Prophetic Justice” The Atlantic Monthly October, 2006 p.82ff.

This traditional discretion has most recently been approved in R. v. Khalawon 2006 SCC 57

Michael Plaxton has argued that many aspects of the criminal law, including defences and sentencing, are concerned with motive. See Michael Plaxton “Irruptions of Motive in the War on Terror” (forthcoming). Although the Crown must disprove most defences, the accused generally has the choice about whether to raise issues of motive as a defence. In addition, the focus would rarely be on the accused’s political or religious opinions in the administration of a defence. Professor Plaxton also points to the role of motive in
traditional criminal law as possible in order to maximize its denunciatory effects in condemning and punishing terrorism. One of the great dangers of terrorism is that it will goad and scare liberal democracies from changing their fundamental defining rules. As much as possible we should retain our traditional principles and rules in the face of terrorism. It is particularly important to maintain the traditional approach that motive does not constitute an essential element of a criminal offence, if we are to rely on our equally as traditional rule that no motive excuses crime. If motive cannot be a shield for the accused, it should also not be a sword for the state.

In many terrorism cases, the Crown will find the urge to lead evidence of political or religious motive to be irresistible in order to establish the narrative of the case and association with a terrorist group. Nevertheless, the Crown could decide not to lead political or religious evidence because of a principled concern that such evidence would distract and prolong the trial and create impressions that the accused’s religion was on trial that would be contrary to the public interest. The Crown may also correctly anticipate that the decision to call such evidence would cause the defence to call its own expert evidence on the significance of the relevant religious and political beliefs.

Finally, it could be argued that Justice Rutherford did not strike down all the motive requirements because he left intact s.83.01(1)(b)(i)(B) which requires the Crown to prove that the accused had the intent to intimidate the public with regard to its security or to compel governments, organizations or persons to act constitutes an implicit motive clause. This, it could be argued, is an implicit motive requirement that will require the Crown to call evidence about the underlying motives behind an alleged terrorist plot. Nevertheless, in my view, this section still differs in some important respects from political and religious motive requirement in s. s.83.01(1)(b)(i)(A) that Justice Rutherford struck down as an unjustified violation of s.2 of the Charter. An accused’s political or religious beliefs, the prayers that he or she says and the holy texts that he or she reads, lie at the core of the freedom of expression and freedom of religion. In contrast, beliefs that relate to the attempt to intimidate the public or compel governments or other people to act exist more on the periphery of protected freedoms. The religious and political motive requirement authorized state inquiries into the deepest convictions and beliefs of the accused including those that are not associated with violence or hatred. Although state inquiry into an accused’s intent to intimidate a population or to compel actions could also involve inquiry into political or religious beliefs, the expression and thought affected by such a requirement are deserving of less constitutional protection than religious or political thought that is not directed at intimidation or compulsion.

The focus in terrorism prosecutions should be on violence and preparations to commit violence and not on the accused’s religious and political views. Such conclusions are supported by both normative and practical concerns. Justice Rutherford’s decision to strike down the political and motive requirement is as much justified by concerns about the effects of the motive requirement on the accused, as on others who may share

sentencing, but again there has been a much wider approach to the relevance of evidence with respect to sentencing than with respect to liability. Even with respect to sentencing, the Supreme Court rejected Robert Latimer’s argument that his motive was relevant to determining the constitutionality of the mandatory sentence of life imprisonment for murder. R. v. Latimer [2001] 1 S.C.R. 3 at para 82 in which the Court concluded that “in considering the character of Mr. Latimer’s actions, we are directed to an assessment of the criminal fault requirement or mens rea element of the offence rather than the offender’s motive or general state of mind.”
political or religious or be perceived to share such beliefs with terrorists. There are
normative arguments that the political and religious motive requirement should be
removed in order to protect the accused and others from discrimination on the basis that
they are members of an unpopular religious group or that they express unpopular
religious or political views. The idea that terrorism trials will inevitably be political or
religious trials may have some force from a historical, political science or sociological
perspective, but it is contrary to the logic of the criminal law which suggests that motive
neither excuses nor constitutes intentional crime.

There are also powerful practical objections to the political and religious motive
requirement. A focus on the accused’s religion and politics can prolong and distract trials.
It could also create harmful and counterproductive impressions that the accused are being
prosecuted for their political or religious beliefs. The motive requirement could also
provide an accused with a possible platform to politicize the trial process by offering
extensive evidence about the true meaning of often ambiguous religious and political
beliefs. The controversial political or religious motive requirement unnecessarily
sacrifices attempts to gain the broadest possible consensus about the illegitimacy of
terrorism.

2) Section 1 Analysis

A conclusion that the political or religious motive requirement violates the
fundamental freedoms of either the accused or others does not end the constitutional
analysis. Although Justice Rutherford’s s.1 analysis is quite brief, it can be unpacked in
a manner that is consistent with the established doctrine. As is often the case, the choice
of governmental objective under s.1 is crucial and not crystal clear. Justice Rutherford

53 Ronald Dworkin has been particularly consistent and courageous in retaining his focus on equal rights in
Review 3. Another way of addressing the normative questions would be following John Rawls to ask
whether a person behind a veil of ignorance who did not know whether he or she would be Muslim would
select a criminal code that would require proof of political or religious motive or one that would not require
such proof. Given present attitudes towards Muslims, the answer is obvious. John Rawls A Theory of
Justice (Cambridge: Harvard University Press, 1971). This line of inquiry is followed by Michael Plaxton,
but rejected on the basis that the liberalism of Rawls and Dworkin is controversial. Michael Plaxton
“Irruptions of Motive in the War on Terror” (forthcoming). This may be so, but it is not clear that there is a
viable alternative to such political liberalism. One possible alternative is a theory of militant democracy
that denounces political and religious views that do not accord with liberal democracy. For my reservations
about that theory see Kent Roach “Anti-Terrorism and Militant Democracy” in Andras Sajo ed Militant
Democracy (Amsterdam: Eleven Publishing, 2004). In a possible nod to militant democracy, Justice
Rutherford considered that the purpose of the political or religious motive requirement could be to
denounce crimes committed with such motives, but concluded that this objective could be more
proportionately pursued by considering political or religious motives to be aggravating factors at
sentencing.

54 The Arab Convention for the Suppression of Terrorism and the Convention of Islamic States on
Combating International Terrorism both define terrorism as acts of violence without regard to religious or
political motive. This approach is also taken in the criminal law of a number of Arab states as well as
Arab States” in Victor Ramraj, Michael Hor and Kent Roach eds. Global Anti-Terrorism Law and Policy
(Cambridge University Press, 2005). My point is not that the laws of Islamic states and organizations
should necessarily be followed, but that the western countries should seek the broadest possible consensus
on a definition of terrorism in order to maximize the stigma of terrorism and support for anti-terrorism
efforts.

55 R. v. Khawaja supra at paras 74-80.
first considers the case that the government’s objective is to punish crimes committed with a political or religious motive more harshly. It is not clear whether such a motive should be considered legitimate in a free and democratic society that accepts a diversity of political and religious views, but Justice Rutherford somewhat reluctantly conceded that this might be the objective of the political or religious motive requirement. He then concluded that such an objective could be satisfied by including political or religious motivation as an aggravating factor at sentencing, as is done with respect to hate crimes. This could limit the harms of exploring the accused’s political or religious motives to the sentencing process and not distort the trial process.

Justice Rutherford then examined the case for the political or religious motive requirement on the basis of the overall objective of the law in preventing terrorism. Consistent with this objective, the motive requirement was included in order to help distinguish terrorism from other crimes that do not require a more preventive approach. Assuming that the political and religious motive is rationally connected to this objective, Justice Rutherford concluded that the state’s case again floundered because there were less rights restrictive means to prevent terrorism and to distinguish terrorism from ordinary crime. He noted that many definitions of terrorism, including those used in the United States, various United Nations instruments and by the Supreme Court in Suresh, all fulfill the objectives of preventing terrorism and distinguishing terrorism from ordinary crime without burdening fundamental freedoms and equality values by requiring proof of political or religious motive. Although comparative examples are not conclusive in s.1 analysis, the many workable and coherent definitions of terrorism that do not rely on religious and political motive provide compelling evidence that the state has not justified its use in the Criminal Code. There are other effective but less rights invasive alternatives to criminalize terrorism than relying on the problematic political or religious motive requirement. In addition, the value of the political and religious motive in fulfilling its objectives of preventing terrorism and distinguishing terrorism from other crimes is outweighed by the harms to fundamental freedoms and equality values.

Questions have been raised about the effect of Justice Rutherford’s ruling on the mandate of the Canadian Security Intelligence Service (CSIS) which applies to “activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective…” Justice Rutherford’s concerns about the chilling of political and religious expression and association may apply to this part of CSIS’s mandate. At the same time, however, CSIS does not have police powers or the ability to charge persons. The role of a security intelligence agency in providing advance information to government about security threats will affect any s.1 analysis. Justice Rutherford’s conclusions that the punitive criminal law objectives of the Anti-Terrorism Act could be achieved without requiring proof of political or religious motives are not easily transferable to the security intelligence field where the focus is on advance

56 Ibid at para 75. See s.718.2(a)(i) of the Criminal Code.
57 Ibid at para 76.
58 Ibid at paras 64, 70-71.
59 Ibid at para 80.
60 Canadian Security Intelligence Service Act R.S.C. 1985 c.C-23 s.2( c). This mandate was amended by the Anti-Terrorism Act S.C. 2001 c.41 s.89 to add religious and ideological objectives to the reference to a political objective.
warning about security threats. In other words, even if a judge was to conclude that the reference to the pursuit of political and religious objectives in the CSIS Act violates s.2 of the Charter, the government would have a much stronger case that such a focus is necessary for a security intelligence agency that provides advance information and intelligence about security threats as opposed to a Criminal Code provision that punishes crimes.  

3) The Effects of Severance and Continued Overbreadth Problems

A final question raised by Justice Rutherford’s ruling is whether the definition of terrorist activities can stand alone without the political or religious motive requirement. Justice Rutherford recognized that his decision will broaden the definition of terrorist activities by removing the requirement that the prosecutor establish political and religious motive, but that such a result was justified to prevent the broader and harmful systemic effects of the motive requirement on fundamental freedoms and minorities who may share political and religious beliefs with terrorists. In this sense, the accused’s successful Charter challenge had the very unusual effect of broadening the crime under which he is charged in order to protect the Charter rights of third parties not in the courtroom. Such an approach would only be justified under the tests for severance if Parliament would have intended that the definition should stand without the political and religious motive requirement and if the remaining definition of terrorist activities itself satisfies Charter standards. On this point, Justice Rutherford dismissed the government’s argument that without the political and religious motive, the terrorism provisions are “not distinguishable from a general law enforcement provision in the Criminal Code”. In reaching this conclusion, he relied on “another significant and distinguishing element in the definition of ‘terrorist activity’” namely the requirement in s.83.01(1)(b)(B) of “the intimidation or coercion of the public or its institutions.”

Justice Rutherford’s conclusion would be sound if Canada had followed the international model as embraced by the Supreme Court in Suresh of distinguishing

---

61 The consequences of severing the reference to political, religious or ideological objectives from the CSIS act would be especially far reaching because it would give CSIS the mandate to collect intelligence on essentially all serious crime against persons or property because unlike under s.83.01(1)(b)(B) there is no additional limiting reference to the intimidation or coercion of the public or the compulsion of governments or international organizations.


63 As noted above, however, the ruling could also benefit the accused by restoring the trial judge’s discretion to decide whether the prejudice of introducing evidence of political or religious motive outweighs its probative value in proving the alleged crime.

64 Schachter v. Canada [1992] 2 S.C.R. 679. This determination of legislative intent is notoriously difficult. In this case, lawyers representing the Attorney General argued that the political and religious motive requirement was an essential part of the definition of terrorist activities but the then Attorney General of Canada had expressed some willingness not to delete the requirement and a decision was made not to appeal Justice Rutherford’s ruling.

65 Should the trial be held on the basis of the new definition of terrorist activities produced by the severance, the accused could appeal any conviction on the basis that the remaining definition constituted an unjustified violation of the Charter. A conclusion that the new definition was overbroad to the objective of preventing terrorism because of its reference to attempts to compel persons might be held to result in no substantial wrong or miscarriage of justice if the evidence established that an intent to intimidate the public or compel governments or international organizations to act.

66 R. v. Khawaja at para 73.

67 ibid at para 76.
terrorism from ordinary crime on the basis of intent to intimidate a population or compel governments or international organizations to act. As I have argued more fully elsewhere, such an approach can distinguish terrorism from ordinary crime without the distorting and discriminatory effects of requiring proof of religious or political motive. Unfortunately, however, Canada eschewed the international model in favour of a broader model that includes attempts to compel persons as well as governments to act. Recall that section 83.01(b)(i)(B) provides that terrorist acts must be committed:

- in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada.

The immediate problem presented by this section is that acts involving the broad range of intentional harms listed under s.83.01(b) now will fall under the definition of terrorist activities if they are intended to compel a person to do or refrain from doing any act. This could apply to a broad array of crimes including extortions, robberies or insurance fraud arsons that endanger human life or public safety. The new breadth of terrorist activities may well affect the government’s ability to justify the legislation under s.1 and it may also invite new and stronger overbreadth challenges of the definition of terrorist activities.

It would have been preferable for Justice Rutherford to have severed the reference to compelling persons in the definition of terrorist activities on the basis of overbreadth to the state’s objectives in preventing terrorism. In other words, it may not be sufficient to allow the judicially pruned definition of terrorist activity to stand; some more pruning may be required. Once the definition is opened up, serious consideration should be given to using the Suresh definition which not only has been approved by the Supreme Court, but is also quite close to best efforts on a general international definition.

Conclusion

It should not be assumed that a definition of terrorism that focuses on the intentional murder and maiming of civilians is a weak definition. The definition will still apply to a broad range of crimes that apply to various acts of preparation that may be quite remote from an actual act of terrorism. The more narrowly and precisely terrorism is defined, the more weight that the prevention of terrorism should carry in determinations of whether limits on rights have been justified under s.1 of the Charter. As the Supreme Court stated in Suresh, the essence of what the world understands as terrorism is the intentional killing and maiming of civilians in order to intimidate a population or compel governments or international organizations to act.

Leaving aside its effects on the remaining definition of terrorism, Justice Rutherford’s decision to sever the political or religious motive requirement from Parliament’s definition of terrorist activities may have some salutary effects both

---

generally and with respect to terrorism prosecutions. Generally, his decision sends a message that the state’s interests in punishing terrorism is directed at the severe violence and harms of terrorism and not at political and religious beliefs. Section 83.01(1.1) attempted to send a similar message, but one that was undermined by the unnecessary inclusion of political and religious motive in the definition of terrorist activities, as well as the refusal to rule out the possibility that the expression of religious and political views could, in themselves, constitute a terrorist activity.71

Justice Rutherford’s statements that the public “would be hard pressed”72 to recount the motives behind various acts of terrorism can be read as a sign that the law should not dignify or elevate the motives of terrorists by making them a focal point of criminal trials. His conclusion that the motive behind terrible acts of terrorist violence “really doesn’t matter”73 is supported by the traditional position of the criminal law that crime neither depends on nor is excused by motive.74 Such a message can better de-legitimate terrorism by stressing the violence in terrorism and not its political or religious motives which may be widely held by many who would never resort to violence.

R. v. Khawaja is significant in its decision to uphold the definition of terrorist activities and various terrorism offences as not being vague or overbroad and as satisfying constitutional standards that require proof of knowledge as well as in its decision to strike down the political and religious motive requirement. The next legal steps will involve whether the Supreme Court exercises its discretion to hear an appeal before the trial begins and whether the trial judge decides that the probative value of evidence of political or religious motive outweighs its prejudicial effect on the trial. Whatever the resolution of these legal issues, Parliament will have to consider whether the judicially altered definition of terrorist activities is sustainable.

It has been suggested in this comment that focusing on evidence of political and religious motive can harm not only those who may share political and religious beliefs with the accused, but also harm the accused by requiring the admission of evidence that may prejudice the jury but have limited probative value of guilt. The admission of such evidence can also prolong and distract criminal trials and create an impression that those accused of terrorism are on trial for their political and religious opinions and not for preparations to commit acts of violence. It has also been suggested that the definition of terrorist activities, even as altered by the decision in Khawaja, may be overbroad and that the fault requirements for the offences under ss.83.19 and 83.2 of the Criminal Code should be carefully reconsidered either by judges or Parliament.

71 The section provides: “for greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition “terrorist activity” in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph” (emphasis added). The most likely scenario for speech being a terrorist activity would be the inclusion of the undefined concept of “threats” to commit terrorist activities as within the definition of terrorist activities.


73 Ibid at para 79