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The Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law

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Abstract:

This paper explores an emerging jurisprudence on terrorism sentencing under post-9/11 law in Canada, the UK and Australia. It argues that, in comparable cases, Canadian courts have often imposed significantly shorter sentences, or shorter periods of parole ineligibility, or both. The outcomes are the result of a series of constraints in the *Criminal Code*, including maximum sentences, credit for pre-trial custody, and limits on parole ineligibility periods. The constraints make it unlikely that recent appellate decisions calling for greater emphasis on deterrence and denunciation will affect this broader trend. The *Code* framework therefore give rise to the concern that, in many cases, courts will continue to have no discretion but to impose sentences that appear disproportionately low, given the nature of the offence and the culpability of the offender. The paper concludes with suggestions for reform that would give courts greater flexibility in terror sentencing.

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Introduction

Since 9/11, few topics have received more attention from law scholars and jurists than counter-terror law and policy.¹ Yet very little has been said about sentencing in particular. Now that a first round of terror prosecutions has concluded, lending a better sense of how a new sentencing framework has been applied, a host of issues have surfaced.

This paper explores these issues by surveying the *Criminal Code* framework for terror sentencing put in place after 9/11,² and the early cases that apply it.³ It then attempts to gain insight into the Canadian framework by drawing a comparison with recent approaches to terror sentencing in the United Kingdom and Australia.

The paper argues that, in comparable cases to those in the UK and Australia, Canadian courts have often imposed significantly shorter sentences, or shorter periods of parole ineligibility, or both. The results are not a reflection of the failure to give sufficient weight to the principles of deterrence and denunciation, but the effect of a series of structural constraints in the *Criminal Code*. These include maximum sentences for offences such as participation in or facilitating terrorism, the need to consider conflicting principles such as rehabilitation and deterrence, credit for pre-trial custody, and limits on parole ineligibility periods.

Given these constraints, recent appellate decisions calling for more emphasis on deterrence and denunciation will not likely affect the broader trend.⁴ In many cases, but especially those at the middle and lower end of the spectrum of culpability, courts will continue to have no discretion but to impose sentences that appear disproportionately low, for involvement in what have been described as among the most serious crimes in Canadian history.⁵ The paper concludes with suggestions for reform that would give courts greater flexibility in terror sentencing.

¹ Commentary on Canada's primary legislative response to 9/11, the *Anti-terrorism Act*, S.C. 2001, c. 41, includes Ronald Daniels, Patrick Macklem and Kent Roach, eds., *The Security of Freedom: Canada's Anti-terrorism Bill* (Toronto: University of Toronto Press, 2001); Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003); W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41:2&3 *Osgood Hall L.J.* 267; and Robert Diab, *Guantanamo North: Terrorism and the Administration of Justice in Canada* (Fernwood Publishing: Halifax, 2008).

² *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code* or *Code*].

³ These include *R. v. Khawaja*, [2009] 248 C.C.C. (3d) 233, *R. v. Ahmad*, 2010 ONSC 5874, *R. v. Khalid* [unreported, summarized in *R. v. Khalid*, 2010 ONCA 861], *R. v. Gaya*, 2010 ONSC 434, and *R. v. Dirie*, 2009 CanLII 58598 (ON S.C.). The paper also refers briefly to *R. v. Durrani*, *R. v. Ansari*, *R. v. James*, *R. v. Yogakrishnan*, and *R. v. Chand* (all unreported Ontario Superior Court decisions in 2010; the first three sentences are referred to in *R. v. Ahmad*, 2010 ONSC 5874 at paras. 67-69. See also British Columbia Supreme Court decision in *R. v. Thambithurai*, 2010 (unreported; a 6-month custodial sentence for funding terror), upheld on appeal in *Thambithurai*, 2011 BCCA 137.

⁴ *R. v. Khawaja*, 2010 ONCA 862 and *R. v. Khalid*, 2010 ONCA 861.

⁵ Durno J., in *R. v. Amara*, *supra*, note 3, at para. 145.

I. Terrorism sentencing in Canada prior to 2001

Before the *Anti-terrorism Act* was passed in December of 2001, acts associated with terror were prosecuted under a range of offences in the *Criminal Code*.⁶ These included murder, hijacking, possessing or using explosives, or unlawfully causing bodily harm or death.⁷ The *Code* also captured the conspiracy or attempt to carry out acts amounting to terrorism, or the effort to assist in them before or after the fact.⁸ The range of penalties included life without parole for 25 years in the case of murder, and up to life for hijacking.⁹ Possession of an explosive substance with intent to cause serious bodily harm or death carried a maximum life sentence,¹⁰ as did conspiracy to commit murder.¹¹ While these provisions still apply in terror prosecutions, their function is now amended in ways to be explored below.

II. The impetus for new anti-terror law in Canada, the UK, and Australia after 9/11

A primary impetus for passing new counter-terror law in the wake of 9/11 was United Nations Security Council Resolution 1373, adopted on September 28, 2001.¹² This called on member states to reform criminal law regimes to more effectively prevent “those who finance, plan, facilitate or commit terrorist acts”.¹³ It also called on states to establish “terrorist acts... as serious criminal offences in domestic laws” and to ensure that “the punishment duly reflects the seriousness” of such offences.¹⁴ Two and a half months later, Canada enacted the *Anti-terrorism Act*, which inserted a chapter on terrorism offences into the *Criminal Code*. The United Kingdom added to its *Terrorism Act, 2000*¹⁵ by passing the *Anti-terrorism, Crime and Security Act, 2001*,¹⁶ followed by a series of other statutes over the course of the decade.¹⁷ Australia passed the *Security Legislation Amendment (Terrorism) Act 2002*, and other

⁶ Kent Roach, “The New Terrorism Offences and the Criminal Law” in *The Security of Freedom*, *supra*, note 6, at 152.

⁷ *Criminal Code*, sections 230 (murder); 76 (hijacking); 81-2 (explosives); 269 (unlawfully causing bodily harm); and 222(5) (unlawfully causing death). See also Kent Roach’s more extensive catalogue of offences and applicable *Code* provisions at 152, *ibid*.

⁸ *Criminal Code*, ss. 465 (conspiracy), 24 (attempt), 21(1) and 22 (assistance).

⁹ *Ibid.* s. 76.

¹⁰ *Ibid.* s. 81(2)(a).

¹¹ *Ibid.* s. 465(1)(a).

¹² S/Res/1373 (2001) [“Resolution 1373”]. On the role of this resolution as a primary impetus for legislative responses to 9/11, see Kent Roach, “Sources and Trends in Post-9/11 Anti-terrorism Laws” in Benjamin J. Goold and Liora Lazarus, eds., *Security and Human Rights* (Oxford: Hart Publishing, 2007).

¹³ Resolution 1373, section 2(d), *ibid*.

¹⁴ *Ibid.* section 2(e).

¹⁵ UK, 2000 c. 11.

¹⁶ UK, 2001 c. 24.

¹⁷ See, e.g., *Criminal Justice Act 2003*, c. 44; *Prevention of Terrorism Act, 2005*, c. 2; *Terrorism Act, 2006*, c. 11; *Counter-terrorism Act, 2008*, c. 28; and the *Terrorist Asset-Freezing (Temporary Provisions) Act 2010*, c. 2.

bills.¹⁸ These new laws offered new possibilities for prosecuting and punishing acts of terror, turning on an expansive statutory definition of “terrorism”.

As Kent Roach has noted, many states, including Canada and Australia, drew on the definition of terrorism in the UK *Terrorism Act, 2000* as a precedent.¹⁹ That Act defines terrorism as any act involving violence, damage to property or risk to public safety that is “designed to influence the government or to intimidate the public [...and is done] for the purpose of advancing a political, religious or ideological cause.”²⁰ The definition of a “terrorist activity” in Canada’s *Anti-terrorism Act* entails a similar connection between violence and the intention of “intimidating the public... or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act”.²¹ It also requires that the activity be committed “in whole or in part for a political, religious or ideological purpose, objective or cause”.²²

III. The new Canadian framework for terrorism sentencing

The *Anti-terrorism Act* altered Canada’s framework for terror sentencing in various ways. One was to include a series of new terrorism offences. Among them are the offences of participating in a terrorist group or facilitating its terrorist activity;²³ instructing or directing others to engage in terror;²⁴ and financing or providing property for terrorism.²⁵

Participating in and funding terror carry ten-year maximums penalties; for facilitating, the maximum is fourteen years.²⁶ Committing any indictable offence in association with, or for the benefit of, a terrorist group carries a maximum life sentence.²⁷ A further provision asserts broadly that “a person convicted of an indictable offence, other than an offence for which a sentence of imprisonment for life is imposed as a minimum punishment” is liable to receive a life sentence if “the act or omission

¹⁸ Other acts include the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth); the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); the *Criminal Code Amendment (Espionage and Related Matters) Act 2002* (Cth); and the *Criminal Code Amendment (Offences against Australians) Act 2002* (Cth). For an overview of this legislation, see Philip Ruddock, “Australia’s Legislative Response to the Ongoing Threat of Terrorism” (2004) 254 *UNSW LJ* 20.

¹⁹ Kent Roach, “Sources and Trends”, *supra*, note 12, at 242.

²⁰ Section 1 of the Act, *supra*, note 15.

²¹ Section 83.01(1) of the *Criminal Code*. A similar definition is found in Australia’s *Security Legislative Amendment (Terrorism) Act, 2002* (Cth), Schedule 1, Part 5.3, Division 100. See Roach, *supra*, note 12, at 243 on the differences between British, Canadian and Australian definitions.

²² The constitutional validity of this aspect of the definition has been upheld in *R. v. Khawaja*, 2010 ONCA 862.

²³ *Criminal Code*, ss. 83.18 and 83.19.

²⁴ *Ibid.* s. 83.21.

²⁵ *Ibid.* s. 83.02. Various commentators have explored the constitutional and criminological merits of these new offences: see the contributions noted, *supra*, note 1.

²⁶ *Criminal Code*, ss. 83.18(1), 83.19(1) and 83.02.

²⁷ *Ibid.* s. 83.2.

constituting the offence also constitutes a terrorist activity”.²⁸ This raises the question of why most new terror offences would have a maximum sentence shorter than life, since most are indictable offences that would appear to constitute a “terrorist activity”.²⁹ The chapter also stipulates that where multiple sentences for terrorism offences are imposed, aside from one of life imprisonment, the sentences are to be served consecutively.³⁰ Notably, the government chose not to impose mandatory minimum sentences for any terrorism offences.³¹

The *Anti-terrorism Act* also amended section 718.2 the *Criminal Code*, which deems certain facts to be aggravating circumstances at sentencing. The section now calls for an increase in sentence where there is “evidence that the offence was a terrorism offence.”³² This amendment calls attention to the fact that while deterrence and denunciation have been primary considerations in terrorism cases, it is also necessary to consider other sentencing principles in the *Code*. Courts must therefore observe the principle that “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh”.³³ A sentence must also be tailored to the varying degrees of responsibility for an offence.³⁴ Similarly, in striving to impose a “just sanction”, the court is open to crafting a sentence that has, as one of its objectives, the rehabilitation of the offender.³⁵ The implications of this possible conflict of principles are explored further below.

None of the penalty provisions in the terrorism chapter of the *Criminal Code* speaks to the question of parole eligibility. Section 743.6(1.2), however, states that where an offender is sentenced for a conviction for a terrorism offence, the court

shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society’s denunciation of the

²⁸ *Ibid.* s. 83.27. If the indictable offence in question is murder, section 231(6.01) states that “[i]rrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an indictable offence [...] that] also constitutes a terrorist activity.”

²⁹ I am indebted to Professor Isabel Grant for raising this issue. Presumably, each of the new indictable “terrorism offences” in the *Code* that carries less than a maximum life sentence contemplates an action that may amount to something less than a “terrorist activity” as defined in section 83.01. Alternatively, while those offences might amount to a “terrorist activity,” Parliament has chosen to impose lower sentences in those cases.

³⁰ *Ibid.* s. 83.26.

³¹ Kent Roach, *September 11, supra*, note 1, at 46, suggests that mandatory minimum sentences for terrorism offences would likely have survived a *Charter* challenge (as cruel and unusual punishment), given the Supreme Court of Canada’s deference to Parliament on the mandatory minimum at issue in *R. v. Morrissey*, [2000] 2 S.C.R. 29.

³² *Criminal Code*, s. 718.2(a)(v).

³³ *Ibid.* s. 718.2(c).

³⁴ *Ibid.* s. 718.1: the *Code*’s “fundamental principle” of mandates that: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

³⁵ *Ibid.* s. 718(d).

offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act*.

There are several points to note here. First, the section raises the period of parole ineligibility from what it would be otherwise – *i.e.*, from either one-third of the sentence or 7 years, whichever is shorter, to one-half or 10 years.³⁶ Second, this is a discretionary provision. It will likely be followed in most cases. However, the court may avoid imposing an additional parole ineligibility period if the enumerated principles of sentencing can be adequately addressed otherwise.³⁷

Third, the practical operation of the section will often entail shorter non-parole periods than is suggested on first reading. If a life sentence is imposed, the non-parole period of ten years is calculated from the time of arrest or detention, not sentencing.³⁸ Where a determinate sentence is imposed, an offender will likely receive credit for pre-trial custody.³⁹ Often this credit will account for a significant portion of the sentence; however, the non-parole period will apply only to the portion remaining to be served. In *R. v. Dirie*, for example, the offender was sentenced to 2 years of a notional 7-year sentence (having received 5 years' credit for roughly 2.5 years in pre-trial custody).⁴⁰ The non-parole period is only one year. Finally, the section speaks only of "full parole," not lesser forms of release, such as weekend or day parole.⁴¹

The larger significance of this section is to suggest that in even the most serious of terrorism cases (short of where a murder conviction is obtained), the parole ineligibility period will be no longer than 10 years, and it could be much shorter if the period is calculated from the time of detention as opposed to sentencing.

³⁶ Provision for the shorter non-parole period is found in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 120. The rule does not apply in the case of a mandatory life sentence.

³⁷ The discretion not to impose a longer non-parole period was exercised in both *R. v. Gaya*, *supra*, note 3, and *R. v. Khalid* (sentencing decision unreported, summarized in *R. v. Khalid*, 2010 ONCA 861). In each case, Durno J. found that a shorter parole period was consistent with the direction provided in section 743.6(2), which states: "[f]or greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles." At para. 130 of *Gaya*, Durno J. noted that "[t]he offender bears the burden of establishing on the balance of probabilities that the named objectives can be adequately served by the standard parole eligibility." Durno J. held that *Gaya* had satisfied this burden in part on the basis of his limited role in the plot, and that *Khalid* had done so partly based on his not appearing to pose a continuing danger. The Ontario Court of Appeal overturned the shorter non-parole period in both cases: *R. v. Gaya*, 2010 ONCA 860 and *Khalid*, 2010 (*supra*).

³⁸ This is due to the operation of section 746, *Criminal Code*. See, for example, *R. v. Amara* and *R. c. Namouh*, *supra*, note 3, in which life sentences were imposed.

³⁹ This is provided for in s. 719(3) of the *Code*. Recent amendments to this provision are discussed below.

⁴⁰ *Dirie*, *supra*, note 3, para. 73.

⁴¹ Under section 119(1)(c) of the *Corrections and Conditional Release Act*, *supra*, note 41, an offender subject to an order under section 743.6 of the *Code* would be eligible for day parole six months prior to their eligibility for full parole.

In summary, the new sentencing framework would seem to fulfill the UN Security Council's call for stiffer punishments for terrorism offences. But although the *Anti-terrorism Act* allows for lengthier sentences, it neither mandates them nor makes them more likely in practice. Indeed, as the early case law demonstrates, the Act gives rise to the possibility of an offender having a significant role in a terror conspiracy to commit mass murder, yet receiving either a short sentence or short non-parole period, or both, relative to UK and Australian sentences for similar conduct.

IV. Canadian sentencing decisions under the *Anti-terrorism Act*

The early cases highlight a central conundrum for judges: how to address the many competing considerations on sentencing in the *Criminal Code*.⁴² Courts must strive to place an emphasis on deterrence and denunciation while also factoring in varying degrees of culpability and the possibility of rehabilitation.⁴³ Multiple convictions for terrorism offences call for consecutive sentences, yet a global sentence should not be "unduly long or harsh."⁴⁴ The combined operation of parole provisions, credit for time served, and maximum penalties add a further set of constraints. Together, these constraints result in sentences that appear lengthy and appropriate in the abstract, but can be, and often are, short in practice.

a. *Khawaja*

The first prosecution and sentencing under the new *Code* framework was *R. v. Khawaja*. The accused was a 25-year old Ottawa resident who, in 2002, formed an association with a group of extremists in the UK and Pakistan. His involvement entailed travel to London and Lahore, where he briefly attended a training camp. He also gave members money and access to his parents' apartment in Pakistan. Before the group was arrested in March 2004, Khawaja worked on the prototype of a remote-detonation explosive device he called the 'hifidigimonster,' and agreed to build roughly 30 such devices for the group's use in the UK. Principal members in London were found in possession of 600 kilograms of ammonium nitrate-rich fertilizer, along with CDs containing maps of the UK's national utility grid. Wiretaps reveal his involvement in discussions of targets that included airports and nightclubs, and fuel, water, and energy utilities. Following a search of Khawaja's Ottawa home, police seized various electronic components, two semi-automatic military rifles, 640 rounds of ammunition, documents relating to violent jihad, and \$10,300 in cash.

Khawaja was convicted of six counts of terror-related offences. The most serious was that of intending to cause an explosion endangering life, and doing so in association with a terrorist group.⁴⁵

⁴² See cases listed *supra*, note 3.

⁴³ *Criminal Code*, ss. 718.1 and 718.2.

⁴⁴ *Ibid.* s. 718.2(c).

⁴⁵ *Ibid.* s. 81(1) and s. 83.2, the latter carrying a life maximum. The remaining offences were participating in a terrorist group (for receiving training) (s. 83.18(1), 10 year maximum); funding terror (ss. 83.01(1) and 83.21(1), a life maximum); making property available to facilitate a terrorist activity (ss. 83.01(1) and 83.03(a), a 10-year maximum); participating in a terrorist

The Crown sought a life sentence for building a bomb and funding terror, and close to the maximum on the remaining counts. The defence argued for a total sentence of 7.5 years; or, with double credit for pre-trial custody, a sentence of time served. The court imposed a global sentence of a further 10.5 years, without apportioning a specific amount of credit for pre-trial custody.⁴⁶ Parole non-eligibility was set at 5 years.⁴⁷

Both Crown and defence appealed the sentence. The Ontario Court of Appeal's decision in this case, together with its reasons in *R. v. Khalid*, are the leading authorities on terror sentencing in Canada at present.⁴⁸ On this basis, Rutherford J.'s initial sentence is worth canvassing briefly, for the context it lends to both the appellate decision and sentences imposed in other cases.

Mitigating circumstances included Khawaja's age, lack of a criminal record, and conduct in prison. While Rutherford J. held that the emphasis in terror cases should be placed on "denunciation, deterrence, and protection of the public",⁴⁹ he also noted that "the potential for rehabilitation [...] cannot be overlooked."⁵⁰ In this case, however, he found that "the Court knows virtually nothing about [Khawaja's] potential for reformation, of any sense of responsibility or of any remorse he may feel for his criminal conduct, or of the likelihood of his re-offending."⁵¹ Khawaja had not testified, would not be interviewed for the pre-sentence report, and made no statement at sentencing. The court treated the uncertainty about remorse and rehabilitative prospects as a neutral factor.

The analysis also turned on an assessment of Khawaja's degree of responsibility. The court dismissed the suggestion that Khawaja's lack of knowledge of the specific intent to use the 'hifidigimonster' in the 'UK fertilizer bomb plot' was a mitigating factor. The detonators were clearly "intended to unleash fireworks at other as yet unspecified places in aid of the jihad."⁵² Nor was it mitigating that the 'hifidigimonster' was said to be "amateurish" and needed more work.⁵³ Khawaja's culpability was serious; just how serious was the issue.

activity (meetings in the UK relating to bomb-building; 83.01(1) and 83.18, a 10-year maximum); and facilitating a terrorist activity (s. 83.01(1) and 83.19, a 14-year maximum).

⁴⁶ Khawaja received four years for bomb-building in association with a terrorist group; two years each for participation in the training camp, providing funding, and making property available; and three months for participating in discussions relating to terrorism activity in the UK and facilitating those activities.

⁴⁷ *Khawaja* [2009], *supra*, note 3, at para. 53.

⁴⁸ *Khawaja* 2010 ONCA 862 and *Khalid* 2010 ONCA 861.

⁴⁹ *Khawaja* [2009], *supra*, note 3, at para. 24, citing *Faheem Khalid Lodhi v Regina*, [2007] NSWCCA 360 and *R. v. Martin* [1999] 1 Cr App R(S) 477.

⁵⁰ *Ibid.* at para. 26.

⁵¹ *Ibid.* at para. 27.

⁵² *Ibid.* at para. 32.

⁵³ Rutherford J. noted, at para. 33, *ibid.*, that Khawaja's "device, as seized, would not do the job, although it would take only minor modifications to change that."

The Crown urged the court to consider Khawaja's culpability to be comparable to that of his UK co-conspirators who received life sentences in *R. v. Khyam*.⁵⁴ Rutherford J. declined to do so on the basis that Khawaja was "a willing helper and supporter, but Khyam, Amin, Akbar, Garcia and Mahmood were away out in front of [him] in terms of their determination to bring death, destruction and terror to innocent people."⁵⁵ Yet, apart from noting Khawaja's lack of specific knowledge of the fertilizer plot, Rutherford J. did not expand upon this assertion.⁵⁶

The direction in 718.2(c) of the *Code*, calling for a global sentence that is not "unduly long or harsh", posed a further challenge – given the requirement for consecutive sentences in section 83.26. Rutherford J. interpreted the one section as a constraint upon the other. To support this reading, he drew upon Lamer C.J.'s dicta in the Supreme Court of Canada's decision in *R. v. M. (C.A.)*,⁵⁷ to the effect that "[w]hether under the rubric of the "totality principle" or a more generalized principle of proportionality, Canadian courts have been reluctant to impose single and consecutive fixed-term sentences beyond 20 years."⁵⁸ Rutherford J. therefore implied that where consecutive sentences are imposed for terror offences, they should not exceed that ceiling.

On appeal, Khawaja's sentence on count 1 (bomb-building in association with a terror group) was raised from 4 years to life without parole for 10 years. The period of the remaining counts was raised from 6 to 24 years, to be served concurrently. The court allowed the Crown's appeal on the basis of both specific errors in the decision below and an error in the "overall approach" to the sentencing of terrorism offences.⁵⁹

The first of the specific errors pertained to the distinction between Khawaja's culpability and that of his UK co-conspirators. The claim that the latter were "way out in front" in their determination to bring death and destruction was "not borne out by the record."⁶⁰ The record, including the emails cited in the trial decision, attests to a deep "commitment to violent Jihad" and a "willingness to do anything and go anywhere to promote violent Jihad."⁶¹ The court conjectured that Rutherford J. might have meant that Khawaja's UK associates were closer to realizing their plans, but if so this was irrelevant. His level of determination was comparable, and thus also his "degree of moral blameworthiness."⁶²

⁵⁴ [2008] EWCA Crim 1612.

⁵⁵ *Khawaja* [2009], *supra*, note 3, at para. 37.

⁵⁶ Khawaja's UK co-conspirators, apart from Khyam, also lacked knowledge of the specifics.

⁵⁷ [1996] 1 S.C.R. 500.

⁵⁸ *Ibid.* at para. 43, cited in *Khawaja* [2009], *supra*, note 3, at para. 39.

⁵⁹ *Khawaja* [2010], *supra*, note 48, at para. 192.

⁶⁰ *Ibid.*, at para. 194.

⁶¹ *Ibid.*

⁶² *Ibid.*, at para. 196.

A more serious error was treating the lack of evidence of remorse as a neutral factor. On the contrary, in the court's view, "the absence of any evidence of the appellant's remorse or of his prospects for reformation should have been treated as a significant indicator of his present and future dangerousness."⁶³ Without "convincing evidence" that violent Jihad has been repudiated, a terrorism offender "continues to pose a serious threat to society and is likely to do so for the indefinite future."⁶⁴ Even where such repudiation is made, the court was clear to state that rehabilitation remains relevant in terror sentencing but that its import is "significantly reduced in this context given the unique nature of the crime of terrorism".⁶⁵

A third error pertained to Rutherford J.'s resolution of the apparent conflict between sections 83.26 and 718.2(c) of the *Criminal Code*. Rutherford J. read *R. v. M. (C.A.)* to stand for the proposition that 20 years marks a notional benchmark for what is "unduly long or harsh" in section 718.2(c), one that would apply to the directive to impose consecutive sentences in section 83.26. The appellate court held that this reading runs contrary to the holding in *R. v. M. (C.A.)*, and also belies the intention of inserting s. 83.26 into the terror sentencing framework. In *M. (C.A.)*, the Supreme Court of Canada confirmed the validity of a 25-year global sentence that consisted of shorter consecutive terms. It found that despite the tendency in recent years for courts not to exceed the 20-year mark, neither the *Code* nor the *Charter's* protection against cruel and unusual punishment precluded this.⁶⁶ The Court of Appeal in *Khawaja* explored *M. (C.A.)* at some length to ground the assertion that section 83.26 "reflects Parliament's intention that the general principle of totality must be moderated or altered in the case of terrorism-related crimes. [...] the customary upper range for consecutive fixed-term sentences will not be applicable."⁶⁷

Turning to the larger error of "overall approach," the court set out three more general grounds on which the sentence below was "manifestly unfit. The sentence failed to reflect the "enormity" of the crime:

Terrorism, in our view, is in a special category of crime and must be treated as such. When the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the

⁶³ *Ibid*, at para. 200.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*, at para. 201.

⁶⁶ *R. v. M.(C.A.)* preceded the inclusion of the directive in section 718.2 to avoid "unduly long or harsh" global sentences, but it considered the issue in light of the requirement that global sentences be "just and appropriate" in accordance with the older section 717. At para. 72, Lamer C.J. stated: "I see no reason why numerical sentences in Canada ought to be *de facto* limited at 20 years as a matter of judicial habit or convention. Whether a fixed-term sentence beyond 20 years is imposed as a sentence for a single offence where life imprisonment is available but not imposed, or as a cumulative sentence for multiple offences where life imprisonment is not available, there is no *a priori* ceiling on fixed-term sentences under the *Code*."

⁶⁷ *Khawaja* [2010], *supra*, note 48, at para. 210.

indiscriminate injury and killing of innocent human beings, sentences exceeding 20 years, up to and including life imprisonment, should not be viewed as exceptional.⁶⁸

The sentence also “failed to adequately reflect the continuing danger the offender presents to society”, based on the absence of evidence of remorse.⁶⁹ Finally, the principle of deterrence requires that terrorism “must be dealt with in the severest of terms.”⁷⁰

The court’s imposition of a life sentence in *Khawaja*, and the call for lengthier sentences as a norm in terror sentencing, is certainly significant. It suggests that Canadian cases may be brought into greater conformity with UK and Australian decisions, with their emphasis on deterrence and denunciation as primary principles. Yet the potential impact of the *Khawaja* appeal should not be overstated. Maximum sentences for participating in or facilitating terror, coupled with credit for pre-trial custody, will often preclude sentences in the range considered here.⁷¹ A further disparity remains in the area of parole ineligibility.

Following Rutherford’s J.’s sentence, *Khawaja* was eligible for full parole 5 years after sentencing. Where a life sentence is imposed, however, s. 746.2(c) dates the beginning of a 10-year parole ineligibility period to the time of arrest. As a result, given *Khawaja*’s close to five years of pre-trial custody, his parole ineligibility on appeal is virtually unchanged. Thus, the *de facto* custodial term in this case may prove to be much shorter than those imposed in comparable UK and Australian cases. For example, *Khawaja*’s co-conspirators in the UK (excluding *Khyam*), received life sentences with parole ineligibility periods ranging from 17.5 to 20 years from the date of sentencing. In the Australian case of *R. v. Elomar*,⁷² the conspirators amassed weapons, bomb-building materials and contemplated various targets, without settling upon any in particular at the time the plot was foiled. There was also a reasonable doubt as to a deliberate intention to cause casualties. Sentences ranged from 23 to 28 years, with non-parole periods ranging from 17 to 21 years.

b. *Amara, Gaya, Khalid, Dirie, and Ahmad*

These cases concern a group known as the “Toronto 18”. In the fall of 2005, *Ahmad* and *Amara*, then only 20, formed an association with a view to setting up a terrorist training camp in Washago, a

⁶⁸ *Ibid*, at para. 238. The judgment contains this qualification at para. 220: “In advocating this sentencing approach to terrorist-related activity that, to the offender’s knowledge, is designed to or is likely to result in the indiscriminate killing of human beings, we are not suggesting that there will never be cases of that nature for which the appropriate sentence will be within or below the 15 to 20-year customary range. For example, full and meaningful cooperation by the offender with law enforcement authorities in the detection of terrorists and terrorist activity may well alleviate against the imposition of longer than customary sentences.”

⁶⁹ *Ibid*, at para. 239.

⁷⁰ *Ibid*, at para. 246.

⁷¹ See, e.g., *Dirie and Ahmad*, *supra*, note 3.

⁷² *Regina (C’Wealth) v. Elomar & Ors* [2010] NSWSC 10.

rural town outside of Toronto. Possible targets included CSIS's headquarters and the CBC building in Toronto, Parliament, military bases, and a nuclear power plant.⁷³ Ahmad played a leadership role at this stage, recruiting 13 other young men to the group. A camp was held in December, where Ahmad showed videos encouraging violent jihad and gave a motivational speech. In March of 2006, Ahmad and Amara had a falling out, splitting the group in two. Amara's group developed a more specific terror plot, and took further steps to its fulfillment. A number of convictions have followed the arrest of members of both groups in June 2006.

Amara

Amara's sentence is the longest of the group and his culpability is clearly the most serious. Following the split with Ahmad, Amara had developed a remote detonation device and coordinated his smaller groups' collection of materials, including large amounts of ammonium nitrate. They conspired to bomb the Toronto Stock Exchange, a CSIS building, and a military headquarters in November of 2006. Their goal was to persuade Canada to withdraw its forces from Afghanistan. At the time of their arrest, Amara and other members were removing bomb-making materials from storage. Equipment relating to bomb-making was seized from Amara's home, along with ammunition and \$12,000 in cash.

Amara pleaded guilty to two counts: participating in a terrorist group and intending to cause an explosion endangering life, in association with a terrorist group.⁷⁴ The Crown sought the maximum sentence on each count: 10 years and life, respectively; defence proposed a total of 18 years. Durno J. imposed a life sentence for the bomb plot and 21 months for participation, giving 7-year's credit for pre-trial custody. The non-parole period imposed was 10 years from the time of his arrest, or 6 years and 3.5 months from sentencing.

In arriving at the sentence, Durno J. accorded some weight to the evidence of a psychiatrist as to Amara's positive progress in custody, his acceptance of responsibility, and "strong willingness to change his attitudes and behaviours".⁷⁵ This was coupled with the offender's guilty plea, lengthy statement of remorse at sentencing, his age, lack of a criminal record, and his being a husband and father of a young family. Aggravating factors included the planned and deliberate nature of the crime, Amara's leadership role and active recruiting of others, and the use of firearms. Above all, it was a "terrorist offence", one in which "there is no dispute that what would have occurred was multiple death and injuries."⁷⁶ Durno J. described this as among "the most serious kind of terrorism imaginable."⁷⁷ The devices were not "amateur" in nature, nor the larger plot "inevitably doomed to failure".⁷⁸ In short, Amara was "the leader

⁷³ See the factual summary in *R. v. Ahmad*, *supra*, note 3.

⁷⁴ Contrary to *Criminal Code*, ss. 83.81(1), 83(1)(a), and 83.2 respectively.

⁷⁵ *R. v. Amara*, *supra*, note 3, at para. 59.

⁷⁶ *Ibid.* at para. 102.

⁷⁷ *Ibid.* at para. 141.

⁷⁸ *Ibid.* at para. 143.

and directing mind of a plot that would have resulted in the most horrific crime Canada has ever seen.”⁷⁹ Applying the principles set out in *Khawaja* and *Khalid*, the Court of Appeal upheld the life sentence.⁸⁰

Gaya

Saad Gaya was a member of Amara’s group for roughly a month in the summer of 2006. Eighteen at the time of the offence, Gaya pleaded guilty to intending to cause an explosion endangering life, and doing so in association with a terrorist group.⁸¹ He knowingly contributed to the group’s activity, but had limited knowledge of the larger plot. He was tasked with finding a place to store three tons of ammonium nitrate.⁸² Gaya had provided a statement to police, was remorseful, and took full responsibility for the offence. Giving him 7.5 years’ credit for roughly 3 years and 8 months of pre-trial custody, Durno J. imposed a further 4.5-year sentence (with parole eligibility at one-third of this sentence).⁸³

Assessing Gaya’s culpability, Durno J. emphasized that he was “not the prime mover in the plot. He did not know all the details of the plan. He took detailed orders. He did not give them. [...] He did not know anything about bomb making.”⁸⁴ Gaya’s rehabilitative prospects, his experience in custody and with the trial led Durno J. to conclude that “he has already be specifically deterred and is not a continuing danger to the public.”⁸⁵

The Court of Appeal raised Gaya’s notional 12-year sentence to 18 years, extending the remaining term of 4.5 years to 10.5 years. It also set the non-parole period at half the remaining custodial term: 5 years and 3 months.⁸⁶ The initial sentence “did not adequately reflect the unique nature of terrorism-related crimes, nor did it adequately reflect the enormity of the respondent’s crime and the role he played in it.”⁸⁷

Khalid

Khalid’s case is similar to Gaya’s but more pertinent due to the way it highlights a tension in terror sentencing between a high degree of culpability and often compelling mitigating circumstances. In

⁷⁹ *Ibid.* at para. 145.

⁸⁰ *R. v. Amara*, 2010 ONCA 858.

⁸¹ Contrary to ss. 81(1) and 83.2 of the *Criminal Code*.

⁸² At a pre-trial hearing, Durno J. found that Gaya was “wilfully blind that it was likely that the explosion(s) would cause serious death or bodily harm.” *Gaya, supra*, note 3, at para 3.

⁸³ On this shorter parole period, see note 58, *supra*.

⁸⁴ *Gaya, supra*, note 3, at para. 120.

⁸⁵ *Ibid.*, at para. 19.

⁸⁶ *R. v. Gaya* 2010 ONCA 860.

⁸⁷ *Ibid.*, at para. 19.

particular, like Gaya, Khalid was a youthful offender with prospects (a 19-year old university student) and no criminal record. He was remorseful and appeared to pose no continuing danger. Yet his culpability was greater. While he admitted to being a member of the bomb plot, he claimed not know that the planned explosions would cause death or bodily harm. He was found to have been wilfully blind of this fact,⁸⁸ but unaware that he was intended to drive a van containing a bomb to one of the targets.⁸⁹ He pleaded guilty to intending to cause an explosion endangering life, and doing so in association with a terrorist group.

The seriousness of the offence called for a term in the range of 18 to 20 years as suggested by the Crown, but due to the mitigating factors, Durno J. held that a shorter term was appropriate. Khalid was sentenced to 14 years, with 7-years' credit for 39 months of pre-trial custody, and no order was imposed for a longer non-parole period under s. 743.6(1.2).

As in Gaya, the Court of Appeal found that the sentence "did not adequately reflect the enormity of the respondent's crime and the significant part he played in it."⁹⁰ Mitigating factors had been overemphasized. In the appeal court's view, "were it not for the mitigating features that serve to reduce the length of sentence, the respondent would most certainly have been a candidate for a life sentence."⁹¹ Although Khalid's remorse may have been sincere, he continued to minimize his involvement, and despite the findings of a psychiatrist, the danger he continued to pose was indeterminate. A longer sentence for first time young adult offenders in this context was also found to be necessary for the purposes of general deterrence, given the "sad truth... that young home-grown terrorists with no criminal antecedents have become a reality."⁹² The sentence was raised from 14 to 20 years, or from 7 to 13 years remaining, with a non-parole of half this term imposed under s. 743.6(1.2).

Ahmad

After thirteen days of trial before a jury, Ahmad pleaded guilty to participation in a terrorist group, importing firearms on the group's behalf, and knowingly instructing six others to carry out an activity for the benefit of the group.⁹³ The Crown had not sought a life sentence, given the offender's guilty plea, youth, and lack of a criminal record. Dawson J. imposed a 16-year sentence, giving 8 years and 9 months' credit for pre-trial custody. This left 7 years and 3 months to be served, with parole ineligibility set at half that time.

⁸⁸ *R. v. Khalid* 2009 CanLII 44274.

⁸⁹ *Ibid.* The summary of the sentencing decision set out here draws from *R. v. Khalid* 2010 ONCA 861.

⁹⁰ *R. v. Khalid* 2010, *ibid.*, at para. 32.

⁹¹ *Ibid.*, at para. 37.

⁹² *Ibid.*, at para. 47.

⁹³ Contrary *Criminal Code*, ss. 81.18, 103, 83.2, and 83.21 respectively.

Dawson J. characterized Ahmad's culpability, after the split with Amara, to be limited. He sought to gather firearms and held a further "amateurish" training camp. Ahmad was, in the words of an informant, "an exaggerator who had talked a good game... but had not been able to develop any real operational capability."⁹⁴ He was also remorseful. Yet this was an act of terrorism and a crime of prejudice on religious grounds. As a leader, Ahmad was also "substantially responsible for virtually ruining the lives of a number of other men".⁹⁵

The judgment concluded with an attempt to distinguish Ahmad's sentence from those imposed against other members of the Toronto 18. Outcomes for three of the offenders who pleaded guilty to participating in Ahmad's group – Durrani, James, and Ansari – are worth noting. Each had spent approximately three and a half years in pre-trial custody, and each received a custodial sentence of *one day* (with probation), given credit ranging from roughly 6.5 to 7.5 years.⁹⁶

Dirie

R. v. Dirie is perhaps the most contentious decision among the early cases. Dirie was an associate of Ahmad, acting with the intent of aiding Ahmad's emerging terrorist group. In August of 2005, Dirie, then in his early twenties, was arrested upon attempting to re-enter Canada from Buffalo, New York, with two loaded semi-automatic weapons taped to his thigh, along with two other handguns and several rounds of ammunition on his person. He was sentenced to two years on counts of possessing and importing firearms. At the time of that prosecution, authorities were unaware of his association with Ahmad, or that the purpose of his action was to assist in a terrorist group. While in prison for the weapons charges, Dirie continued to assume a leading role in the group by communicating with various persons inside and outside the prison, including Ahmad.⁹⁷

In June 2006, while still in prison serving his sentence on the weapons charges, Dirie was arrested and charged with participating in a terrorist group.⁹⁸ Following a guilty plea, counsel presented a joint submission that in addition to the 2 years for the weapons offences, a further 7 years was appropriate for

⁹⁴ *Ahmad*, *supra*, note 3, at para. 14.

⁹⁵ *Ibid.* at para. 56.

⁹⁶ *Ibid.* at paras. 66 to 70. With the maximum penalty for participation being 10 years, these sentences were in the middle range. Even if the maximum penalty were imposed here, sentences would have ranged between three and four (additional) years in custody, with non-parole periods of half that time. The conduct in at least one of these cases was well beyond the *de minimus* range. Significantly, Durrani's second bail review indicated that his involvement in the plot was serious enough to justify his continued detention in accordance with section 515(10)(c): *R. v. Durrani* [2008] O.J. 5949 (Q.L.). Among the circumstances Hill J. noted, at para. 144, were Durrani's attendance at training camps with Ahmad in Ramara and Rockwood Ontario, at which he used a firearm and, in the latter case, "took charge of several aspects of the camp"; his having worked closely with Ahmad at various stages; and his comments about bomb-building and his willingness to die to advance the group's goals.

⁹⁷ *Dirie*, *supra*, note 3, at para. 25. An agreed statement of facts in the sentencing for the subsequent terrorism charges noted that "one of the group's objectives was to facilitate or carry out violent acts that would cause death or serious bodily harm to persons."

⁹⁸ Contrary to section 83.18 of the *Criminal Code*.

participation. The only issue was how much credit to grant for pre-trial custody on the new charge. The period in question began from the time that Dirie's mandatory release on the earlier sentence would have occurred, in February of 2007. Some 861 days of the following 2.5 years to sentencing were spent in solitary confinement. Dirie received two for one credit for this period, leaving only a further 2 years to be served – with parole eligibility after only a year.

Durno J. was doubtful of the offender's prospects for rehabilitation, but offered a sound argument for the validity of a sentence that would entail only 2 further years of custody – for an offence that involved express intentions to commit mass murder. "The maximum sentence permitted by Parliament for this offence is 10 years" he noted, "and with the 2 year sentence [Dirie] has already received, the effective 9 year sentence for all his conduct is appropriate."⁹⁹ The assertion that the sentence is appropriate is thus qualified by the legislative framework. There was little room for movement. Out of context, however, it cannot but appear anomalous. Even if he serves the full sentence, the offender will have spent a total of only 6 years in custody – at least 2 of which involved continuing participation in a terrorist group.

Namouh

*R. c. Namouh*¹⁰⁰ is a decision of Leblond, J.C.Q. of the Cour de Québec involving the second life-sentence imposed under the new law. Namouh, in his mid-thirties, had struck an association with a European terror group called the 'Global Islamic Media Front', and expressed his willingness to conduct a suicide bombing on its behalf. The group sought to persuade the German and Austrian governments to withdraw soldiers from Afghanistan by publishing an "open letter" video that threatened to carry out terrorist attacks. (This was found by the court to be both an act of terrorism and an act of extortion.) The group was also associated with a group in Gaza that had kidnapped and held hostage an English journalist, Alan Johnston.

Namouh helped disseminate the "open letter" video, and create and distribute other material. He also helped facilitate covert communications with members of the group over the Internet. Following a trial, he was convicted and sentenced to life for conspiracy to discharge an explosive device in a public place with the intent to cause serious bodily harm or death;¹⁰¹ 4 years for participation; 8 for facilitation and 8 for extortion in association with a terrorist group.¹⁰²

Among the aggravating factors were that it was a crime motivated by hate based on race, ethnicity and religion; that mass murder was the objective of Namouh's online activity; that he was known, in online forums, to be a particularly zealous and diligent member; that he occupied an important place in

⁹⁹ *Ibid.* at para. 35.

¹⁰⁰ *Namouh, supra*, note 3.

¹⁰¹ Contrary to *Criminal Code*, ss. 431.2(2) and 465(1)(c).

¹⁰² The counts in question were contrary to ss. 83.81, 83.19, 346 and 83.2 of the *Criminal Code, ibid.* Leblond J.C.Q. found that the attempt to persuade Germany and Austria to remove soldiers from Afghanistan constituted extortion.

the group; and that he was unrepentant. Leblond J.C.Q. distinguished the offender's circumstances from those in *Amara* by asserting that in Namouh's case, "there are no mitigating circumstances. The accused does not have the excuse of his youth. There are no signs of a possible rehabilitation. He remains dangerous. He must be separated from society. We do not know for that matter when, if ever, he will cease to be a danger."¹⁰³ The parole ineligibility period of the concurrent 20-year sentence was 10 years, beginning from the time of arrest, or roughly 7 years from sentencing.

d. Discussion of issues arising from the Canadian cases:

The cases demonstrate that although courts may seek to emphasize the principles of deterrence and denunciation, aspects of the *Code* framework produce a wide of range of outcomes at both ends of the spectrum of culpability. At the lower end, the range includes time served for less central members of the Toronto 18 plot, to the 10.5 years (of a notional 20-year sentence) imposed in *Gaya*. Among the more serious cases – *Khawaja*, *Amara*, *Dirie*, *Ahmad*, and *Namouh* – the sentences range from between 2 years (of a notional 7 years in *Dirie*) to life. Moreover, with life sentences carrying a 10-year parole ineligibility period that dates from the time of arrest, a significant discrepancy still exists between ineligibility periods in sentences at the upper extreme of the Canadian range (*Khawaja*, *Amara* and *Namouh*) and those in the UK and Australia.

It might be argued that the reading of the Canadian cases offered here mistakes a long sentence that carries a relatively short non-parole period with a potentially short sentence. Parole eligibility, on this view, should be distinguished from the sentence itself. A life sentence is still a life sentence, regardless of one's parole status. Concerns about rehabilitative prospects or public safety are best addressed in the context of parole. The fact that life sentences were imposed in *Khawaja*, *Amara* and *Namouh* proves that Canada has successfully instituted a framework in which the penalty for terrorism offences "duly reflects the seriousness" of the crime – as the UN Security Council had mandated in 2001.

While conceding the merits of this view, a host of issues remain. One is that it applies only where life sentences are imposed. A survey of the Canadian cases demonstrates, however, that for many offenders significantly involved in serious terror plots, much shorter determinate sentences are likely to be imposed (*e.g.*, *Khalid*, *Dirie*, *Ahmad*, *Chand*). This is due in large part to constraints in the *Code* that include credit for pre-trial custody, maximum sentences, and the need to balance conflicting principles of sentencing.

Bill C-25, the *Truth In Sentencing Act* of 2009, alters the *Code* framework for terror sentencing, but not significantly. It amends section 719(3) with respect to the maximum credit to be given at sentencing for pre-trial custody. The earlier iteration of the section allowed courts the discretion to "take into account any time spent in custody by the person as a result of the offence." The Supreme Court of

¹⁰³ *Namouh*, *supra*, note 3, at para. 96.

Canada in *R. v. Wust*¹⁰⁴ held that courts must credit offenders for pre-trial custody, but provided no strict formula for doing so.¹⁰⁵ The bill amends section 719(3) to limit the credit to be accorded for each day of pre-trial custody to one and one-half days, if the offender has not been detained pending trial due either to a breach of bail or to concerns with respect to their criminal record – and “if the circumstances justify it”. The bill is silent on what these circumstances might entail.

All of the cases reviewed here precede the enactment of the bill, but if it did apply, the impact would be marginal. Dirie’s sentence, for example, would have been 18 months to 2 years longer, and Ahmad’s between 2 and 3 years longer. In short, sentences may become slightly longer under the *Code*, with less credit for pre-trial custody, but a significant reduction for time served is still possible.

A comparison of Canadian approaches to those of the UK and Australia lends further insight into constraints that operate in the Canadian context.

V. Evolving approaches to sentencing for terrorism in the UK

As is the case in Canada, terrorism prosecutions in the UK are premised upon a combination of a similar set of new offences along with older offences such as conspiracy to commit murder or to cause an explosion.¹⁰⁶ Among the new offences introduced by the UK’s *Terrorism Act, 2000*¹⁰⁷ are those of being a member or supporter of a terrorist organization;¹⁰⁸ funding terror;¹⁰⁹ and possessing an article for a terrorist purpose.¹¹⁰ Penalties range from a maximum of six months in prison, for a summary conviction offence, to life. Notably, the Parliament of the UK, like its Canadian counterpart, has avoided the imposition of mandatory sentences for terrorism offences.

While terror prosecutions in Canada and the UK bear similarities, approaches to sentencing are distinct. In particular, a clear break is marked from both the Canadian framework and earlier UK jurisprudence by the ruling of the Court of Appeal for England and Wales in *R. v. Barot* (2007).¹¹¹ Prior

¹⁰⁴ [2000] 1 S.C.R. 455.

¹⁰⁵ *Ibid.*, at para. 44.

¹⁰⁶ Conspiracy to murder carries a maximum life sentence in section 3(2) of the *Criminal Law Act, 1977*, c. 45. Conspiracy to cause an explosion carries a maximum life sentence in section 1 of the *Explosive Substances Act, 1883*, c. 3 (Regnal 46 and 47 Vict). The principal convictions in three recent Canadian cases have also involved *Criminal Code* offences that predate the *Anti-terrorism Act* – in *Khawaja*, building an explosive device to endanger lives (s. 81(1)(a) and (d)); in *Amara*, s. 81(1)(a); and in *Namouh*, conspiracy to cause an explosion (s. 465(1)(c)).

¹⁰⁷ *Terrorism Act, 2000*, c. 11.

¹⁰⁸ *Ibid.* ss. 11 and 12.

¹⁰⁹ *Ibid.* s. 15.

¹¹⁰ *Ibid.* s. 57; this was initially a ten year maximum but amended to fifteen years by the *Terrorism Act 2006*, c. 11.

¹¹¹ [2007] EWCA Crim 1119. On *Barot* marking a shift in approach, see Ali Naseem Bajwa, “Sentencing Terror Offences” *Criminal Law and Justice Weekly* (14 August 2010); online: <<http://criminallawandjustice.co.uk/index.php?/Analysis/sentencing-terror-offences.html>>

to *Barot*, UK decisions for a terrorist conspiracy to commit murder ranged from 30 to 45 years.¹¹² Terrorist conspiracies to cause an explosion endangering life ranged from 20 to 35 years.¹¹³

The ceiling would be raised with *Barot*. This case concerned the appeal of one of eight members of a terrorist group that had conspired to carry out four attacks. The most serious involved the use of three limousines containing propane gas cylinders and remotely controlled explosive devices. These were to be used in an underground parkade of an office building, with a view to causing hundreds of casualties. Receiving a life sentence with a 40-year non-parole period, Barot appealed on the basis that the conspiracy had been foiled.

On appeal, Lord Phillips C.J. held that longer sentences should be imposed in terrorism cases as a consequence to amendments in the *Criminal Justice Act 2003*. Schedule 21 of the Act set out new guidelines for parole ineligibility for murder.¹¹⁴ The schedule indicates that where the seriousness of the offence is “exceptionally high” (defined in part as “a murder done for the purpose of advancing a political, religious or ideological cause”), a “whole life order” is appropriate. Where the seriousness is “particularly high” (defined in part as “a murder involving the use of a firearm or explosive”), the starting point is 30 years.¹¹⁵

Lord Phillips C.J. held that the “effect of [schedule] 21 has been to increase significantly the minimum terms being imposed for the most serious murders”, and by implication, for attempted murder and conspiracy.¹¹⁶ Setting out a general framework, he stated that “a life sentence with a minimum term of forty years should, save in quite exceptional circumstances, represent the maximum sentence for a terrorist who sets out to achieve mass murder but is not successful in causing any physical harm.” For conspiracy or acts that “fall short of an attempt”, the sentence would be lower.¹¹⁷ Barot’s life sentence was appropriate given the intent of the conspiracy — “mass murder of innocent citizens on a massive scale”¹¹⁸ — but given the uncertainty that any of the four conspiracies would move beyond the planning stages, parole ineligibility was reduced from 40 to 30 years.

Barot was followed in the UK’s most serious terrorism case, *R. v. Ibrahim*,¹¹⁹ which involved the failed London bombing attempt that took place two weeks after the attacks on July 7, 2005. Detonators

¹¹² Bajwa, *ibid*, includes in this category *R. v. Al-Banna* (1984) 6 Cr App R(s) 426; *R. v. Basra* (1989) 11 CR App R(S) 527; and *R. v. McGonagle and Heffernan* [1996] 1 Cr App R(S) 90.

¹¹³ *R. v. Martin*, *supra*, note 70.

¹¹⁴ Section 269.

¹¹⁵ See, in particular, sections 4 and 5 of Schedule 21.

¹¹⁶ *Barot*, *supra*, note 111, at para. 57.

¹¹⁷ *Ibid.* at para. 60.

¹¹⁸ *Ibid.* at para. 64.

¹¹⁹ (2008) 4 All ER 208.

in the backpacks of all four of the offenders entering the subway failed at the last moment. All four received life sentences with non-parole periods of 40 years.¹²⁰

Other cases that have applied the *Barot* framework include *R. v. Jalil*,¹²¹ which concerned Barot's four co-accused (charged with conspiracy to cause an explosion endangering life, with sentences ranging from 15 to 25 years); *R. v. Asiedu*¹²² (an accomplice in the failed London plot who abandoned his bomb in bushes moments before the intended attack, receiving a life sentence with 33 years before parole); and the UK companion case to the matter involving Momin Khawaja, *R. v. Khyam* (life, with non-parole periods from 17.5 to 20 years).¹²³ Following *Barot*, UK sentencing decisions suggest the likelihood of a life sentence in cases involving a conspiracy to commit murder, and roughly 20 or more years for causing an explosion endangering life. The non-parole periods have tended to range from roughly 20 to 40 years, depending on the degree of culpability and viability of the plot.

Sentences for a host of other, less serious terror-related offences under the new laws explored above have entailed shorter custodial terms. This is due in part to maximum sentences in the legislation, but also with the court's inclination to accord greater weight to mitigating factors. In *R. v. Rahman & Mohammed*,¹²⁴ appeals against 6- and 4-year sentences for disseminating terrorist publications were reducing to 5 and 2 years. In *R. v. Sherif and Ors*,¹²⁵ various sentences were reduced for a group of offenders peripherally involved in the July 21, 2005 failed bombing of the London subway. The lowest of the sentences imposed at trial – 3 and 4 years – were upheld.¹²⁶

In summary, UK terror sentencing, following *Barot*, has entailed longer custodial periods for principal offenders in serious plots, and shorter sentences for marginal figures in less serious plots. Yet the shorter sentences are generally not as short as in the less serious Canadian cases.

VI. Recent approaches to sentencing for terrorism in Australia

Following 9/11, various terror-related offences were added to part 5.3 of Australia's *Criminal Code*.¹²⁷ The *Code* also includes a definition of terrorism modeled after that set out in the UK's

¹²⁰ *Ibid.*

¹²¹ (2009) 2 Cr App R(S) 40.

¹²² (2009) 1 Cr App R (S) 72.

¹²³ *Supra*, note 54.

¹²⁴ [2008] EWCA Crim 1465.

¹²⁵ [2008] EWCA Crim 2653.

¹²⁶ *Ibid.* Offences at issue included providing assistance or property, and failing to give authorities information relating to the plots.

¹²⁷ *Criminal Code Act, 1995* (Cth) [*Criminal Code* or *Code*]. For an overview of these additions, see Edwina MacDonald and George Williams, "Combating Terrorism: Australia's *Criminal Code* Since September 11, 2001" (2007) 16 Griffith L. Rev. 27; and Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thompson) 2005, at 871 to 897.

Terrorism Act, 2000.¹²⁸ New offences capture the act of possessing a thing connected with preparation for or assistance in a terrorist act (with a maximum 15-year penalty);¹²⁹ collecting or making a document with the same connection (a maximum of 15 years);¹³⁰ and the catchall provision, doing any act in preparation for, or planning, a terrorist act (a maximum of life).¹³¹ In a manner analogous to Canada's facilitation and participation provisions, the Australian *Code* requires, for each of these offences, only a generalized knowledge or intent in relation to a terrorist act.¹³²

General guidelines for the sentencing of criminal offences in the Australian context are found in section 16A of the *Crimes Act 1914*.¹³³ Courts are required to consider the nature of the offence and the offender's culpability, along with his or her remorse and rehabilitative prospects. In terrorism cases, however, the courts have asserted the need to subordinate these factors in favour of an emphasis upon the principles of general deterrence and the "protection of the public".¹³⁴ Australian law also notably lacks a provision analogous to Canada's totality principle, in section 718.2(c) of the *Criminal Code*. This precludes Canadian courts from imposing a set of consecutive sentences that is "unduly long or harsh."¹³⁵ In the absence of an equivalent provision, Australian judges have demonstrated greater flexibility than their Canadian counterparts in emphasizing deterrence or concerns about public safety above other principles of sentencing.

Differences between Canadian and Australian law on parole eligibility are also notable. Section 19AG of Australia's *Crimes Act, 1914* imposes a minimum parole ineligibility period of three quarters of the "aggregate" sentence imposed for certain offences, including the "terrorism offences" set out in Part 5.3 of the *Code* among others.¹³⁶ This is to say that where concurrent sentences are imposed, the

¹²⁸ Section 100.1 of the *Code* defines terrorism as an action causing "serious harm" or "damage to property" with the "intention of advancing a political, religious or ideological cause" and the intention of "coercing, or influencing by intimidation, the government of the Commonwealth or a State". Exceptions are made in section 100.1(3) for political dissent, and protest not intended to cause physical harm or death.

¹²⁹ *Criminal Code*, s. 101.4.

¹³⁰ *Ibid.* s. 101.5.

¹³¹ *Ibid.* s. 101.6.

¹³² *Ibid.* Section 101.6(2) states, for example, that a person commits an offence even if a terrorist act "does not occur", or if "the person's act is not done in preparation for ... a specific terrorist act".

¹³³ *Crimes Act, 1914* (Cth).

¹³⁴ See, e.g., *Regina (C'Wealth) v. Sharrouf*, [2009] NSWSC 1002, *Regina (C'Wealth) v. Mulahalilovic*, [2009] NSWSC 1010, and *Regina (C'Wealth) v. Touma*, [2010] NSWSC 10. The role that the "protection of the public" plays as a distinct consideration in terrorism sentencing is explored by Spigelman C.J. in *Lodhi*, *supra*, note 70, paras. 94-110.

¹³⁵ The closest equivalent is arguably section 16B of the *Crimes Act 1914* (Cth), which requires the court to consider "any sentence already imposed on the person by the court or another court".

¹³⁶ Section 19AG(1) of the *Crimes Act, 1914* (Cth).

aggregate sentence would refer to the longest of them; where consecutive sentences are imposed, it would refer to the total sentence.¹³⁷

The leading sentencing case under post-9/11 law in Australia is the New South Wales Court of Appeal decision in *R. v. Lodhi*.¹³⁸ With the intention of carrying out a bombing, Lodhi collected maps of the Australian electrical supply system and made efforts to obtain explosives. He was convicted of collecting a document, possessing a thing, and doing a thing – all in preparation for a terrorist act.¹³⁹ At sentencing, Whealy J. noted that at the time of arrest, the choice of bomber, area to be bombed, and method had not been decided.¹⁴⁰ Yet Lodhi's culpability was still significant. The court imposed concurrent 10-year sentences on the counts of possessing a thing and collecting a document, and 20 years for doing a thing in preparation. Parole ineligibility was set at 15 years.

Lodhi's sentence was upheld on appeal. Spigelman C.J. and Price J. offered separate but concurring reasons. For Spigelman C.J., the sentence was justified despite the fact that the appellant "did not go beyond collecting materials for future use".¹⁴¹ The intent was inherently serious, and the appellant had "not resiled from the extremist intention with which these acts were performed."¹⁴² Price J. was careful to distinguish between the concept of an offence that imposes liability at an earlier stage of a terrorist conspiracy and the objective seriousness of the conduct at issue. "It does not follow", he wrote, "that as long as the preparatory acts relied upon to constitute the offences are in their infancy criminal culpability must necessarily be low."¹⁴³

Among the more serious cases that have followed *Lodhi* are the decisions in *Touma*,¹⁴⁴ *Benbrika*,¹⁴⁵ and *Elomar*.¹⁴⁶ Touma was a principal of a group of nine others in a 2005 plot. He had acquired ammunition and attempted to build a bomb, but a doubt remained about his intent to target humans. Given the guilty plea and resilement from extremist views, a sentence of 18 years and 19 months was warranted, discounted to 14 years, with a non-parole period of 11 years.

Benbrika dealt with the sentencing of seven offenders involved in activities that occurred between 2003 and 2005. Benbrika spoke at various mosques and Islamic community centres, recruiting members

¹³⁷ See 'interpretation,' section 16 of the *Crimes Act*, 1914. On the application of this provision, see *Touma, supra*, note 160, at para. 155.

¹³⁸ *Faheem Khalid Lodhi v Regina*, [2007] NSWCCA 360.

¹³⁹ Contrary to *Criminal Code* ss. 101.4, 101.5, 101.6.

¹⁴⁰ *Regina v. Lodhi* [2006] NSWSC 691, para. 26.

¹⁴¹ *Lodhi* [2007], *supra*, note 138, at para. 66.

¹⁴² *Ibid.*

¹⁴³ *Ibid.* para. 229.

¹⁴⁴ *Supra*, note 134.

¹⁴⁵ *Regina v. Benbrika & Ors* [2009] VSC 21.

¹⁴⁶ *Regina (C'wealth) v. Elomar & Ors* [2010] NSWSC 10.

to his group. With a view to staging a bombing, he raised funds and organized a training camp. Given the seriousness of the conduct, coupled with Benbrika's lingering extremist views, Bongiorno J.A. held that deterrence and incapacitation were primary considerations.¹⁴⁷ Benbrika received a 15-year sentence for leading the group, with a non-parole period of 12 years. Other offenders received between 7 years for membership, 8 for providing resources, and 5 for possession of a thing in preparation of a terrorist act.

The latest of these decisions, *Elomar*,¹⁴⁸ entails the longest custodial terms thus far imposed in Australia under post-9/11 law. The group had stockpiled firearms and explosives, and members attended two camps. The intent was to carry out bombings at unspecified locations. Each offender was convicted of preparation of a terrorist act.¹⁴⁹ The Crown did not seek life sentences, given the failure to establish an intent to kill.¹⁵⁰ Yet Whealy J. accepted the Crown's assertion that the conspiracy "clearly encompassed in the mind of each of the offenders a real risk of danger to human life."¹⁵¹ Sentences ranged from 28 to 23 years, with non-parole periods ranging from 21 to 17 years.

Cases at the lower end include the decisions in *Mulahalilovic*,¹⁵² *Sharrouf*,¹⁵³ *Kent*,¹⁵⁴ and *Khazaal*.¹⁵⁵ *Mulahalilovic* dealt with an offender who acquired a firearm for O, a person with extremist sympathies. Whealy J. found the extent of Mulahalilovic's culpability to consist in his recklessness as to the possible terrorist use of the ammunition. He imposed a sentence of 4 years and 8 months, with a non-parole period of 3.5 years. *Sharrouf* concerned the acquisition of various clocks and batteries for a terrorist group. In imposing a sentence of 5 years and 3 months, and parole ineligibility at just under 4 years, Whealy J. held that the seriousness of the offence was mitigated by the offender's schizophrenia.¹⁵⁶ *Kent* dealt with the charges of being member of a terrorist group and making a propaganda video inciting terror.¹⁵⁷ An aggregate sentence of 5.5 years was imposed, with a non-parole period of 3 years and 9 months. *Kazaal* was a more serious document case, involving the production and dissemination of a book titled "Provisions on the Rules of Jihad". The offender's lack of remorse and efforts to minimize the seriousness of his actions were further considerations in imposing a sentence of 12 years, with a non-parole period of 9 years.

¹⁴⁷ *Supra*, note 145, at para. 85.

¹⁴⁸ *Supra*, note 146.

¹⁴⁹ Contrary to 101.6 of the *Criminal Code*, carrying a maximum life sentence.

¹⁵⁰ *Supra*, note 146, at para. 65.

¹⁵¹ *Ibid.*

¹⁵² *Mulahalilovic*, *supra*, note 134.

¹⁵³ *Sharrouf*, *supra*, note 134.

¹⁵⁴ *Regina v. Kent* [2009] VSC 375.

¹⁵⁵ *R v Khazaal* [2009] NSWSC 1015.

¹⁵⁶ *Sharrouf*, *supra*, note 134. para. 60.

¹⁵⁷ Contrary to ss. 102.3 and 105.1 of the *Criminal Code*, each carrying maximum penalties of 10 years.

In summary, at the higher end of the spectrum, Australian courts may have resisted imposing life sentences, but as the cases demonstrate, courts have the capacity to impose, and generally tend to impose, longer determinate custodial terms with longer non-parole periods than in Canada.

VII. Issues arising from a comparison of the three sentencing regimes

The comparison undertaken here is meant to show how Canadian judges are constrained by the *Code* in ways that lead to large discrepancies in analogous cases to those in the UK and Australia.

Among the most serious cases, the culpability of offenders in the UK decisions in *Ibrahim* (life, 40 years without parole) and *Khyam* (life, 20 years without non-parole) and the Australian case of *Elomar* (28 years, 21 without parole) was roughly comparable to those in *Khawaja* (life, 5 without parole, following sentencing) and both *Ahmad* and *Namouh* (life; 6 and 7 years without parole, after sentencing).¹⁵⁸ At the lower end of the spectrum, there were no UK or Australian equivalents to sentences as short as those in *Dirie*, *Durrani*, *James*, *Ansari*, *Chand*, and *Yogakrishnan* (time served to 2 years).¹⁵⁹ The shortest sentences in UK and Australian terror cases under review in this paper were both longer in duration and imposed against offenders whose culpability was less serious (*e.g.*, in the UK, *Rahman* and *Sherif*; in Australia, *Mulahalilovic* and *Sharrouf*).¹⁶⁰

These discrepancies could be addressed by amending aspects of the *Code* framework. Maximum penalties for what are becoming common avenues of terrorism prosecution – the participation and facilitation provisions – might be raised in conformity with their UK and Australian equivalents.¹⁶¹ Parliament might also raise parole ineligibility limits, or give courts the flexibility to impose longer non-parole periods in serious cases. And more specific direction might also be provided as to the workings of consecutive sentences imposed for terror offences in section 83.26 of the *Criminal Code*, along with credit for pre-trial custody in this context.

Another possibility – suggestive of a certain irony – is that terror prosecutions might come to rely to a greater degree on older offences, such as conspiracy or attempt to commit murder, or intending to cause an explosion endangering life. The latter offence was the primary charge in *Khawaja*, *Amara*, *Khalid*, and *Gaya*. Carrying a maximum life sentence, these offences allow for more flexibility in sentencing than is available for either facilitating or participating in terrorism. Prosecutors might also more frequently invoke sections 83.2 and 83.27 of the *Code*, which allow for sentences of up to life

¹⁵⁸ *Ibrahim*, *supra*, note 119; *Khyam*, *supra*, note 54; *Elomar*, *supra*, note 146; *Khawaja*, *Ahmad*, and *Namouh*, *supra*, note 3.

¹⁵⁹ *Supra*, note 3.

¹⁶⁰ *Rahman*, *supra*, note 124; *Sherif*, *supra*, note 125; *Mulahalilovic* and *Sharrouf*, *supra*, note 134.

¹⁶¹ The analogous UK provision to both of Canada's participation and facilitation provisions is found in section 5 of the UK's *Terrorism Act, 2006*, c. 11. "Preparation of terrorist acts" carries a maximum life sentence. Similarly, section 101.6 of Australia's *Criminal Code, 1995* (Cth) carries a maximum life sentence for preparation for or planning of a terrorist act.

where indictable offences are committed in association with a terrorist group, or where they also constitute a “terrorist activity.”

Justifying longer sentences raises the broader issue of the purposes that terrorism sentencing should strive to serve. A common theme in the more serious post-9/11 cases in Canada, the UK, and Australia is the need for longer sentences to satisfy the principles of deterrence, denunciation, and incapacitation. An unexamined assumption in those cases is that sentences for terrorism offences are in fact capable of deterring would be terrorists.

This issue was canvassed in earlier debates about the merits of new anti-terror laws. Kent Roach, for example, notes that Anne McLellan, Minister of Justice when the *Anti-terrorism Act* was first before Parliament, had emphasized that one of the Act’s primary purposes was to impose more serious penalties for terrorism for the purpose of deterrence.¹⁶² Yet no evidence or argument was offered in support of “her apparent belief that tougher penalties would deter the type of terrorists who caused such destruction on September 11”.¹⁶³ Indeed, the claim that longer sentences would deter others is a proposition still very much in question -- a question beyond the scope of this paper. Resolving it will require evidence that may not be available for many years to come, given the evolving nature of terrorism, the novelty of the current sentencing regimes, and the state of knowledge about the psychology of terrorism offenders.

Yet the case for revising Canada’s terrorism sentencing framework draws on arguments other than just deterrence. One is that a short sentence for the most serious of crimes fails to adequately denounce the conduct at issue. Another is the belief that in some cases it would be prudent to incapacitate, for a significant period of time, a terrorism offender whose rehabilitative prospects are in doubt.¹⁶⁴

Canada’s sentencing framework ought to be amended not simply for the sake of imposing longer sentences, but to give judges more discretion to craft sentences that would avoid the counter-intuitive results in many of the early cases. Where an offender with a criminal history, a lack of remorse, or lingering extremist sympathies is charged with participating in or facilitating terrorism, the actual scope for sentence is narrow. He will likely spend a lengthy period in pre-trial custody – given the average duration of complex terrorism trials, among other factors – and will therefore receive considerable credit for pre-trial custody. The period remaining to be served after sentencing will be relatively short, even if

¹⁶² *September 11, supra*, note 1, at 46.

¹⁶³ *Ibid.*

¹⁶⁴ In theory, the “dangerous offender” scheme in Part XXIV of the *Criminal Code* offers an additional tool to address these concerns. But, in practice, the statutory tests for imposing the designation make its use in this context unlikely. Section 753(1)(a)(i) permits a “dangerous offender” designation, and therefore an indeterminate prison sentence, where the offender has exhibited a pattern of behaviour suggesting a failure to exercise restraint and a likelihood of death or injury to others. Alternatively, the designation may be imposed, under s. 753(1)(a)(iii), if the offender has committed an offence “of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.”

parole is denied. In cases dealing with central but non-principal figures in more serious plots, the framework makes it possible, if not likely, that a court will impose a relatively short custodial term, or a short non-parole period, or both.

Conclusion

Terror sentencing in Canada is still a work in progress. At present, constraints in the *Criminal Code* have lead courts to impose shorter non-parole custodial terms relative to those imposed in comparable UK and Australian cases. In *Dirie* and other cases, the framework has lead to strikingly short sentences given the gravity of the offence and the culpability of the offender. Suggested reforms include an increase in maximum sentences, and limits on both credit for pre-trial custody and parole ineligibility. The point would not be to make sentences for terrorism excessively punitive, but to bolster, at the least, their capacity for denunciation, incapacitation, and, to some extent, deterrence.