

**IN THE SUPREME COURT OF CANADA
(on Appeal from the Court of Appeal for Ontario)**

BETWEEN:

MOHAMMAD MOMIN KHAWAJA et al.

Appellants

-and-

ATTORNEY GENERAL OF CANADA et al.

Respondents

**FACTUM OF THE INTERVENER,
THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION (“BCCLA”)**

PART I – OVERVIEW

1. This case raises important issues about fundamental freedoms and the dangers of sacrificing such principles in the face of terror. Parliament opted for the broadest possible definition of terrorist activities immediately after 9/11. However, legislative responses to great tragedies do not relieve the judiciary of its unpopular task of applying enduring constitutional norms. This is particularly so because Parliament’s definition of terrorist activities needlessly targets non-violent forms of political and religious expression.

2. Departing from decades of settled law, the Court of Appeal held that the impugned laws did not violate s.2 of the *Canadian Charter of Rights and Freedoms* (“Charter”)¹ despite prohibiting expressive political and religious activity that did not involve violence or the threat of violence. The Court of Appeal undermined s.2(b) by requiring evidence to demonstrate that expression was chilled. It dismissed concerns about discriminatory application of the law that targeted religious and political activity as a matter for s.24(1) remedies or, worse, an inevitable reflection of the “temper of the times.”²

3. The Court of Appeal also failed to appreciate the ambit of the impugned laws including the very broad definition of “terrorist activity” which is in turn expanded by including as a

¹ Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

² *R v Khawaja*, 2010 ONCA 862 (CanLii) at para 127 [*Khawaja*].

terrorist activity threatens to commit such activities. The definition of terrorist activities is broad enough to capture members of the Occupy movement or Aboriginal groups that cause substantial property damage or disrupt essential services in a way that risks health and safety.

4. The BCCLA accepts the facts set out by the parties and takes no position to the extent that there is any disagreement.

PART II – QUESTION IN ISSUE

5. The question at issue is: do sections 83.03, 83.18, 83.19 or 83.21 of the *Criminal Code*,³ which incorporate the definition of “terrorist activity” in s.83.01(1), infringe s.2 of the *Charter*?

PART III – ARGUMENT

The Impugned Laws Infringe Fundamental Freedoms

6. The impugned laws clearly infringe the fundamental freedoms of Canadians and the Court of Appeal erred by holding that they did not. With respect to the infringement of the appellants’ s.2 fundamental freedoms, the Court of Appeal erred for at least four reasons:

- a. First, the Court of Appeal ignored well-settled doctrine that the protection afforded by s.2 is content neutral and instead held that the *Charter* does not protect political or religious activities that, in its opinion, are not socially useful;
- b. Second, it erred by failing to consider the breadth of both the impugned laws and the incorporated definition of “terrorist activity” in context;
- c. Third, the panel’s interpretation of the impugned provisions is inconsistent with a purposive reading of the *Charter* that approaches the rights and freedoms afforded by it in a generous and harmonious manner; and
- d. Fourth, the Court of Appeal misconceived the appellant’s challenge as one directed at Parliament’s ability to criminalize motive whereas the real concern is the effect of criminalizing political or religious motive.

(a) *Only Violence and Threats of Violence against Persons Should be Excluded*

7. It is well-settled that a court should not review the content of an activity to determine whether the activity is protected by a fundamental freedom.⁴ The reason courts have opted for a content neutral approach is that they are not well-situated to sit in judgment over a person’s self-actualization, which is one of the principal values underlying s.2.⁵ The preference for a content neutral approach is perhaps most obvious with respect to expressive activity. This Court has

³ RSC 1985, c C-46.

⁴ See e.g. *R v Keegstra*, [1990] 3 SCR 697 at 828 [*Keegstra*].

⁵ See e.g. *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 968-971 [*Irwin Toy*].

consistently held that s.2(b) protects *all* expressive activity if it “attempts to convey meaning.”⁶ Expressive activity that takes the form of actual violence or threats of violence is not protected.⁷ However, s.2(b) protects other anti-social expressive activity, such as hate speech, because the only way to filter out protection for this type of speech is by reference to its content. At most, the content of an activity may be an appropriate consideration under s.1.⁸

8. Instead of adopting a content neutral approach, the Court of Appeal did precisely the opposite. It held that non-violent expressive activity was not protected by s.2 because its content was destructive of *Charter* values. The nub of the Court of Appeal’s reasoning is found at paras. 116-117 of its decision in *R. v. Khawaja* (“*Khawaja*”). There, the panel made the value-laden assertion that none of the conduct that might fall within the definition of terrorist activity could “involve[e] expressive activity that advances any of the values underlying s.2(b),” but rather involves only “the conveying of meaning that is contrary to and destructive of the principles underlying freedom of expression.” Quite apart from the fact that this is only a relevant consideration under s.1, it is hard to see how the impugned speech can be so “destructive” given that the expressive activity at issue is political or religious speech. Put simply, the panel disagreed with the content of the impugned speech. This should be irrelevant in determining whether the expression is protected under s.2(b).

9. It is a fundamental principle of *Charter* adjudication that laudatory purposes (such as the prevention of terrorism) should not insulate laws from judicial scrutiny that have adverse effects on *Charter* rights. The Court of Appeal’s departure from settled jurisprudence imposes sweeping new limits on what is protected by s.2(b). Prior to this decision, s.2(b) had protected expressive activity regardless of its content or perceived value. This Court should not depart from decades worth of its own jurisprudence stressing the need for a generous and content neutral interpretation of s.2(b).

10. The violence exception to *Charter* protected speech should be defined⁹ and narrowly

⁶ *R v Sharpe*, [2001] 1 SCR 45 at 125. See also *Re ss 193 and 195.1 of Criminal Code*, [1990] 1 SCR 1123 at 1180; *Rocket v Royal College of Dental Surgeons*, [1990] 2 SCR 232 at 244; and *Keegstra*, *supra* note 4 at 729, 826.

⁷ *Greater Vancouver Transportation Authority v Canadian Federation of Students* [2009] 2 SCR 295 at 315; *Baier v Alberta*, [2007] 2 SCR 673 at 685-86; *Khawaja*, *supra* note 2 at paras 100-101.

⁸ See e.g. *R v Zundel*, [1992] 2 SCR 731 at 760 [*Zundel*].

⁹ The Attorneys General of Canada and Ontario both rely on the violence exception but do not offer a definition of the broad and vague term. The Attorney General of Ontario at paras 20 and 21 of its factum, however, draws attention to crimes that involve threats of violence against persons as opposed to property and this would be

construed. In *Suresh v Canada* (“*Suresh*”), this Court held that “[t]he 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*.”¹⁰ This statement should be clarified to make clear that only violence or threats of violence against natural persons are excluded from s.2(b) protection.

11. Violence against persons is not protected under s.2 because it is inimical to the purposes of freedom of expression.¹¹ In contrast, property crimes (such as those included in the impugned laws) should not be construed as violence because crimes affecting property do not threaten personal autonomy or other *Charter* values. This Court has long held that the *Charter* does not protect property rights.¹² There is no reason the Court should hold that the *Charter* protects property in an oblique way. To the extent necessary, s.1 allows the government to justify limits on broadly defined freedoms, and so there is no need to limit the scope of s.2 further.

(b) *The Impugned Laws are too Broad and Target Much Political and Religious Conduct*

12. This Court should be very cautious before authorizing vague restrictions that do not accord with the purposes of freedom of expression because such laws may capture unforeseen conduct. A proper evaluation of whether the impugned laws infringe upon the fundamental freedoms in s.2 requires a comprehensive assessment of the breadth of the impugned offences. Critically, the Court of Appeal failed to examine the interaction between the broad definition of terrorist activities in s.83.01(1) with the breadth of the offences in sections 83.03, 83.18, 83.19 and 83.21 of the *Criminal Code*. Section 83.01(1) contains generic definitions of terrorist activities,¹³ which includes any act or omission in or outside Canada that:

(D) causes substantial property damage, whether to public or private property, if causing such damages is likely to result in the conduct or harm referred to in of the 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

consistent with the BCCLA’s proposed definition of violence as threats against natural persons. Note, however, that the Attorney General of Ontario at para 25 of its factum suggests that “threatening terrorist activity is a form of violence” without regard to the activity captured in that definition that does not involve violence or threats of violence against natural persons.

¹⁰ [2002] 1 SCR 3 at 58-59.

¹¹ *Montréal (City) v 2952-1366 Québec Inc.*, [2005] 3 SCR 141 at 171.

¹² There is no explicit protection of property in the *Charter*. See e.g. *Irwin Toy*, *supra* note 5 at 1003-4 and *Becker v Alberta*, 1983 ABCA 161.

¹³ For example, the definition of terrorist activities in s 83.01(1) of the *Criminal Code* includes, in 83.01(a)(iii), threats under s 424 of the *Criminal Code* against internationally protected persons, and in 83.01(a)(3.4), thefts and fraud relating to nuclear material.

that is intended to cause in the conduct of harm referred to in any of the clauses (A) or (C).¹⁴

13. This definition of “terrorist activities” could easily encompass political activity, which, when appropriately considered on a s.1 analysis, is at the core of the values protected by s.2(b).

As Professor Forcese has observed,

Paragraph (D) possibly reaches as far as now commonplace anti-globalization protests; that is, it may apply to vandalism that, depending on its scope, could likely constitute a serious risk to the health or safety of the public or a segment of the public. The prospect that these sorts of acts might be tarred with the terrorist activity designation has excited controversy among civil liberties groups.¹⁵

14. Similarly, Professor Stuart has warned that the impugned definition could extend to “Aboriginal groups’ blockading of logger roads to assert aboriginal title” and sending humanitarian aid to Muslim groups in Afghanistan that may have been involved in facilitating terrorist activities. Drawing on the experience of South Africa, one recently re-affirmed in Libya¹⁶ and Syria, he warns that the “line between a freedom fighter and a terrorist often depends on your political allegiances.”¹⁷

15. While these definitions of terrorist activities are not in themselves crimes, they are incorporated into a range of offences. These offences apply to a large number of acts, including preparation for terrorist activities and acts that benefit terrorist groups. A terrorist group is also defined very broadly in s.83.01 to include all entities listed by Cabinet, as well as any entity that “has as one of its purposes or activities facilitating or carrying out any terrorist activities.”

16. The broad definition of terrorist activities has a particularly wide reaching bite when combined with s.83.03(b), which makes it an indictable offence subject to 10 years imprisonment to directly or indirectly collect property, provide or invite a person to provide or make available property or financial or other related services knowing that in whole or part they will be used to benefit a terrorist group. The United States Supreme Court has held that a similar offence would apply to charitable giving designed to benefit the non-violent and humanitarian efforts of a listed terrorist group.¹⁸ As one commentator has suggested, a restaurant owner who accepted a

¹⁴ See ss 83.01(b)(ii) (D) and (E).

¹⁵ Craig Forcese, *National Security Law* (Toronto: Irwin Law, 2008) at 267.

¹⁶ For an application of the similar British definition to those opposing the Ghadafi regime see *R v F*, [2007] EWCA 243.

¹⁷ Don Stuart, “The Anti-terrorism Bill (Bill C-36)” in David Daubney, ed, *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (Montreal: Themis, 2002) at 190, 181-182.

¹⁸ *Holder v Humanitarian Law Project*, 08-1498 US 1 (2009).

reservation from a known terrorist could fall within the ambit of this offence.¹⁹

17. Moreover, this very broad definition of terrorist activities is made even more expansive by the inclusion of not only the well-established inchoate offences of conspiracies, attempts, counseling or being an accessory after the fact, but also by making it an offence to “threat[en] to commit any such act or omission.” The inclusion of threats in s.83.01 greatly increases the harm to our fundamental freedoms because a threat to commit non-violent offences is at best only tenuously connected to actual harm. Threats can include intemperate speech that describes prohibited conduct *without regard* to the speaker’s intention that such conduct will occur or the likelihood of such conduct occurring.²⁰

18. Finally, s.83.01(1.1) does not save the overbroad effects of s.83.01(1) on non-violent expressive activities. This provision only exempts “the expression of political, religious or ideological thought, belief, or opinion” that does not constitute an act or omission that satisfies the broad criteria of s.83.01(1). It simply begs the question. For instance, the expression of threats to commit non-violent offences under either sections 83.01(a) or 83.01(B)(ii)D and E (which would be protected expressive activity under s.2) could nonetheless satisfy the criteria of s.83.01(1) and would thus not be protected by the putative exclusion in s.83.01(1.1).

(c) *The Charter Should Be Interpreted Generously and the Rights Protected in Harmony*

19. The Court of Appeal erred when it held at para. 96 of *Khawaja* that a conclusion that s.2(b) was not violated necessarily meant that sections 2(a) and (d) were not violated. The proper approach, as reflected in the constitutional questions in this appeal, is to consider each right separately, but also in their cumulative force.

20. A generous approach to freedom of expression is particularly important when the expression at issue implicates and overlaps with political and religious diversity, freedom of peaceful assembly, as well as Canada’s multicultural heritage and other *Charter* values. Section 2(b) should be interpreted harmoniously with other sections of the *Charter*. It has long been recognized that the rights and freedoms protected by the *Charter* do not exist in watertight

¹⁹ Kevin Davis “Cutting Off the Flow of Funds to Terrorist: Whose Funds? Which Funds? Who Decides?” in Ronald Daniels et al *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) at 302.

²⁰ Contrast with the restrictions placed on the counseling offence in *Sharpe*, *supra* note 6 at 83-84, and *R v Hamilton*, [2005] 2 SCR 432 at 441, 444.

compartments, but rather influence and reinforce one another.²¹

21. The panel’s failure to consider the rights cumulatively is perhaps most strikingly reflected at para. 127 of its reasons in *Khawaja* where the panel dismissed the adverse impact of the law on unpopular minorities and unpopular forms of expression as “the temper of the times.”

22. In light of the persons or groups affected by the law, this appeal not only engages the fundamental freedoms, but also the s.15 equality guarantee. The equality guarantee, which has been held to be “the broadest of all guarantees,”²² bears an especially close relationship to the other *Charter* rights, including s.2.²³ It is appropriate and indeed necessary where a s.2 challenge raises equality issues for the principles of equality to be considered when interpreting the scope and content of the freedom. This ensures that the law will respond to all members of our society.

23. The trial judge’s concerns²⁴ about the effects of s.83.01(1) on unpopular extremists who express political and religious views similar to those of terrorists is a legitimate one and the Court of Appeal erred in dismissing concerns about how the law may chill such expression. The *Charter* restrains state actions and the government is not excused when it takes actions that capitalize on public resentment towards the rights of the unpopular. Even when expression has manifest social harms, the proper place to consider the harm of expression is s.1 where the government bears the burden of justification. In Canada, unlike in the United States, this Court must consider the pivotal role of s.1 when defining the scope of s.2(b) and the fact that s.2(b) includes protection for harmful speech, such as lies, child pornography and hate speech.

24. It is common sense that the impugned laws will more acutely impact on the fundamental freedoms of members of vulnerable groups, such as Muslims. It is constitutionally unacceptable for Parliament to develop a scheme the effect of which is to target the freedoms of marginalized groups for increased scrutiny, even if the law is of general application.

(d) *The Section 2(b) Issue is Not Motive but Political and Religious Motive*

25. The Court of Appeal appears to have misconstrued the appellant’s point respecting the distinction between motive and intent at paras. 88-94 of *Khawaja*. The constitutional issue is not

²¹ *R v Lyons*, [1987] 2 SCR 309 at 326; *R v Morgentaler*, [1988] 1 SCR 30 at 175; and *B (R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at 366.

²² *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 185.

²³ *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at 99 *per* L’Heureux-Dubé, Gonthier and McLachlin Jj. (as she then was).

²⁴ *R v Khawaja*, 2006 CanLII 63685 (ON SC) at paras 52-58.

whether Parliament can define a crime to include motive as an essential element. The issue under s.2 of the *Charter* is the inclusion of a particular kind of motive; namely a political or religious one. Requiring proof of a political or religious motive invites scrutiny of a person's beliefs and may well encourage increased surveillance of persons or groups espousing unpopular views.

Evidence Should Not be Required to Establish Chill

26. Concerns about chill on expression are an established part of freedom of expression jurisprudence, both in Canada²⁵ and elsewhere.²⁶ This Court has reaffirmed the importance of considering chill in very different contexts, including libel law and journalist source privilege.²⁷

27. The Court of Appeal erred by taking an unprecedentedly restrictive approach to the concept of expressive and religious freedoms being “chilled” by legislation. In its reasons, the panel treated chill as an effect that must be proven through sworn evidence or by judicial notice. However, a “chilling effect” is a legal concept informed by common sense and judicial reasoning based on the concerns that underlie the purposes and interests that s.2 is meant to protect. A chilling effect is just another way of saying that the constitutional analysis of a law must account for the likely impact of a law on the legitimate exercise of a constitutional right.

28. The Court of Appeal's decision to require evidence of chill imposes a new hurdle on litigants to overcome. The law has never required evidence of chill,²⁸ not should it. It is well-settled that the constitutional analysis of the effects of an impugned law can rest on a “reasonable hypothetical.”²⁹ A chilling effect is a different term used to describe the same analytical tool.

29. Similarly, in this case, the evaluation of the impugned laws' impact on legitimate expressive activity should be assessed in light of “imaginable circumstances which could

²⁵ *Zundel*, *supra* note 8 at 771-72; *Sharpe*, *supra* note 6 at 106.

²⁶ *Lamont v Postmasters General*, 381 US 301 (1965) at 308-309.

²⁷ *Grant v Torstar Corporation*, [2009] 3 SCR 640 at 662-663, 666, 678; *R v National Post*, [2010] 1 SCR 477 at 504-505.

²⁸ The Supreme Court itself has found a chilling effect without requiring evidence, and the Court of Appeal's requirement runs counter to these examples, which include: *Canadian Human Rights Commission v Taylor*, [1990] 3 SCR 892 at 929; *Canadian Broadcasting Corporation v Lessard*, [1991] 3 SCR 421 at 431, 436, 446; *Dunmore v Ontario (AG)*, [2001] 3 SCR 1016 at 1062-1063, 1104-1106; *Ellis-Don Ltd v Ontario (Labour Relations Board)*, [2001] 1 SCR 221 at 249; *First Vancouver Finance v Canada (MNR)*, [2002] 2 SCR 720 at 739; *Harper v Canada (AG)*, [2004] 1 SCR 827 at 850-851; *R v Elshaw*, [1991] 3 SCR 24 at 63; *R v Gruenke*, [1991] 3 SCR 263 at 311; *R v Keegstra*, *supra* note 4 at 772, 780, 819, 852, 859-861; *Sharpe*, *supra* note 6 at 106; *Zundel*, *supra* note 8 at 773-774, 777-778; *R v Wholesale Travel*, [1991] 3 SCR 154 at 246-247; *Rodriguez v BC (AG)*, [1993] 3 SCR 519 at 573; *Smith v Jones*, [1999] 1 SCR 455 at 466-467.

²⁹ *R v Goltz*, [1991] SCJ 90 (SCC) at 505-506; *R v Mills*, [1999] 3 SCR 668 at 704-705 [“*Mills*”].

commonly arise in day-to-day life.”³⁰ In other words, all the appellants have asked this Court to do is use its common sense to evaluate the reasonable effects of a law, effects which are not generally susceptible to proof by their very nature. Indeed, the Court of Appeal’s approach would require the very people “chilled” to come forward (including vulnerable minorities), which is simply not practical. From a practical and a constitutional perspective, this is a very troubling departure from the governing jurisprudence.

30. Moreover, the fact that the law could also be improperly applied does not detract from the fact that it is an unconstitutional law. In this respect, the Court of Appeal erred at para. 134 of *Khawaja* when it held that the appellant’s complaint was, in effect, premature, and should be the subject of a s.24(1) remedy if the law were applied improperly. In this case, the appellant correctly seeks a s.52 remedy since it is well-settled that no one should be convicted under an unconstitutional law.³¹ To demonstrate the law’s unconstitutionality under s.52, the appellant relied in part on the law’s chilling effect. He should not be disentitled from the remedy sought simply because he relies on well-settled doctrine that the effect of a law is relevant to assessing its validity or because discriminatory profiling might also require s.24(1) remedies..

The Impugned Laws are not Minimally Impairing

31. The restrictions created by the political, religious or ideological motive requirement, cannot be justified under s.1. Even if rationally connected to the objective of preventing terrorism, the restrictions are not minimally impairing. It is possible to distinguish terrorist activities from other crimes without requiring proof of political, religious or ideological motive. Definitions of terrorism (including the one employed by this Court in *Suresh*) are less restrictive alternatives that can advance the state’s objectives in preventing terrorism as well, if not better, than the impugned provisions, which do not fall within a range of reasonable alternatives.

32. When evaluating whether laws are minimally impairing, it is often helpful to consider responses to issues adopted by other free and democratic societies. In this light too, Parliament’s response is overreaching. As Professor Forcese has noted, the “definition of ‘terrorist activities’ [in the *Criminal Code*] is broader than international definitions and those employed by key allied nations.”³² For instance, s.83.01 is even broader than its model, s.1 of the United Kingdom’s

³⁰ *Mills, ibid*, at 704-705.

³¹ *R v Big M Drug Mart*, [1985] 1 SCR 295 at 313.

³² Craig Forcese, *supra* note 15 at 265.

Terrorism Act, 2000 (the “UK Act”). Whereas the UK Act targets attempts to influence the government or intimidate the public, s.83.01(b)(A) and (B) include attempts to compel “persons,” including corporations, to act, and also addresses politically motivated attempts to intimidate a segment of the public with regard to its “economic security.” The Canadian expansion means that members of the Occupy movement, Aboriginal protesters or Unions could well fall afoul of the definition of terrorist activities to the extent that they destroy property or disrupt essential services such that they threaten the public’s health or safety.

There are a Range of Constitutional Remedies

33. The BCCLA does not take a position on the ultimate disposition of the appeals. It does note that there is a range of constitutional remedies that could respond to the identified constitutional defects. At one end of the spectrum would be a declaration of invalidity, potentially suspended because of concerns for public safety and to give Parliament an opportunity to redraft a definition of terrorism without the problematic political or religious motive requirement. At the other end of the spectrum is severance. However, the trial judge’s severance remedy in this case was underinclusive. At a minimum, it should extend to the reference to compelling corporate “persons” and “economic” security³³ to bring the definition of terrorist activities closer to that used by this Court in *Suresh*. An alternative remedy would be a reading in or reading down remedy that would exclude from the ambit of the definition attempts to convey meaning that did not involve violence or the threat of violence against persons.

PART IV – COSTS

34. The BCCLA does not seek costs, and asks that no costs be awarded against it.

PART V – DISPOSITION OF THE ISSUES AND ORAL ARGUMENT

35. The appeals should be disposed of in a manner that is consistent with the principle that restrictions on civil liberties should be as limited as possible and are only justified where they are ultimately necessary for the sake of those very same rights and freedoms. The BCCLA asks leave to present 10 minutes of oral argument at the hearing of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 24, 2012

Kent Roach/Robert A. Centa/Michael Fenrick

³³ *Criminal Code*, *supra* note 3, s 83.01(b)(i)(B).

PART VI – TABLE OF AUTHORITIES

Jurisprudence	Paragraph Number
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Davis, Kevin. "Cutting Off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?" in Ronald Daniels, Patrick Macklem, and Kent Roach, eds, <i>The Security of Freedom: Essays on Canada's Anti-Terrorism Bill</i> (Toronto: University of Toronto Press, 2001)	16

- Forcese, Craig. *National Security Law* (Toronto: Irwin Law, 2008) 13, 32
- Stuart, Don. "The Anti-terrorism Bill (Bill C-36)" in David Daubney, ed, *Terrorism, Law and Democracy: How is Canada Changing Following September 11?* (Montreal: Themis, 2002) 14

PART VII – STATUTES

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Criminal Code, RSC 1985, c C-46.

83.01 (1) The following definitions apply in this Part.

“terrorist activity” means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

- (i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,
- (ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of*

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Chacun a les libertés fondamentales suivantes:

- (a) liberté de conscience et de religion;
- (b) liberté de pensée, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- (c) liberté de réunion pacifique;
- (d) liberté d'association.

83.01 (1) Les définitions qui suivent s'appliquent à la présente partie.

« activité terroriste »

a) Soit un acte — action ou omission, commise au Canada ou à l'étranger — qui, au Canada, constitue une des infractions suivantes :

- (i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression de la capture illicite d'aéronefs*, signée à La Haye le 16 décembre 1970,
- (ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signée à Montréal le 23 septembre 1971,

Civil Aviation, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in

(iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la *Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques*, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973,

(iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la *Convention internationale contre la prise d'otages*, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979,

(v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la *Convention sur la protection physique des matières nucléaires*, conclue à New York et Vienne le 3 mars 1980,

(vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le *Protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signé à Montréal le 24 février 1988,

(vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la *Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime*, conclue à Rome le 10 mars 1988,

(viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le *Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental*, conclu à Rome le 10 mars 1988,

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la *Convention*

subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(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

(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

internationale pour la répression des attentats terroristes à l'explosif, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la *Convention internationale pour la répression du financement du terrorisme*, adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte — action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(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.

83.03 Every one who, directly or indirectly, collects property, provides or invites a

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

83.03 Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, directement ou non, réunit des biens ou fournit — ou invite une autre personne à le faire

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, or

(b) knowing that, in whole or part, they will be used by or will benefit a terrorist group,

is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

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.

(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.

— ou rend disponibles des biens ou des services financiers ou connexes:

a) soit dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — , en tout ou en partie, pour une activité terroriste, pour faciliter une telle activité ou pour en faire bénéficier une personne qui se livre à une telle activité ou la facilite;

b) soit en sachant qu'ils seront utilisés, en tout ou en partie, par un groupe terroriste ou qu'ils bénéficieront, en tout ou en partie, à celui-ci.

83.18 (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, sciemment, participe à une activité d'un groupe terroriste, ou y contribue, directement ou non, dans le but d'accroître la capacité de tout groupe terroriste de se livrer à une activité terroriste ou de la faciliter.

(2) Pour que l'infraction visée au paragraphe (1) soit commise, il n'est pas nécessaire :

a) qu'une activité terroriste soit effectivement menée ou facilitée par un groupe terroriste;

b) que la participation ou la contribution de l'accusé accroisse effectivement la capacité d'un groupe terroriste de se livrer à une activité terroriste ou de la faciliter;

c) que l'accusé connaisse la nature exacte de toute activité terroriste susceptible d'être menée ou facilitée par un groupe terroriste.

(3) La participation ou la contribution à une activité d'un groupe terroriste s'entend notamment:

(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;

(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;

a) du fait de donner ou d'acquérir de la formation ou de recruter une personne à une telle fin;

b) du fait de mettre des compétences ou une expertise à la disposition d'un groupe terroriste, à son profit ou sous sa direction, ou en association avec lui, ou d'offrir de le faire;

c) du fait de recruter une personne en vue de faciliter ou de commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était commis au Canada, constituerait une telle infraction;

d) du fait d'entrer ou de demeurer dans un pays au profit ou sous la direction d'un groupe terroriste, ou en association avec lui;

e) du fait d'être disponible, sous les instructions de quiconque fait partie d'un groupe terroriste, pour faciliter ou commettre une infraction de terrorisme ou un acte à l'étranger qui, s'il était commis au Canada, constituerait une telle infraction.

(4) Pour déterminer si l'accusé participe ou contribue à une activité d'un groupe terroriste, le tribunal peut notamment prendre en compte les faits suivants :

a) l'accusé utilise un nom, un mot, un symbole ou un autre signe qui identifie le groupe ou y est associé;

b) il fréquente quiconque fait partie du groupe terroriste;

c) il reçoit un avantage du groupe terroriste;

d) il se livre régulièrement à des activités selon les instructions d'une personne faisant partie du groupe terroriste.

(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.

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.

(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.

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.

(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

83.19 (1) Est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans quiconque sciemment facilite une activité terroriste.

(2) Pour l'application de la présente partie, il n'est pas nécessaire pour faciliter une activité terroriste :

a) que l'intéressé sache qu'il se trouve à faciliter une activité terroriste en particulier;

b) qu'une activité terroriste en particulier ait été envisagée au moment où elle est facilitée;

c) qu'une activité terroriste soit effectivement mise à exécution.

83.21 (1) Est coupable d'un acte criminel passible d'un emprisonnement à perpétuité quiconque, sciemment, charge directement ou indirectement une personne de se livrer à une activité au profit ou sous la direction d'un groupe terroriste, ou en association avec lui, dans le but d'accroître la capacité de tout groupe terroriste de se livrer à une activité terroriste ou de la faciliter.

(2) Pour que l'infraction visée au paragraphe (1) soit commise, il n'est pas nécessaire :

a) que l'activité à laquelle l'accusé charge quiconque de se livrer soit effectivement mise à exécution;

b) que l'accusé charge une personne en particulier de se livrer à l'activité;

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.

c) que l'accusé connaisse l'identité de la personne qu'il charge de se livrer à l'activité;

d) que la personne chargée par l'accusé de se livrer à l'activité sache que celle-ci est censée être menée au profit ou sous la direction d'un groupe terroriste, ou en association avec lui;

e) qu'une activité terroriste soit effectivement menée ou facilitée par un groupe terroriste;

f) que l'activité visée à l'alinéa *a)* accroisse effectivement la capacité d'un groupe terroriste de se livrer à une activité terroriste ou de la faciliter;

g) que l'accusé connaisse la nature exacte de toute activité terroriste susceptible d'être menée ou facilitée par un groupe terroriste.