R v Khawaja (2012): Criminalizing Terrorism is Constitutional

Introduction

On December 14, 2012, the Supreme Court of Canada released its decision on whether the *Criminal Code* sections that criminalize terrorist activities violated the right to liberty and freedom of expression guaranteed in the *Canadian Charter of Rights and Freedoms (Charter)*.[1] The Court unanimously affirmed that Part II.1 of the *Criminal Code*, which it referred to as the terrorism section, did not violate the *Charter* and was thus constitutional. This article explores the Supreme Court's attempt to clarify the boundary and purpose of the terrorism section with respect to the *Charter* right to liberty and freedom of expression.

Facts

In the years leading up to 2004, Mr. Khawaja, a Canadian citizen living in Ottawa, became obsessed with Osama Bin Laden and his "Jihad" cause against Western intervention in the Middle East.[2] Mr. Khawaja began communicating with other people who were involved in planning terrorist activities connected to Al Qaeda in the UK and other parts of Europe. He provided these people with financial support, built explosives for a bomb plot in London, and recruited a woman in Ottawa to facilitate money transfers. He also travelled several times to Pakistan to attend small arms training camps led by one of the Jihad extremists.

In February 2004, Mr. Khawaja came to the attention of the British Security Service who were investigating suspected terrorists in London. As a result, on March 29, 2004, Mr. Khawaja was arrested and charged under Part II.1 of the *Criminal Code*.[3] Part II.1 was added to the *Criminal Code* in 2001 pursuant to the *Anti-Terrorism Act*, which the Canadian Parliament passed the same year.[4] The purpose of the *Anti-Terrorism Act* was to provide law enforcement agencies or personnel with a permanent means, not restricted to emergency situations, by which terrorism could be prosecuted and prevented. Activities criminalized under Part II.1 included the following:

- Financing terrorism
- Participating, facilitating, instructing and harbouring terrorist activities or terrorists
- Direct or indirect involvement in planning or carrying out terrorist activities
- Organizing a terrorism hoax

Mr. Khawaja was the first individual to be charged under the terrorism section. Prior to the trial at the Ontario Superior Court, Mr. Khawaja brought a motion, a written petition, asking

the Court to declare sections 83.01(1), 83.03(a), 83.18, 83.18(1), 83.18(3)(a), 83.19, 83.2, and 83.21(1) of the Criminal Code unconstitutional.[5] He claimed that the sections were vague and overbroad in a manner that prohibited expressive activity and thus violated his *Charter* right to freedom of expression.[6]

Procedural History

On October 24, 2006, the motions judge at the Ontario Superior Court held that the terrorism sections Mr. Khawaja challenged were constitutional, except for section 83.01(1)(b)(i)(A). Section 83.01(1)(b)(i)(A), referred to as the 'motive clause', defines "terrorist activity" as "an act or omission, in or outside Canada, that is committed in whole or in part for a political, religious or ideological purpose, objective or cause."[7] The motion judge determined that the motive clause violated the right to freedom of expression because it shifted the focus of investigation and prosecution towards scrutinizing expression of beliefs and opinions and away from the purpose of preventing terrorism. He ruled that the motive clause should be severed from section 83.01(1).

On October 28, 2008, the Ontario Superior Court agreed with the motion judge's pre-trial decision that the motive clause was unconstitutional and that it should be severed from the *Criminal Code*.[8] However, the Superior Court found Mr. Khawaja guilty of providing property or services for terrorist purposes, contributing to the activity of a terrorist group, facilitating a terrorist activity, and instructing people to carry out an activity for a terrorist group. The Superior Court sentenced him to imprisonment for ten and a half years. Mr. Khawaja appealed this conviction to the Ontario Court of Appeal and the Crown cross-appealed for life imprisonment.

On December 17, 2010, the Ontario Court of Appeal dismissed Mr. Khawaja's conviction appeal and overturned the Superior Court decision. The Court held that the motive clause did not violate Mr. Khawaja's *Charter* right to freedom of expression and was thus constitutional.[9] The Court found that the *Charter* right to freedom of expression does not protect expressive activity that involves threats of violence. Additionally, Mr. Khawaja's claim that the motive clause undermined freedom of expression was held to be speculative without evidence. Although the Court of Appeal found the Superior Court to have erred and thus overturned its decision on the constitutionality issue, the Court dismissed the conviction appeal instead of ordering a new trial.[10] At the same time, the Court allowed the Crown's cross-appeal and sentenced Mr. Khawaja to life imprisonment.

Mr. Khawaja appealed the Court of Appeal decision to the Supreme Court of Canada. He made two claims: 1) He argued that the motive clause was unconstitutional for violating his *Charter* right to freedom of expression; 2) He claimed that the conviction for life imprisonment was unfair.

Interestingly, in a case that was appealed to the Supreme Court of Canada at about the same time as *Khawaja*, the *Sriskandarajah v United States of America*, case, section 83.18 of the terrorism section, which prohibits participation in or contribution to terrorist activity, was challenged for violating the right to liberty based on an overbreadth argument.[11]

Since both *Sriskandarajah* and *Khawaja* dealt with the constitutionality of the terrorism section, the Supreme Court decided to consider the constitutionality issue for both cases conjointly in *Khawaja*.

Issues

1. Does section 83.18 of the *Criminal Code* violate the right to liberty guaranteed under section 7 of the *Charter*?

    a) Is "overbreadth" a principle of fundamental justice?

    b) Is section 83.18 of the *Criminal Code* overbroad so as to violate the *Charter*?

        i) Objective of the terrorism section

        ii) Scope of section 83.18

        iii) Is section 83.18 broader than necessary to achieve its objective?

2. Does the motive clause (section 83.01(1)(b)(i)(A)) of the *Criminal Code* violate Mr. Khawaja's freedom of expression under section 2(b) of the *Charter*?

    a) Does the purpose of the terrorism section violate Mr. Khawaja's freedom of expression?

    b) Does the effect of the motive clause violate Mr. Khawaja's freedom of expression?

3. Did the Court of Appeal's re-insertion of the motive clause make the trial unfair?

4. Was the Ontario Court of Appeal wrong to overturn the Superior Court decision and sentence Mr. Khawaja to life imprisonment?

Decision

On December 14, 2012, the Supreme Court of Canada found that Part II.1 of the *Criminal Code* was constitutional. The Supreme Court held that section 83.18 and the motive clause did not violate the *Charter* right to liberty or freedom of expression. The Supreme Court determined that the Ontario Court of Appeal correctly interpreted and applied the terrorism section to find Mr. Khawaja guilty under the *Criminal Code*. Lastly, the Supreme Court upheld the Court of Appeal's conviction of Mr. Khawaja to life imprisonment because he posed an ongoing danger to Canadian society.

Court's Analysis

1. Does section 83.18 of the Criminal Code violate the right to liberty under section 7 of the Charter?

a) Is "overbreadth" a principle of fundamental justice?

Under section 7 of the *Charter*, the legislation or government action that violates a person's right to liberty may be justified if it is made in accordance with the principles of fundamental justice.[12] To establish that a principle meets the threshold required to be a principle of fundamental justice, the claimant must demonstrate three components:

(1) there is a legal principle; (2) there is a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and (3) the principle is capable of being identified with sufficient precision so as to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[13]

In *Khawaja*, the Supreme Court of Canada stated, "it is a principle of fundamental justice that criminal laws not be overbroad."[14] The Court quoted the decision in *R v Heywood* which described a law to be overbroad if "the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective."[15] Therefore, if a criminal law provision restricts a person's liberty more than is necessary to accomplish its goal, the provision would be overbroad and thus violate principles of fundamental justice in a manner that cannot be justified under section 7.

b) Is section 83.18 of the Criminal Code overbroad so as to violate the Charter?

The appellants in *Sriskandarajah* argued that section 83.18 of the *Criminal Code* was overbroad and thus violated their *Charter* right to liberty. Section 83.18(1) reads as follows:

> (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.[16]

The appellants claimed that section 83.18 criminalized conduct that created no risk of terrorism, such as participation in legitimate, innocent, and charitable activities carried out by a terrorist group. Therefore, the section was said to be overly broad in relation to its objective of preventing terrorist activity. In order to assess this argument, the Supreme Court examined the objective of the terrorism section, the scope of section 83.18, and whether the means were broader than necessary to achieve the legislative objective.

i) Objective of the terrorism section

The objective of Parliament in adding the terrorism section to the *Criminal Code* was to prosecute and prevent terrorism.[17] However, the terrorism section did not intend to punish individuals for "innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity."[18]

ii) Scope of section 83.18

Given this objective, section 83.18 has a considerably limited scope within which an individual may be found guilty. Two requirements must be met in order to convict a person under section 83.18(1): the individual must have participated or contributed to a terrorist

activity “knowingly”, and the action must have been undertaken “for the purpose” of enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity.[19] The Supreme Court interpreted the second criteria as requiring the particular person accused to have had “specific intent” to enhance the ability of the terrorist group to carry out a terrorist activity. Yet, the terrorist activity need not result in actual harm to meet the threshold.

The Supreme Court determined that this high standard of specific intent, which the Crown must prove to convict an individual under section 83.18, exempted those who may assist terrorist groups for legitimate, innocent, and charitable reasons.[20] For example, a lawyer may represent a terrorist knowing that a successful trial will allow that client to pursue terrorist activity thereafter. However, if the lawyer had no specific intent to enable that client to pursue further terrorist activity, but simply to provide a defence, the lawyer could not be convicted under section 83.18. Hence, the Court found that section 83.18 excluded convictions for innocent or socially useful conduct performed absent any intent to enhance the ability of a terrorist group to facilitate or carry out a terrorist activity.

Despite the narrowing of the scope of section 83.18 by the “specific intent” requirement, the appellants in *Sriskandarajah* continued to assert the overbreadth argument. They claimed that the section captured harmless conduct, such as marching in a non-violent rally held by the charitable arm of a terrorist group, regardless of whether the person had “specific intent” or not.[21] However, as previously mentioned, the purpose of the terrorism section is not only to prosecute but also to prevent terrorism. Therefore, Parliament saw a need to prosecute actions that support terrorist activity which may never materialize but that present a real risk for Canadian society. Hence, the Supreme Court held that depending on the nature of the conduct and the relevant circumstances, a conduct would fall within section 83.18 if a “reasonable person would view [it] as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity.”[22]

iii) Is section 83.18 broader than necessary to achieve its objective?

As such, section 83.18 has a limited scope which excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. The section also excludes situations where the accused had no specific intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity. Section 83.18 still catches a wide range of conduct including participation or contribution to terrorist activity that may never materialize into actual harm. However, the Court reiterated Parliament’s objective in adding the terrorism section, which recognized that “there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts.”[23]

Based on these findings, the Supreme Court determined that section 83.81 was not broader than necessary to achieve the state objective of preventing and prosecuting terrorism. Therefore, the Court concluded that section 83.18 of the *Criminal Code* was not overbroad and did not violate section 7 of the *Charter*. As a result, it was not necessary for the Court to consider whether the violation could be justified under section 1 of the Charter.

2. Does the motive clause (section 83.01(1)(b)(i)(A)) of the Criminal Code violate Mr. Khawaja's freedom of expression under section 2(b) of the Charter?

The motive clause defines "terrorist activity" as "an act or omission, in or outside Canada, that is committed in whole or in part for a political, religious or ideological purpose, objective or cause."[24] Mr. Khawaja claimed that the motive clause violated his right to freedom of expression because it criminalized expressive activities and had a chilling effect on exercising his right to freedom of expression.[25] In order to assess these claims, the Court examined the purpose of the terrorism section and the effect of the motive clause with respect to section 2(b) of the *Charter*.

a) Does the purpose of the terrorism section violate Mr. Khawaja's freedom of expression?

In *Irwin Toy Ltd v Quebec (AG)*, the Supreme Court of Canada ruled that violent activities are not protected by section 2(b) of the *Charter*.[26] In *Khawaja*, the Supreme Court went further to clarify that the violence exception to section 2(b) not only includes physical violence but also threats of violence. The Court emphasized that threats of violence "undermine the very values and social conditions that are necessary for the continued existence of freedom of expression."[27] Therefore, while section 2(b) protects expressive activities, the right to freedom of expression is a limited one which excludes acts of violence or threats of violence.

Mr. Khawaja claimed that the activities targeted by the terrorism section were mostly expressive activities. These included committing a terrorist activity, assisting in the commission of terrorist activity, enhancing the ability of others to commit a terrorist activity, and instructing others in the commission of a terrorist activity. However, the Supreme Court held that these activities were acts of serious violence or threats of violence which fall outside the scope of protected expressive activities under section 2(b) of the *Charter*. Hence, the terrorism section did not violate Mr. Khawaja's freedom of expression.

The Court went further to explain why the activities prohibited under section 83.01(1)(b)(ii)(E) of the *Criminal Code* fell outside section 2(b) of the *Charter*. The section defines "terrorist activity" as "an act or omission…that…causes serious interference with or serious disruption of an essential service, facility or system, whether public or private…that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)."[28] The Court held that section 83.01(1)(b)(ii)(E) is restricted to activities that intentionally interfere with essential infrastructure on which people's lives may depend. Hence, the section targeted acts of violence or threats of violence that are excluded from section 2(b) of the *Charter*. However, the Court did not rule out the possibility that the section may be found in future cases to capture an activity protected by the *Charter*.

b) Does the effect of the motive clause violate Mr. Khawaja's freedom of expression?

With respect to Mr. Khawaja's argument that the motive clause had a chilling effect on the

exercise of his right to freedom of expression, the Supreme Court held that there was insufficient evidence to support his claim.[29]

First, there was no evidence of a causal connection between the motive clause and discouraging expression of religious or ideological views. The Court explained that the alleged chilling effect, which the Superior Court accepted, resulted from the "post 9/11 climate of suspicion" and not from the motive clause in the *Criminal Code*.[30] Second, the chilling effect coming from an incorrect understanding of the motive clause, where it is viewed as prosecuting non-violent expressive activities, cannot support a constitutional challenge argument.[31] Lastly, the Court rejected Mr. Khawaja's argument that the motive clause would legitimize law enforcement action that scrutinizes individuals based on religious, political, or ideological beliefs. As previously stated, the motive clause targets acts of violence or threats of violence and does not catch non-violent expressions, whether they involve political, religious or ideological views.

Having found that the motive clause had no chilling effect on Mr. Khawaja's ability to exercise his freedom of expression, the Court ruled that the motive clause did not violate his section 2(b) *Charter* right. Hence, it was unnecessary for the Court to consider section 1 of the *Charter*.

3. Did the Court of Appeal's re-insertion of the motive clause make the trial unfair?

In addition to arguing the unconstitutionality of the terrorism section, Mr. Khawaja claimed that the re-insertion of the motive clause by the Court of Appeal after it had been severed by the Superior Court made his trial unfair. Ordinarily, if an additional essential element of the offence is considered on appeal, such as the motive clause in this case, the courts of appeal would typically order a new trial.

However, the Supreme Court determined that *Khawaja* was an exception. The Court ruled that Mr. Khawaja was not prejudiced by the re-inclusion of the motive clause. The Court determined that the conviction would have been imposed against Mr. Khawaja with or without the motive clause and that his defence strategy would not have changed had the clause been recognized by the Superior Court. Therefore, the Supreme Court held that the Court of Appeal's re-insertion of the motive clause did not make the trial unfair.

4. Was the Ontario Court of Appeal wrong to overturn the Superior Court decision and sentence Mr. Khawaja to life imprisonment?

The Supreme Court found that the Ontario Superior Court made critical errors in sentencing and upheld the Court of Appeal conviction against Mr. Khawaja. The Superior Court underestimated the seriousness of Mr. Khawaja's conduct as a willing participant in a terrorist group and failed to give adequate weight to the ongoing danger he posed to Canadian society. The Supreme Court affirmed that it should be left to the hearing court to determine such matters on a case-by-case basis. However, in this case, the lack of evidence on the probability of Mr. Khawaja re-offending failed to support his claim that he would no longer be a serious danger to society. Hence, the Supreme Court found that the Court of

Appeal's sentence for life imprisonment was fair and justified.

The Supreme Court affirmed that terrorism offences under the *Criminal Code* should be subject to the same sentencing principles as other criminal offences. In this case, Mr. Khawaja argued that the Court of Appeal applied a more rigid standard of sentencing. He claimed that this led the collective weight of sentences issued against him to exceed the overall liability for the multiple offences he committed.[32] The Supreme Court dismissed this argument because the Court recognized the gravity of terrorist offences and the moral blameworthiness of the offender. Hence, the Supreme Court held that sentencing of terrorism offences that extend beyond 20 years did not exceed the overall liability of the offender.

Significance of the Ruling

In *Khawaja*, the Supreme Court of Canada tried to strike a balance between the *Charter* right to freedom of expression and the need to prevent potential risk to the security of Canadian society. In doing so, the Court clarified that the terrorism section under the *Criminal Code* has a limited scope which requires 'specific intention' on the part of the accused. Such a high threshold was set with the intent to exclude innocent individuals whom the legislation did not intend to capture. At the same time, the decision recognized the seriousness of terrorism offences and the need to deter such activities that create a danger to Canadian society. Although section 83.18 still catches a wide range of conduct including participation or contribution to terrorist activity that may never materialize into actual harm, the Court reiterated Parliament's objective in adding the terrorism section, which recognized that "there is substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from the completion of terrorist acts."[33]

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[1] *R v Khawaja*, 2012 SCC 69 [Khawaja].

[2] Merriam-Webster Dictionary, *Definition of Jihad*, online: Merriam-Webster <http://www.merriam-webster.com/dictionary/jihad> (Dictionary definition of 'Jihad': a holy war waged on behalf of Islam as a religious duty; a personal struggle in devotion to Islam especially involving spiritual discipline).

[3] *Criminal Code*, RSC 1985, c C-46, ss 83.01-83.33 ; *Khawaja*, *supra* note 1 at para 12.

[4] *Anti-Terrorism Act*, SC 2001, c 41 .

[5] *Criminal Code*, *supra* note 3; Section 83.01(1): terrorist activity committed for a political, religious or ideological purpose, objective or cause; Section 83.03(a): providing or making available property or services for terrorists purposes; Sections 83.18, 83.18(1), 83.18(3)(a): participating in or contributing to the activity of a terrorist group; Section 83.19: everyone who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for less than 14 years; Section 83.2: everyone who commits an offence in

association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life; Section 83.21(1): instructing people to carry out an activity for a terrorist group.

[6] *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," s 2(b))

[7] *R v Khawaja*, 214 CCC (3d) 399 ; *Criminal Code*, *supra* note 3.

[8] *Khawaja Superior Court*, *supra* note 7.

[9] *Khawaja*, *supra* note 1.

[10] When a legal error at trial is found at the appeal court, the ordinary remedy would be to order a new trial. However, under the *Criminal Code*, the court is permitted to dismiss an appeal notwithstanding the legal error at trial if it is found that the error is harmless and would not cause a miscarriage of justice; *Criminal Code*, *supra* note 3, s 686(1)(b)(iii) ("[o]n the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal (b) may dismiss the appeal where (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred," s 686(1)(b)(iii)).

[11]*Sriskandarajah v United States of America*, 2012 SCC 70; *Charter*, *supra* note 6, s 7 ("[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," s 7).

[12] *Reference re Section 94(2) of the Motor Vehicle Act*, [1985] 2 SCR 486 at para 31 (principles of fundamental justice are basic tenets of our legal system which are fundamental to its fair operation).

[13] *R v Malmo-Levine*, 2003 SCC 74 .

[14] *Khawaja*, *supra* note 1 at para 35.

[15] *Ibid* at para 37.

[16] *Criminal Code*, *supra* note 3, s 38.18.

[17] *Khawaja*, *supra* note 1 at para 44.

[18] *Ibid*.

[19] *Ibid* at para 41.

[20] *Ibid* at para 47.

[21] *Ibid* at para 49.

[22] *Ibid* at para 51.

[23] *Ibid* at para 63.

[24] *Criminal Code*, *supra* note 3, s 83.01(1)(b)(i)(A) ("'[t]errorist activity' means (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," s 83.01(1)(b)(i)(A)).

[25] Certain legislation or government action having a 'chilling effect' on the exercise of a *Charter* right means that the legal sanction pursuant to the legislation or action has a discouraging effect on a person's legitimate exercise of the *Charter* right.

[26] *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927.

[27] *R v Keegstra*, [1990] 3 SCR 697 <http://www.canlii.ca/eliisa/highlight.do?text=r+v+keegstra&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ca/scc/doc/1990/1990canlii24/1990canlii24.html&searchUrlHash=AAAAAQAMciB2IGtlZWdzdHJhAAAAAAAAAQ>.

[28] *Criminal Code*, *supra* note 3, ss 83.01(1)(b)(ii)(A)-(C) ("(1)"[t]errorist activity" means (b) an act or omission, in or outside Canada, (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public," ss 83.01(1)(b)(ii)(A)-(C)).

[29] *Khawaja*, *supra* note 1 at para 80.

[30] *Ibid* at para 81.

[31] *Ibid* at para 82.

[32] *Ibid* at para 126.

[33] *Ibid* at para 63.