

**An Empirical and Qualitative Assessment of Terrorism Sentencing Decisions in  
Canada since 2001: Shifting away from the fundamental principle and towards  
cognitive biases**

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## **An Empirical and Qualitative Assessment of Terrorism Sentencing Decisions in Canada since 2001: Shifting away from the fundamental principle and towards cognitive biases**

### **Introduction**

Today, the spectacle of terrorist acts and terrorism trials has become unfortunately rather commonplace, with over 50 prosecutions in Canada in the last fifteen years.<sup>1</sup> Prior to 2001, a “terrorism offence” did not exist in Canada, at least not according to the *Criminal Code*.<sup>2</sup> It was not until the 9/11 terrorist attack on the World Trade Centers that Canada passed in a matter of months, the *Anti-Terrorism Act* (“ATA”).<sup>3</sup> The ground-breaking ATA included the very first of the terrorism offences that are now found in Part II.1 of the *Criminal Code*.<sup>4</sup> The ATA also defined the terms relied upon by the Part II.1 offences, including elusive phrases such as “terrorism offence”,

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<sup>1</sup> For an overview of the prosecutions to date, see Michael Nesbitt, “An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and August 2018,” *Crim LQ* (Forthcoming Winter 2019). [Nesbitt, “Empirical Study of Terrorism Offences”].

<sup>2</sup> *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]. Indeed, through most of Canada’s history, criminal prosecutions did not delve into whether an act was terrorist in nature at all. Instead, every-day *Criminal Code* provisions were used to get at the criminality of what might today be considered terrorist acts. For a study of “terrorist prosecutions” in Canada starting in 1963 and leading up to and through 2001, see: Joanna Amirault et al “Criminalizing Terrorism in Canada: Investigating the Sentencing Outcomes of Terrorist Offenders From 1963 to 2010” (2016) 106:4 *J Crim L & Criminology* 769 at 772-774 [Amirault, “Criminalizing Terrorism”]. See also Robert Diab, “Sentencing of Terrorism Offences After 9/11: A Comparative Review of Early Case Law,” in Craig Forcese and François Crépeau, eds, *Terrorism, Law and Democracy: 10 Years After 9/11* (Montreal: Canadian Institute for the Administration of Justice, 2011) 347 at 351-353 [Diab, “Sentencing of Terrorism Offences”]. For a discussion of Canada’s approach to prosecuting the notorious 1985 Air India bombing as murder trials, see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at 406-410 [Roach, “9/11 Effect”].

<sup>3</sup> Shortly after 9/11, at the instigation of the United States, the United Nations (UN) Security Council adopted Resolution 1373 (see UNSC Res 1373 (2001)). It *required* – and continues to require – UN member states to address, *inter alia*, terrorism as discrete and independent crimes. It was in response to this international obligation that Canada passed the *Anti-Terrorism Act*, SC 2001, c 41 [ATA 2001]. See also Department of Justice, “About the Anti-Terrorism Act,” online: Department of Justice <[www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html](http://www.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html)>.

<sup>4</sup> Section 2 of the *Criminal Code*, the “Interpretation” section, defines a “terrorism offence” as any “offence under any of sections 82.02 to 82.04 or 83.18 to 83.23.” Those are now considered the discrete “terrorism offences”. However, section 2 also recognizes that terrorism offence may be “an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group”, where “terrorist group” and “terrorist activity” are then defined in section 83.01 of Part II.1 of the *Criminal Code*. Section 83.05 sets out a process for listing “entities” that are recognized as terrorist groups for the purposes of the *Criminal Code*’s Part II.1 terrorism offences.

“terrorist activity”, and “terrorist group” and went so far as to provide a process for “listing” a number of such terrorist groups.<sup>5</sup>

The ATA also included a smaller amendment to section 718.2 of the *Criminal Code*, one that is often overlooked and has received no sustained interrogation to date,<sup>6</sup> yet has come to be of great import in determining the sentences for convicted terrorists in Canada.<sup>7</sup> This amendment enshrined a uniquely circular logic to the process of sentencing crimes of terrorism: according to section 718.2(a)(v), a conviction for a “terrorism offence” must be considered an aggravating factor in sentencing terrorism offences.<sup>8</sup> In practical terms, when a sentencing judge today considers the “totality of the circumstances” of a person convicted of a “terrorism offence”, the sentencing judge *must* tailor the sentence to be more serious in light of its terrorist nature.

In this paper, we take a comprehensive and multi-disciplinary look at terrorism sentencing decisions over a 17-year period, between September 2001 when the ATA was first conceived of and September 2018.<sup>9</sup> In so doing, we first offer an empirical analysis of the sentences for all terrorism offences to date, including the total number of sentences, conviction rates, charges, demographics associated with the accused and other factors.<sup>10</sup> We then engage in a qualitative assessment of the sentencing decisions to date. In particular, we ask why the high sentences and

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<sup>5</sup> *Ibid*, note 3. See also Craig Forcese & Kent Roach “Yesterday’s Law: Terrorist Group Listing in Canada” (2018) 30 *Terrorism & Political Violence* 2 at 259-277.

<sup>6</sup> Robert Diab is one noted exception who has noted the importance – and existence – of the section 718.2 amendment, though it is discussed only in a general manner in his work. See Diab, “Sentencing of Terrorism Offences,” *supra* note 2 at 354; Robert Diab, “*R v. Khawaja* and the Fraught Question of Rehabilitation in Terrorism Sentencing” (2014) 39 *Queen’s LJ* 587 at page 593 [Diab, “Fraught Question”].

<sup>7</sup> Indeed, in an editorial for the *Criminal Law Quarterly*, Kent Roach noted that “[t]here has been surprisingly little writing about the sentencing of terrorists since 9/11”. See Kent Roach, “Sentencing Terrorists” (2011) 57:1 *Crim LQ* 1.

<sup>8</sup> See *Criminal Code*, *supra* note 2, s 718.2(a)(v).

<sup>9</sup> This paper will, however, maintain a focus on the seminal Supreme Court decision in *R v Khawaja*, the first individual convicted of a “terrorism offence” in Canada in 2012, and those cases that followed. See *R v Khawaja*, 2012 SCC 69, [2012] 3 SCR 555 [*Khawaja SCC*]. The decision to focus on cases following the SCC decision in *Khawaja* is based on the fact that *Khawaja* is the only binding SCC decision on terrorism sentencing, and clarified the framework that had been in use at the time by the Ontario Court of Appeal.

<sup>10</sup> Robert Diab has done outstanding work evaluating terrorism sentencing in the Canadian context. For an excellent overview sentencing in early case law in Canada, see Diab, “Sentencing of Terrorism Offences,” *supra* note 2.

one hundred percent incarceration rate for those convicted,<sup>11</sup> and why even those who have pled guilty have received similar treatment – and sentences – as compared to those that were found guilty after full trials. We test the judicial reasons for sentencing in terrorism cases against the usual logic that the courts follow when applying the fundamental principle of sentencing in Canada, as elaborated by both section 718 of the *Criminal Code* and Supreme Court of Canada jurisprudence. We also investigate the role that section 718.2(a)(v) of the *Criminal Code* has had on terrorism sentences in Canada and whether it might help to explain the empirical and qualitative shifts we are seeing in terrorism sentencing decisions. Finally, we ask whether there is anything inherent to the legislative and judicial framing of terrorism as a crime, and therefore in its sentencing, that might explain the unique nature of terrorism sentences.

In the final section of this paper, we posit a cognitive behavioural theory that, when viewed in light of the way sentencing decisions are framed by the judiciary and the *Criminal Code*, can help explain the sentences to date and even make them seem preordained. We find that despite the Supreme Court of Canada's detailed decision in *R v Khawaja* in 2012, which affirmed that the fundamental and general principles of sentencing in Canada continue to apply to terrorism offences as they do elsewhere, the reasoning found in Canadian terrorism sentencing decisions does not look much like that which obtains in sentencing decisions for any other crime.<sup>12</sup> In particular, in terrorism sentencing decisions, the courts have offered a unique approach to balancing the seriousness of the crime with the moral culpability of the offender as the fundamental principle of sentencing requires.

The result is one that prioritizes long term incarceration, a repeated focus on the seriousness of terrorism *in general*, and a diminution of the individual. In so doing, the process is framed so as to be uniquely susceptible to cognitive biases that can serve to inflate the sentencing ranges. In addition, fears of terrorism are amplified as a persistent and uniquely deadly threat, which can in turn have a disproportionality negative impact on young and minority

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<sup>11</sup> While all sentences involved jail time, Asad Ansari and Nishathan Yogakrishnan were sentenced with time served. See *R v Ansari*, 2010 ONSC 5455 at paras 20-22 [*Ansari*]; *R v NY*, [2008] OJ No 3902 at paras 282-283 [*NY*].

<sup>12</sup> *Khawaja SCC*, *supra* note 9.

accused, who are then seen as the most affected by the increased presence of cognitive biases in terrorism sentencing.

### **Part 1: By the Numbers – Successful Terrorism Prosecutions in Canada since the ATA, from December 2001 to September 2018**

In this first part of the paper, we offer a very brief introduction into Canadian terrorism offences and the *Criminal Code* provisions relevant to the sentencing thereof. We then provide the first empirical overview of the number of successful prosecutions for terrorism offences in Canada, the sentences received, and the nascent trends we have observed based on the numbers to date. This analysis draws on a bank of all publicly available sentencing decisions in Canada as of September 2018 – and some that are not public – as garnered from courthouses, reported decisions and other sources. It provides basic numbers related to sentencing decisions and ranges in order to provide context for the subsequent qualitative analysis of sentencing of terrorism in Canada.<sup>13</sup>

#### *a. Reviewing the prosecutions and sentences to date*

The *ATA 2001* created ten new criminal terrorism offences, defined in section 2 of the *Criminal Code* to be those between sections 83.02 and 83.04 (terrorist financing offences) and those from 83.18 to 83.23 of the *Criminal Code*.<sup>14</sup> Five new offences were added after 2013, including 83.181 (leaving Canada to participate in activity of terrorist group) and 83.191 (leaving Canada to facilitate terrorist activity), which carry ten and fourteen year terms of incarceration respectively.<sup>15</sup> As well, each terrorism offence incorporates at least one of following predicates.

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<sup>13</sup> On file with the authors.

<sup>14</sup> The definition of a terrorism offence is found in section 2 of the *Criminal Code*. For more discussion in how these offences have featured in terrorism prosecutions to date, see Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1. See also *ATA 2001*, *supra* note 2.

<sup>15</sup> The *Combatting Terrorism Act*, SC 2013, c 9 [CTA] added four more offences in 2013: leaving Canada to participate in terrorism – s 83.181 (s 6 of the CTA); leaving Canada to facilitate terrorism – s 83.191 (s 7 of the CTA); leaving Canada to commit offence for a terrorist group – s 83.201 (s 8 of the CTA); and, leaving Canada to commit terrorist activity – s 83.202 (s 8 of the CTA). The *Anti-Terrorism Act (2015)*, SC 2015, c 20 [Bill C-51] added an additional offence: advocating terrorism – s 83.221.

The first is “terrorist activity.”<sup>16</sup> The second is “terrorist group”, which refers to an entity listed through the process set out in section 83.05 of the *Criminal Code*, or to a group that has terrorist activity as one or more of its objects.<sup>17</sup> This alternative definition of “terrorist group” thus refers back to the first predicate.

Terrorism offences are perceived as amongst the most serious offences in Canadian criminal law. Section 718.2(a)(v) of the *Criminal Code*, for example, was amended by the ATA to *require* that terrorism be considered an aggravating factor in sentencing.<sup>18</sup> In this way, terrorism is unique to the *Criminal Code*: it is the only conduct that is both a substantive offence and simultaneously an aggravating factor in sentencing all crimes, including ones of the same name (terrorism).<sup>19</sup> Moreover, section 83.26 of the *Criminal Code* requires that all persons convicted of a terrorism offence “shall” serve those sentences *consecutively to* rather than *concurrently* with any other “offence arising out of the same event or series of events” (per 83.26(a)) or *consecutively to* any other terrorism offence for which the offender is sentenced (per 83.26(b)).<sup>20</sup> Finally, the rarely-used section 83.27 provides that the Crown may seek a life sentence wherever, “the act or omission constituting the offence” – other than one that already provides for a life

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<sup>16</sup> The definition of “terrorist activity” features in every terrorism offence on its face or as part of the definition of a “terrorist group.” Under section 83.01 of the *Criminal Code*, an act will constitute terrorist activity where it was committed in breach of an international treaty incorporated under s 7 of the *Criminal Code*. It is also satisfied where an act was committed for an ideological, religious or political motive with the intent of intimidating the public regarding its security or to compel a particular result and results in one of the consequences enumerated in s 83.01.

<sup>17</sup> ATA 2001, *supra* note 2.

<sup>18</sup> *Criminal Code*, *supra* note 2, s 718.2(a)(v).

<sup>19</sup> The application of s 718(a)(v) in cases involving terrorism offences is not without controversy. In *Ahmed*, defence argued before the Ontario Court of Appeal that it was an error for the sentencing judge to have applied the section (*R v Ahmed*, 2017 ONCA 76 at paras 101 – 109, 346 CCC (3d) 504 [*Ahmed ONCA*]). *Ahmed*’s counsel cited *Lacasse* for authority, where the Supreme Court of Canada held it was an error to treat an element of an offence as an aggravating factor. The Court of Appeal dismissed the argument, holding the section was merely mentioned and not applied, although the Court did state it was inappropriate to merely mention the section (*Ahmed ONCA* at para 109). For more discussion on this point, see below at 59 where this paper concludes that the section should not be applied in terrorism cases.

<sup>20</sup> *Criminal Code*, *supra* note 2, s 83.26. Section 83.26 reads “a sentence, other than one of life imprisonment, imposed on a person for an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 shall be served consecutively to (a) any other punishment imposed on the person, other than a sentence of life imprisonment, for an offence arising out of the same event or series of events; and (b) any other sentence, other than one of life imprisonment, to which the person is subject at the time the sentence is imposed on the person for an offence under any of those sections.”

sentence – “also constitutes terrorist activity”, which is defined in section 83.01(1)(a) and (b) of the *Criminal Code*.<sup>21</sup>

Despite the seriousness with which both the *Criminal Code* and the courts treat terrorism, none of the *Criminal Code*'s terrorism offences are subject to mandatory minimum penalties. In theory, available sentences range from fines to custodial sentences, ranging between six months to life.<sup>22</sup> Moreover, since the enactment of the ATA, relatively few people have actually been successfully prosecuted and sentenced for discrete terrorism offences in Canada.<sup>23</sup> In its 2017-2018 report, the *Public Prosecution Service of Canada* (“PPSC”) noted that in total, 54 people have been charged with discrete terrorism offences, a number that has been supported and detailed in recent academic study.<sup>24</sup> Our research has identified 26 cases where individuals have been both prosecuted and sentenced for discrete terrorism offences in this timeframe.<sup>25</sup> Of those, twelve individuals were sentenced after having mounted a defence at trial, meaning the remaining fourteen successful prosecutions were the result of guilty pleas.

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<sup>21</sup> *Criminal Code*, *supra* note 2, s 83.01. Section 83.01 defines “terrorist activity” in two ways. The first is an act or omission breach one of the international conventions enumerated in the section and incorporated under section 7 of the *Criminal Code*. The second is an act or omission committed for political, ideological or religious reasons with the intention of intimidating the public in regards to its security and with the intention of bringing about one of the consequences enumerated in 83.01. For a brief discussion of how section 83.27 might, in theory, limit terrorism sentence lengths, see Diab, “Sentencing of Terrorism Offences”, *supra* note 2 at 593.

<sup>22</sup> *Infra*, tables on pages 7-8.

<sup>23</sup> According to one preeminent study, between 2001 and 2011 only 32 offenders were prosecuted for terrorism related crimes, whereas between 1963-1982 over 100 offenders were prosecuted within the Separatist movement in Quebec for violent acts that might today be considered terrorist. See Amirault, “Criminalizing Terrorism,” *supra*, note 2 at 791.

<sup>24</sup> Canada, Public Prosecution Service of Canada, *Public Prosecution Service of Canada Annual Report 2017-2018* (June 29 2018), online: <[www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2017\\_2018/ar18-ra18.pdf](http://www.ppsc-sppc.gc.ca/eng/pub/ar-ra/2017_2018/ar18-ra18.pdf)>; Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1.

<sup>25</sup> This paper defines a “successful” prosecution as one where the accused was convicted or plead guilty. *Infra* page 7 and 8 to view tables of the available information on sentencing.

The following table lists the twelve offenders convicted at trial and their sentences:

Name of Accused	Charges Convicted Of	Sentence
<b>Momin Khawaja</b>	83.18 (2 counts), 83.21(1), 83.03(a) & 83.19	Life + 24 years concurrent <sup>26</sup>
<b>Shareef Abdelhaleem</b>	83.18, 83.2 (81(1)(a))	Life + 5 years concurrent <sup>27</sup>
<b>Asad Ansari</b>	83.18	6 years, 5 months <sup>28</sup>
<b>Steven Vikash Chand</b>	83.18, 83.2 (380(1), 464(a))	10 years <sup>29</sup>
<b>Nishathan Yogakrishnan</b>	83.18	2 years, 6 months <sup>30</sup>
<b>Said Namouh</b>	431.2(2)(465(1)(c), 83.18, 83.19, 83.2 (346)	Life + 20 years concurrent <sup>31</sup>
<b>Raed Jaser</b>	83.2 (229, 465(1)(a)), 83.18 (2 counts)	Life + 13 years concurrent <sup>32</sup>
<b>Mohammed Hassan Hersi</b>	83.18 (463(b)), 83.18(464(a))	10 years <sup>33</sup>
<b>Misbahuddin Ahmed</b>	83.18, 83.19 (465(1)(c))	12 years <sup>34</sup>
<b>Chibeb Esseghaier</b>	83.2 (248, 465(1)(c)), 83.2 (229, 465(1)(a)), 83.18 (3 counts)	Life + Life (concurrent) + 18 years concurrent <sup>35</sup>
<b>Youth (LSJPA)</b>	83.2 (344), 83.181	2 years <sup>36</sup>
<b>Ismael Habib</b>	83.181	8 years <sup>37</sup>

<sup>26</sup> *R v Khawaja*, 2010 ONCA 862 at paras 255-256, 273 CCC (3d) 415 [*Khawaja ONCA*], sentence aff'd 2012 SCC 69.

<sup>27</sup> *R v Abdelhaleem*, 2011 ONSC 1428 at paras 83-85 [*Abdelhaleem*].

<sup>28</sup> *Ansari*, *supra* note 11.

<sup>29</sup> *R v Chand*, 2010 ONSC 6538 at paras 93-95 [*Chand*].

<sup>30</sup> *NY*, *supra* note 11. See also "Ban lifted on convicted terrorist's identity," *CBC News* (9 September 2009), online: <[www.cbc.ca/news/canada/toronto/ban-lifted-on-convicted-terrorist-s-identity-1.778966](http://www.cbc.ca/news/canada/toronto/ban-lifted-on-convicted-terrorist-s-identity-1.778966)>. Yogakrishnan was convicted as a youth but was sentenced as an adult.

<sup>31</sup> *R v Namouh*, 2010 QCCQ 943 at paras 103-105 [*Namouh*].

<sup>32</sup> *R v Esseghaier*, 2015 ONSC 5855 at para 126 [*Esseghaier*].

<sup>33</sup> *R v Hersi*, 2014 ONSC 4414 at paras 87-88 [*Hersi*].

<sup>34</sup> *R v Ahmed*, 2014 ONSC 6153 at para 110 [*Ahmed ONSC*].

<sup>35</sup> *Supra* note 19 at para 125.

<sup>36</sup> *R v LSJPA – 1557*, [2015] JQ no 7759 [*LSJPA*]. See also Public Prosecution Service of Canada, News Release, "Youth Sentenced for Terrorism" (6 April 2016), online: <[www.ppsc-sppc.gc.ca/eng/nws-nvs/2016/06\\_04\\_16.html](http://www.ppsc-sppc.gc.ca/eng/nws-nvs/2016/06_04_16.html)> [PPSC News Release re LSJPA].

<sup>37</sup> *R c Habib*, 2017 QCCQ 11427 at paras 56-57 [*Habib*].



The fourteen accused who pled guilty to a terrorism offence are listed below:

Name of Accused	Charges Convicted Of	Sentence
<b>Zakaria Amara</b>	83.2 (81(1)(a)), 83.18	Life + 9 years concurrent <sup>38</sup>
<b>Fahim Ahmad</b>	83.18(1)(a), 83.2(103), 83.21	16 years <sup>39</sup>
<b>Mohammed Ali Dirie</b>	83.18	7 years <sup>40</sup>
<b>Saad Gaya</b>	83.2 (81(1)(a))	18 years <sup>41</sup>
<b>Amin Mohamed Durrani</b>	83.18	7 years, 6 months <sup>42</sup>
<b>Jahmaal James</b>	83.18	7 years, 7 months <sup>43</sup>
<b>Saad Khalid</b>	83.2 (81(1)(a))	20 years <sup>44</sup>
<b>Carlos Larmond</b>	83.181	7 years <sup>45</sup>
<b>Suliman Mohamed</b>	83.18	7 years <sup>46</sup>
<b>Ashton Larmond</b>	83.21	17 years <sup>47</sup>
<b>Hiva Mohammad Alizadeh</b>	83.2 (81(1)(a))	24 years <sup>48</sup>
<b>Prapaharan Thambaithurai</b>	83.03(b)	6 months <sup>49</sup>
<b>Kevin Omar Mohammed</b>	83.18	4 years, 6 months <sup>50</sup>
<b>Manitoba Youth</b>	83.2 (464(a), 267)	20 months (including 6 months deferred) <sup>51</sup>

At the time of this paper's writing only five individuals have ever been acquitted in Canada after being formally charged with a terrorism offence: Khurram Syed Sher,<sup>52</sup> Othman Ayed

<sup>38</sup> *R v Amara*, 2010 ONSC 441 at paras 159-162 [*Amara*].

<sup>39</sup> *R v Ahmad*, 2010 ONSC 5874 at para 72 [*Ahmad*].

<sup>40</sup> *R v Dirie*, 2009 CanLII 58598 at para 73 [*Dirie*].

<sup>41</sup> *R v Gaya*, 2010 ONCA 860 at paras 18-20 [*Gaya ONCA*].

<sup>42</sup> Bob Mitchell & Isabel Teotonio "Toronto 18 Member Pleads Guilty," *The Toronto Star* (20 January 2010), online: <[https://www.thestar.com/news/gta/2010/01/20/toronto\\_18\\_member\\_pleads\\_guilty.html](https://www.thestar.com/news/gta/2010/01/20/toronto_18_member_pleads_guilty.html)>.

<sup>43</sup> Isabel Teotonio, "Toronto 18 terrorist freed after guilty plea," *The Toronto Star* (27 February 2010), online: <[https://www.thestar.com/news/gta/2010/02/27/toronto\\_18\\_terrorist\\_freed\\_after\\_guilty\\_plea.html](https://www.thestar.com/news/gta/2010/02/27/toronto_18_terrorist_freed_after_guilty_plea.html)>.

<sup>44</sup> *R v Khalid*, 2010 ONCA 861 at paras 57-58 [*Khalid ONCA*].

<sup>45</sup> *R v Larmond*, 2016 ONSC 5479 at para 10 [*Larmond*].

<sup>46</sup> *Ibid* at para 14.

<sup>47</sup> *Ibid* at para 7.

<sup>48</sup> *R v Alizadeh*, 2014 ONSC 5421 at para 3 [*Alizadeh ONSC*].

<sup>49</sup> *R v Thambaithurai*, 2010 BCSC 1949 at para 21 [*Thambaithurai*].

<sup>50</sup> Public Prosecution Service of Canada, News Release, "Sentence in Terrorism Case" (31 October 2017), online: <[www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/31\\_10\\_17.html](http://www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/31_10_17.html)>.

<sup>51</sup> Public Prosecution Service of Canada, News Release, "Youth Sentenced for Terrorism Offence," (9 January 2017), online: <[www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/09\\_01\\_17.html](http://www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/09_01_17.html)> [PPSC News Release re Manitoba Youth].

<sup>52</sup> *R v Sher*, 2014 ONSC 4790 at para 80.

Hamdan,<sup>53</sup> Ayanle Hassan Ali, El Mahdi Jamali and Sabrine Djermane. Djermane and Jamali remain subject to a peace bond.<sup>54</sup>

Based on publicly available information, several terrorism charges have been stayed, including in the relatively notorious *Nuttall and Korody* case, where the couple were found guilty of trying to bomb the Victoria parliament buildings.<sup>55</sup> In that case, defence brought an application for a stay of proceedings after the verdict based on entrapment and abuse of process by the RCMP.<sup>56</sup> The other stays include terror charges against an Alberta teen and two sets of stayed charges for youths involved in the notorious Toronto 18 bomb plot. Charges were also stayed against Yasim Mohamed, Abdul Qayyum Jamal, Ahmad Mustafa Ghany (also of the Toronto 18), and Mouna Diab who was alleged to have been smuggling arms to Hezbollah.<sup>57</sup> Based on publicly available information, ten sets of charges have been stayed and one withdrawn to date.<sup>58</sup>

*b. Summation of Sentences to Date and General Trends*

We are only beginning to see trends emerging from terrorist prosecutions to date, both because of the small number of total charges as compared with other high-profile offences (e.g., murder, theft, robbery, assault) and because the majority of the terrorism charges have been laid in the last decade or less.<sup>59</sup>

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<sup>53</sup> Public Prosecution Service of Canada, News Release, “Not Guilty Verdict in Terrorism Trial” (22 September 2017), online: <[www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/22\\_09\\_17.html](http://www.ppsc-sppc.gc.ca/eng/nws-nvs/2017/22_09_17.html)>.

<sup>54</sup> “Montreal Couple Cleared of Terror Charges, Boyfriend Guilty of Explosives-Related Offence,” *CBC News* (19 December 2017), online: <[www.cbc.ca/news/canada/montreal/montreal-couple-cleared-of-terror-charges-boyfriend-guilty-of-explosives-related-offence-1.4452720](http://www.cbc.ca/news/canada/montreal/montreal-couple-cleared-of-terror-charges-boyfriend-guilty-of-explosives-related-offence-1.4452720)> [CBC News, “Montreal Couple Cleared”]. Sabrine Djermane’s co-accused, El Mahdi Jamali, was found guilty of an explosives-related *Criminal Code* offence and is also subject to a peace bond as of the writing of this paper.

<sup>55</sup> *R v Nuttall*, 2016 BCSC 1404 at paras 836-837 [*Nuttall*].

<sup>56</sup> *Ibid* at para 2.

<sup>57</sup> Gareth Hampshire, “Terror Charges Stayed Against Alberta Teen,” *CBC News* (23 September 2016), online: <[www.cbc.ca/news/canada/edmonton/terror-charges-stayed-against-alberta-teen-1.3776673](http://www.cbc.ca/news/canada/edmonton/terror-charges-stayed-against-alberta-teen-1.3776673)>. “Toronto 18: Key Events in the Case,” *CBC News* (4 June 2008), online: <[www.cbc.ca/news/canada/toronto-18-key-events-in-the-case-1.715266](http://www.cbc.ca/news/canada/toronto-18-key-events-in-the-case-1.715266)>. Graham Hughes, “All Charges Dropped Against Former Quebec Activist Accused of Smuggling Arms to Hezbollah,” *The National Post* (17 April 2014), online: <[www.nationalpost.com/news/10anada/all-charges-dropped-against-former-quebec-activist-accused-of-smuggling-arms-to-hezbollah](http://www.nationalpost.com/news/10anada/all-charges-dropped-against-former-quebec-activist-accused-of-smuggling-arms-to-hezbollah)>.

<sup>58</sup> For more on the charges that were laid in these cases, see Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 13.

<sup>59</sup> Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 33.

All of the twenty-six prosecutions that resulted in either a guilty plea or a conviction have involved male defendants.<sup>60</sup> Only four of the 54 persons accused of terrorism to date have been women (7% of the total charged), whereas 20% of persons charged with all crimes are women.<sup>61</sup> Of the successful prosecutions, six men received life sentences, with the longest cumulative sentence going to Mr. Esseghaier in relation to the VIA train bomb plot, and fourteen people have received sentences of 10 years or less, with the shortest sentence being given to Mr. Thambaithurai in relation to collecting donations (terrorist financing) for the Tamil Tigers – a listed terrorist entity.<sup>62</sup>

It is not surprising to see that the general sentencing ranges break down as they do, at least when comparing across terrorism charges. As one might expect, individuals who played leadership roles in direct plots and were charged with the most serious crimes (with the highest maximum penalty; section 83.2 is the only one with a maximum of life) received the highest sentences.<sup>63</sup> Likewise, those who facilitated or participated at lower levels received sentences in the relative mid-range, and those that were youths or merely financing operations received the lightest sentences. So, for example, the average sentence for those in leadership roles was 21 years while the average sentence for those in non-leadership roles was 11 years. Amongst the leaders, the 16-year and 17-year sentences imposed respectively on Ahmad and Larmond were on the low end. In contrast, the lowest sentences for offenders in non-leadership roles were six months for Thambaithurai and 21 months for a Manitoba youth. The table below summarizes the sentences for those in leadership roles:

Name	Charges Convicted Of	Terrorist Group	Indiscriminate Loss of Life?	Sentence
<b>Zakaria Amara</b>	83.2 (81(1)(a)), 83.18	Toronto 18 (bomb plot)	Yes	Life + 9 years concurrent <sup>64</sup>
<b>Fahim Ahmad</b>	83.18(1)(a), 83.2(103), 83.21	Toronto 18 (camp plot)	No	16 years <sup>65</sup>
<b>Chibeb Esseghaier</b>	83.2 (248, 465(1)(c)), 83.2 (229, 465(1)(a)), 83.18 (3 counts)	Esseghaier & Jaser	Yes	Life + Life (concurrent) + 18 years concurrent <sup>66</sup>

<b>Hiva Mohammed Alizadeh</b>	83.2 (81(1)(a))	Alizadeh, Ahmed & Sher	Yes	24 years <sup>67</sup>
<b>Ashton Larmond</b>	83.21	Larmond, Larmond & Mohamed	No	17 years <sup>68</sup>

Nevertheless, while the range of terrorism sentences are fairly logical when compared one to another (the more serious section 83.2 offences get longer sentences than the 83.19 facilitation offences), the sentences are very high when seen in the broader context of criminal law: 23% of all sentences (six of twenty-six persons convicted) received life sentences; the average sentence for all terrorism offences to date is 13 years,<sup>69</sup> and even removing the “leaders” who received life sentences, the average sentence for an offender is 11.6 years. Significantly, every single offender, including all youths, was sentenced to jail time, with the lowest sentence being six months for Mr. Thambaithurai, who, as mentioned earlier, collected funds for the Tamil Tigers.<sup>70</sup> By way of comparison, in 2015, only 37% of all offenders received any jail time at all and,

<sup>60</sup> For more on the representation of women in terrorism prosecutions, see Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 14. As noted there, women make up a smaller proportion of those prosecuted for terrorism offences than are believed to be members of terrorist groups, suggesting women are underrepresented in terrorism prosecutions.

<sup>61</sup> Ashley Maxwell, *Adult criminal court statistics in Canada (2013/2014)*, Canadian Centre for Justice Statistics (Ottawa: Minister of Industry, Statistics Canada, 2015) [Maxwell 2013/2014] at 8; Ashley Maxwell, *Adult criminal court statistics in Canada (2014/2015)*, Canadian Centre for Justice Statistics (Ottawa: Minister of Industry, Statistics Canada, 2016) [Maxwell 2014/2015] at 13; Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 14.

<sup>62</sup> *Thambaithurai*, *supra* note 49.

<sup>63</sup> Lending credence to the notion that leaders get stiffer sentences are the comments from the reviewing judge in *Ahmed*, who wrote: “It is clear from the decided cases that acting as a leader in relation to terrorist offences heightens the offender’s moral culpability and justifies a substantial sentence.” See *Ahmed ONSC*, *supra* note 34 at para 104.

<sup>64</sup> *Amara*, *supra* note 38.

<sup>65</sup> *Ahmad*, *supra* note 39.

<sup>66</sup> *Esseghaier*, *supra* note 32.

<sup>67</sup> *Alizadeh*, *supra* note 48.

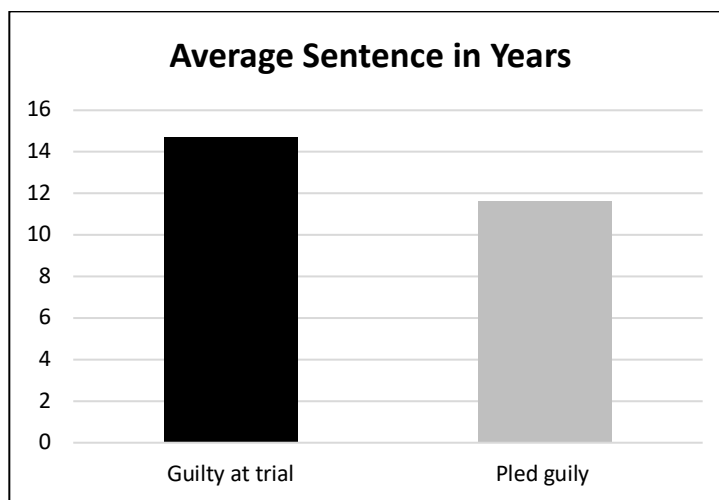
<sup>68</sup> *Larmond*, *supra* note 45.

<sup>69</sup> This number is rounded up to the nearest decimal point and discounts concurrent sentences. This number treats a life sentence as 25 years long as this is the minimum parole for a murder life sentence and, as we shall see, terrorism is being treated in many ways as akin to murder, including with a higher average sentence than homicide offences.

<sup>70</sup> *Thambaithurai*, *supra* note 49 at para 21. Note that two accused were also sentenced with time served, Ansari and Yogakrishnan. See *supra* note 11.

as of 2017, 62.4% per cent of all adult custody admissions to prison in Canada were between one and three months in length.<sup>71</sup> Indeed, the median sentence for terrorism offences is 10 years, a higher median sentence than for homicide offences in Canada, which was 5 years in 2014 – 2015.<sup>72</sup> In 2011, Kent Roach noted that the sentences delivered under the *Criminal Code's* terrorism regime represented “a major ratcheting up of punishment compared to some of the lenient sentences received by those who kidnapped a British diplomat during the [1973, pre-ATA 2001] October Crisis”;<sup>73</sup> though that study has now been overtaken by a number of subsequent sentencing decisions, those subsequent sentences have consistently maintained or even raised the length of the average sentence, further supporting Roach’s initial assessment.

Significantly for defence attorneys and defendants in particular, there is little discernable difference, at least on the numbers alone, between the sentences for those convicted after a full trial and defence and those who plead guilty to terrorism charges. The chart below compares the average sentences for those accused who pled guilty and for those who were convicted at trial:



Normally in Canadian criminal law there is a discounted sentence given to those that plead guilty, both because they are seen as taking responsibility for their crimes and because it

<sup>71</sup> Statistics Canada, “Adult Sentenced Custody Admissions to Correctional Services By Sex and Sentence Length Ordered,” online: <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001801>>.

<sup>72</sup> Ashley Maxwell, *Adult criminal court statistics in Canada (2014/2015)*, Canadian Centre for Justice Statistics (Ottawa: Minister of Industry, Statistics Canada, 2017) at 9 [Maxwell 2014/2015].

<sup>73</sup> Roach, “The 9/11 Effect,” *supra* note 2 at 409.

saves the system time and money and mitigates against the risk of an acquittal. Yet, as the chart above illustrates, the sentence lengths look very similar in terrorism cases as between guilty pleas and those charges that go to trial: the average sentence for those convicted of terrorism offences at trial was 14.7 years while the average sentence for those who pled guilty was 11.6 years.<sup>74</sup> The sentences for guilty pleas ranged from six months (for Thambaihurai) to a life term and 9 years concurrent (for Amara), while the sentences for those convicted at trial went from two years (for a Québec youth) to two life terms and 18 years served concurrently (for Esseghaier).<sup>75</sup> As but one representative example, the youth in *R v LSJPA* was charged with committing an indictable offence for the benefit of a terrorist group (section 83.2) and attempting to leave Canada to commit such an offence (83.181), offences which carry maximum sentences of life imprisonment and 10 years respectively. He received two years of incarceration. By contrast, in the case of a Manitoba youth, the individual pled to guilty to participating in the activity of a terrorist group (section 83.18), which carries a maximum sentence of 10 years, and still received 20-months, only four months short of *LSJPA*.<sup>76</sup> Similarly, Mr. Amara got life in prison despite pleading guilty to his charges. While there seems to have been some discount for the 83.2 offences committed by two of the notorious Toronto 18 terrorists, Mr. Alizadeh and Mr. Ahmad – at least on the numbers alone – they still received harsh sentences of 24 and 16 years respectively, despite pleading guilty. At least based on the charges and sentencing ranges to date, we can thus far see that defence lawyers should be taking a very long look at whether guilty pleas are worth the usual discount one would expect in the criminal justice system, particularly as applied to youth accused.

All terrorism charges but one to date have applied to inchoate or preparatory crimes, that is, crimes that have not yet taken place, such as planning or facilitating a future terrorist act, bomb-making for the purpose of assisting a terrorist group, or conspiracy to commit a (future)

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<sup>74</sup> In calculating the average sentence, life sentences were counted as 25 years, reflecting the minimum parole for homicide offences. Concurrent sentences were discounted. Youth and adult sentences were included in reaching the average.

<sup>75</sup> *Thambaihurai*, *supra* note 49; *Amara*, *supra* note 38; *LSJPA*, *supra* note 36; *Esseghaier*, *supra* note 32.

<sup>76</sup> PPSC News Release re Manitoba Youth, *supra* note 51.

crime.<sup>77</sup> This is not necessarily surprising given that the 2001 ATA brought the current terrorism offences into being in large though not exclusive part to deal with precisely these types of activities.<sup>78</sup> Culpable homicide could already be prosecuted as murder once it happened, but the thinking was that it was too late to wait for the murders to take place to charge terrorists. So in order to ensure police could disrupt the plots before they came to fruition and people were killed, the ATA criminalized the planning of terrorist acts (83.18), the financing of terrorism (83.02-04) and the facilitation of terrorism (83.19), as well as other related inchoate or preparatory offences. Today, murderers are being sentenced for murder, while those planning attacks are being sentenced for terrorism.<sup>79</sup> The theoretical intention to target terrorism pre-emptively – so as to pre-empt terrorist attacks before they occur – has indeed borne out in practice.<sup>80</sup>

One final word is in order given the current debate in Canada about how best to respond to violent extremism, whether deradicalization programs actually work, and whether so-called “soft” approaches to tackling terrorism should supplement the “hard” criminal law approaches.<sup>81</sup> The terrorism convictions and their sentences to date clearly indicate that Canada must

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<sup>77</sup> For the statistics and discrete charges associated with terrorism trials coupled with a robust discussion of this fact and its implications, see Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 21 – 28.

<sup>78</sup> *Ibid* at 21. See generally *Khawaja SCC*, *supra* note 9 at para 63; *United States of America et al v Nadarajah*, 2010 ONCA 859, 266 CCC (3d) 447 at paras 32-35. See also Kent Roach, *September 11: Consequences for Canada* (Toronto: University of Toronto Press, 2002) at 38.

<sup>79</sup> This pattern may also reflect a reluctance to charge right-wing extremists with terrorism charges. In recent years, right-wing extremism has been implicated in several fatal attacks that bore the hallmarks of terrorism, although no terrorism charges followed these incidents. Law enforcement officials have expressed doubts that right-wing violence can be considered terrorism, which may also explain the failure to lay terrorism charges in these cases. For more on this issue, see Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at

<sup>80</sup> See Nesbitt, “Empirical Study of Terrorism Offences,” *supra* note 1 at 15 – 21. The import of this result will become apparent when we discuss how cognitive biases can be exacerbated in the context of inchoate – unrealized – attacks, *infra* pages 47 to 62.

<sup>81</sup> For more, see Benoît Gomis, “Measuring ‘Success’ in Countering Terrorism” (2018) Canadian International Council, Working Paper, online: <[https://3mea0n49d5363860yn4ri4go-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/2018-07-23-Beyond\\_the-Headlines\\_template\\_66-1-Benoit-Gomis-online-Final.pdf](https://3mea0n49d5363860yn4ri4go-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/2018-07-23-Beyond_the-Headlines_template_66-1-Benoit-Gomis-online-Final.pdf)>; Ashlee Babcock et al, “Targeting Radicalization to Violence through Coordination and Cooperation” (2018), Balsillie School of International Affairs, Working Paper, online: <<https://www.balsillieschool.ca/wp-content/uploads/2018/01/Targeting-Radicalization-to-Violence-through-Coodination-and-Cooperation.pdf>>; Ilya Bañares, “Federal Government to Contribute \$1 Million to Toronto to Prevent Violence from Extremists,” *The Toronto Star* (6 September 2018), online: <<https://www.thestar.com/news/gta/2018/09/06/federal-government-to-contribute-1-million-to-toronto-to-prevent-violence-from-extremists.html>>; Hicham Tiflati, “Radicalization to Rehabilitation: How Does Canada Prepare for ISIS Returnees?,” *CBC News* (21 January 2018), online: <<https://www.cbc.ca/cbcdocs/pov/features/radicalization-to-rehabilitation-how-does-canada-prepare-for-isis-returnees>>.

supplement the criminal regime with serious efforts at deradicalization and/or reintegration. Of the twenty-six individuals sentenced thus far, the youngest are youths (LSJPA, Manitoba Youth, Nishathan Yogakrishnan<sup>82</sup>), while the oldest was Mr. Thambaithurai, who was 46 at the time he was sentenced for six months for sending \$3,000 to the Tamil Tigers in Sri Lanka. The average age of an individual upon conviction for a terrorism offence in Canada is 25.<sup>83</sup> Remembering that the average sentence for terrorism is 13 years of incarceration (and that all those convicted have received terms of incarceration to date), that means that the average person convicted of terrorism in Canada will be released at the very latest by the age of 38 (average age of 25 plus average sentence of 13 years), though most will be released on parole in advance.<sup>84</sup> Some will be out of jail while still possibly youths, while some will be out while still in their teens or twenties. Recall that six of the twenty-six persons convicted *might* be in jail for life.<sup>85</sup>

All of this means that even with relatively (very) high sentencing ranges, jail for terrorism offenders in Canada is not a panacea or anything close thereto. Almost nobody is staying in jail for life, and few will be in jail by their sixties when people are sometimes thought to “age out” of crime.<sup>86</sup> Indeed, terrorism offenders may take an especially long time to “age out”: one prominent US study found that terrorism offenders tended to be older than the average offender.<sup>87</sup> Finally, an access to information request placed with *Correctional Services Canada*

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<sup>82</sup> Based on publicly available information the youngest appears to be LSJPA, who was 16 at the time of his convictions. See *LSJPA*, *supra* note 36.

<sup>83</sup> This number is difficult to verify as not all sentencing decisions are available, and of those available, a number of them do not list the age of the offender. Many of the ages of offenders have been found using news sources.

<sup>84</sup> However, even on parole, the ATA 2001 increased to “one half of the sentence or ten years, whichever is less...”. See also *Criminal Code*, *supra* note 2, s 743.6(1.2). The provision is discretionary though has been and will likely be applied in almost all cases. See Diab, “Sentencing of Terrorism Offenders,” *supra* note 2 at 354-355.

<sup>85</sup> Indeed, in recognizing that early terrorism sentences in Canada were associated with long custodial sentences, Robert Diab also noted there were some (possible) qualifications here. “One is that a survey of the Canadian cases demonstrates that for some offenders significantly involved in serious terror plots, a wide range of outcomes is still possible...This is due in part to factors that include credit for pre-trial custody, maximum sentences (or Crown elections), and the need to balance opposing principles of sentencing. See Diab, “Sentencing of Terrorism Offences,” *supra* note 2 at 370.

<sup>86</sup> Ben Feldmeyer & Darrell Steffensmeier, “Elder Crime: Patterns and Current Trends, 1980 – 2004” (2007) 29:4 *Research on Aging* 297 at 307; Dana Goldstein “Too Old to Commit Crime?”, *The New York Times* (20 March 2015) online: <<https://www.nytimes.com/2015/03/22/Sunday-review/too-old-to-commit-crime.html>>.

<sup>87</sup> Jytte Klausen, Tyler Morrill & Rosanne Libretti, “The Terrorist Age-Crime Curve: An Analysis of American Islamist Terrorist Offenders and Age-Specific Propensity for Participation in Violent and Nonviolent Incidents” (2016) 97:1 *SSQ* 19 at 26 – 28.



confirms that Canadian federal prisons do not yet have any specific programming tailored to help those convicted of terrorism offences rehabilitate or reintegrate into society after their release in a way that is constructive and safe.<sup>88</sup> France and other countries have seen a similar pattern develop with the unfortunate result being that prisons become a breeding ground for further radicalization to terrorism.<sup>89</sup> In the result, even the relatively long periods of incarceration that correspond to terrorism sentences in Canada do not alleviate the burden to respond to terrorism in myriad ways; incarceration is not enough, even for those who have been sentenced and even when the sentences are relatively extremely long in duration. Other forms of social programs and initiatives are desperately needed both in Canada's prison system and to respond to the terrorism threat.<sup>90</sup> This finding is especially true so long as the dearth of prison programs aimed at rehabilitating or otherwise engaging incarcerated terrorists persists.<sup>91</sup>

## **Part 2: Terrorism Sentencing Principles and Practice – and its Application to Terrorism Cases**

In this part, we first offer a very general overview of how sentencing works in theory and practice in Canada. The purpose of this introductory section is to contextualize what follows, that

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<sup>88</sup> Correctional Services Canada, ATIP number A-2016-00141, on file with author. A very special thanks to Reem Zaia for both placing this access to information request, sharing the results with me, and allowing me to use the information for the purposes of this paper.

<sup>89</sup> Farhad Khosrokhavar, "Radicalization in Prison: The French Case" (2013) 14:2 Politics, Religion & Ideology 284; Noemi Bisserbe, "European Prisons Fueling Spread of Islamic Radicalism," *The Wall Street Journal* (31 July 2016), online: <<https://www.wsj.com/articles/17anada17n-prisons-fueling-spread-of-islamic-radicalism-1470001491>> ; Eleanor Beardsley, "Inside French Prisons, A Struggle To Combat Radicalization," *NPR News* (25 June 2017), online: <<https://www.npr.org/sections/parallels/2017/06/25/534122917/inside-french-prisons-a-struggle-to-combat-radicalization>>.

<sup>90</sup> Fahim Ahmad's case illustrates the limited deradicalization programming available in Canadian prisons. Ahmad, a ringleader of the Toronto 18, was denied parole in 2017 because he had failed to complete a deradicalization program and a release plan tailored to terrorism offenders. Ahmad, however, was unable to do so because Correctional Services Canada offered no such programs at the time. See Michelle Shephard, "Leader Of Toronto 18 Terror Group Denied Release," *The Toronto Star* (26 May 2017), online: <<https://www.thestar.com/news/17anada/2017/05/26/leader-of-toronto-18-terror-group-denied-early-release.html>>. Deradicalization programming in general is still developing in Canada. In 2016, the federal government opened the Centre for Canada Centre for Community Engagement and Prevention of Violence. One of the Centre's first initiatives was to develop a national deradicalization strategy (see Canada, Public Safety Canada, *Countering Radicalization to Violence* (Ottawa: PSC, 2017), online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cntrng-rdclztn-vlnc/index-en.aspx>>). Examples of more locally focused programs include ReDirect, based in Calgary (see [www.redirectprogram.ca](http://www.redirectprogram.ca)), and Montréal's Centre for the Prevention of Radicalization Leading to Violence (see <https://info-radical.org/en/>).

<sup>91</sup> Access to information request from Correctional Services Canada on file with defence lawyer Reem Zaia. Special thanks are owed to Ms. Zaia for sharing the results of this request with the author.

is, a qualitative analysis of the sentencing decisions for terrorism offences in Canada to date.<sup>92</sup> As we will see, the general approach to sentencing in Canada is divergent from the approach taken to sentencing terrorism cases, the latter of which uses the gravity of the terrorist offence to give “special consideration” to sentencing. These two approaches will be discussed in parts (a) and (b), below.

#### **a. Sentencing in Theory and Practice in Canada: An overview**

Canada’s general sentencing principles come from both the common law and the *Criminal Code*. Section 718 of the *Criminal Code* sets the general framework for sentencing theory and practice. It does so by first including a list of objectives for which sentences are thought to serve, including: deterrence (both general, as in harsh sentences might deter other court watchers, and specific, as in a harsh sentence might deter the individual from offending again), denunciation, separation of offenders from society, rehabilitation, reparations to victims and communities, and promoting “a sense of responsibility” amongst offenders.<sup>93</sup>

By contrast, section 718.2 of the *Criminal Code* does not rely on broad objectives for the sentencing regime, but rather provides very specific aggravating factors (section 718.2(a)) and mitigating factors (section 718.2(b)-(e)) that, if present, should increase or reduce the harshness of the sentence. Where the Crown relies on a factor to aggravate a sentence, they must prove that factor beyond a reasonable doubt.<sup>94</sup>

Sections 718 and 718.2 serve to inform the “fundamental principle” of sentencing, which is the principle of proportionality enshrined section 718.1 of the *Criminal Code*. It states: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.<sup>95</sup> The concept of proportionality ensures that the sentence is proportionate as

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<sup>92</sup> For a more robust overview of the law of sentencing in Canada, see Clayton Ruby et al, *Sentencing, 9<sup>th</sup> Ed.* (Toronto: LexisNexis, 2017).

<sup>93</sup> *Criminal Code*, *supra* note 2, s 718(a)-(f); For a discussion of these principles, see *R v Nasogaluak*, 2010 SCC 6 at paras 39 – 42, [2010] 1 SCR 206 [*Nasogaluak*].

<sup>94</sup> *Criminal Code*, *ibid*, s 724(3)(f).

<sup>95</sup> *Criminal Code*, *ibid*, s 718.1.

between the seriousness of the crime and the individual moral culpability of the offender.<sup>96</sup> As the Supreme Court said in *R v Lacasse*, a seminal judgement in 2015 on sentencing practice in Canada, “[p]roportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances.”<sup>97</sup> It follows, the Supreme Court in *Lacasse* concluded, that section 718.1 sets the fundamental proportionality principle – the equation to be applied – and sections 718 and 718.2 provide the objectives, considerations, and sentencing principles to “be taken into account” by the sentencing judge.<sup>98</sup>

Judges are then given a great deal of discretion over the sentencing ranges.<sup>99</sup> As Lamer C.J. (as he then was) stated for the Supreme Court of Canada in *R v M(CA)*, the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender, and the community in which the offence took place.<sup>100</sup> Disparity of sentences for similar crimes is a natural consequence of this individualized focus. As Lamer C.J. stated:

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the “just and appropriate” mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.<sup>101</sup>

Nevertheless, the judicial discretion is clearly not absolute for it is tailored to and constrained by the law, by the fundamental principle of proportionality as well as the other objectives and considerations found in sections 718 and 718.2 of the *Criminal Code*. As such, the

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<sup>96</sup> See, for example, *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at p 533, 24 DLR (4th) 536.

<sup>97</sup> *R v Lacasse*, 2015 SCC 64 at para 53 [*Lacasse*], [2015] 3 SCR 1089.

<sup>98</sup> *Ibid*, at para 54.

<sup>99</sup> *Ibid*, at para 1, which states that sentencing necessarily involves “a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.” For an excellent overview of the nuts and bolts of sentencing theory and practice in Canada, see *R v Ipeellee*, 2012 SCC 13, [2012] 1 SCR 433.

<sup>100</sup> *R v M(CA)*, [1996] 1 SCR 500 [*M(CA)*], 105 CCC (3d) 327.

<sup>101</sup> *Ibid* at para 567.

principle of proportionality acts as an overall control or limiting mechanism. Sentencing judges may favour some sentencing objectives over others in a given case (for example, rehabilitation over deterrence) so long as that sentence is proportionate as between the gravity of the offence and the degree of responsibility of the offender and all mitigating and aggravating factors are duly considered.<sup>102</sup> In the end, we have a rather complicated theoretical equation that both constrains judges and necessarily allows them a great deal of discretion within that circumscribed legal framework. But, at a general level, that equation remains clear: a judge must balance the gravity of the offence on the one hand with the degree of responsibility of the offender on the other and ensure that the sentence represents a proportionate balancing of that equation.

In practice the two sides of the proportionality equation are not two poles in competition; rather, they are inextricably intertwined. The gravity of the offence (the left side of the equation), particularly as it is measured by a judge within a community in which the offence takes place and is punished, surely aggravates or mitigates an individual's moral culpability (the right side of the equation); an individual is surely more morally culpable for committing a crime that is deemed more serious. So, for example, to return to *Lacasse* and draw from the facts therein, if a community is particularly afflicted by a drinking and driving scourge, the community considers drinking and driving offences to be serious and everyone in the community knows the damage that drinking and driving can cause, then if a person commits such an offence within that community they have committed an offence seen as more serious and can easily be seen as more morally culpable for the commission of the offence. In the *Lacasse* case, there was a particular problem in the Beauce region with impaired driving, and Lacasse had been impaired by drugs and alcohol when he ultimately got into an accident and killed the two passengers in his vehicle.<sup>103</sup> For this reason, Wagner J., writing for the majority in *Lacasse*, found that it was open to a judge to find that the frequency of a crime in a given place or context may justify a harsher sentence both because it made the crime worse – more grave – and, as a result, the individual more morally culpable. It follows that often-times as the courts are balancing the proportionality of two sides

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<sup>102</sup> *Nasogaluak*, *supra* note 93 at para 40.

<sup>103</sup> *Ibid* at para 13; *Lacasse*, *supra* note 97 at para 13.

of the equation, they are also toggling back-and-forth between these two sides of the equation as they are inextricably interrelated.

Finally, the notion of totality must be considered when an accused is charged with more than one offence.<sup>104</sup> The Supreme Court found in 1996 in *R v M (C.A.)* that totality forms part of the overall proportionality analysis. In short, the totality principle holds that a judge must ensure an offender's overall sentence is in concert with his overall culpability when sentencing the offender for multiple offences that will be served either consecutively or concurrently.<sup>105</sup>

Now consider how that balancing act has been applied in terrorism cases to date.

### **b. Applying Sentencing Principles in Terrorism Prosecutions**

The application of the normal sentencing principles has been renovated in the context of terrorism prosecutions. This helps explain the relatively long periods of incarceration, including for youth, as well as the tendency to issue long sentences to low-level offenders and those who pled guilty. As we shall see, below, the starting point remains the same whether the sentence involves a terrorism offence or otherwise. That is, the same legislative, jurisprudential and theoretical principles are said to apply from the outset. Yet the instantiation of these principles has been skewed by how the two sides of the proportionality analysis – the seriousness of the offence and the culpability of the individual – are measured in terrorism cases. To see how this has happened through the case law to date, let us turn now to logic that has been applied to the sentencing of terrorism offences, starting with how the various terrorism offences have been treated in terms of their seriousness (the left side of the proportionality ledger).

- i. Proportionality (including totality) and “the Left Side of the Ledger”: A uniquely serious crime, a sentencing floor and a focus on denunciation and deterrence*

Momin Khawaja was the first person tried and sentenced for terrorism in Canada under Part II.1 of the *Criminal Code*. His case is the only Supreme Court of Canada judgement to date that

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<sup>104</sup> Section 718.2 (c) of the *Criminal Code* states what has become known as the “totality principle”, that being: “where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.”

<sup>105</sup> *M(CA)*, *supra* note 100at para 42.

has dealt with sentencing.<sup>106</sup> Thus, it is extremely important for our purposes. At trial, Khawaja was convicted on one count for participating in a terrorist training camp in northern Pakistan.<sup>107</sup> He was also convicted on six more counts for helping a UK-based group of extremists plot a terrorist attack.<sup>108</sup> The allegations underlying those counts were that Khawaja had helped the group from his house in Ottawa in several ways, from sending the group cash to offering the group his parent's house in Pakistan and building a remote detonator at the group's request.<sup>109</sup> Since Khawaja was found to have no knowledge of the group's specific plot, he was acquitted on two terrorism counts related to the remote detonator but convicted on the explosives offence underlying those counts, s 81(1)(a) of the *Criminal Code*.<sup>110</sup>

At first instance, Khawaja was sentenced at the Ontario Superior Court to a total of ten years of incarceration for six offences under ss. 81(1)(a), 83.03(a), 83.18 (two counts), 83(19) and 83.21(1) of the *Criminal Code*. Defence appealed the conviction and, in the alternative, the sentence, about which there was much dispute not just in terms of the original 10-years of incarceration but also in terms of the application of normal sentencing principles to terrorism cases.<sup>111</sup> On appeal to the Ontario Court of Appeal in 2010, the court found that terrorism was not an ordinary crime but some form of different extraordinary crime, and sentencing should be approached with that fact in mind.<sup>112</sup> In the result, the Ontario Court of Appeal increased Khawaja's sentence to life in prison under s 81(1)(a), which was the underlying offence on the first count at trial.<sup>113</sup> Similarly, the Ontario Court of Appeal raised Khawaja's sentence on count three (s 83.18) from two years to four years, on count four (s 83.21) from two years to seven years, on count six (s 83.18) from three months to eight years and on count seven (s 83.19) from three months to three years.<sup>114</sup> While the Supreme Court of Canada did not see fit to overrule

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<sup>106</sup> *R v Khawaja*, 2006 CanLII 63685 ONSC at para 1 [*Khawaja ONSC*].

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *R v Khawaja*, 2010 ONCA 862, 273 CCC (3d) 415 [*Khawaja ONCA*].

<sup>112</sup> Throughout the portion of the judgment that dealt with the Crown's cross-appeal on sentence, the court noted at trial that the judge had misapprehended the appropriate "overall approach to sentencing". See *ibid.*, at para 192.

<sup>113</sup> *Khawaja ONCA*, *supra* note 26 at para 187.

<sup>114</sup> *Ibid.*

the Ontario Court of Appeal on the ultimate life sentence or its assertion that terrorism was uniquely extraordinary, it left little doubt about how sentencing terrorism should be approached: “The general principles of sentencing, including the totality principle, apply in terrorism cases.”<sup>115</sup> This is to say that the seriousness of the offence is balanced against the moral culpability of the offender to produce a just sentence, considering the usual principles articulated in section 718 of the *Criminal Code* as well as the sentencing ranges for similar offences, and so on. Sentences are therefore best dealt with, in the words of the Supreme Court, on “a case-by-case basis”,<sup>116</sup> just as with all sentencing.

The Ontario Court of Appeal released its judgement in *Khawaja* in December 2010, which coincided with the release of another set of judgements arising out of the Toronto 18 trials.<sup>117</sup> As Justice Code later stated in rendering his sentencing decision in *R v. Esseghaier and Jaser*, the Ontario Court of Appeal decision in *Khawaja* as well as the Toronto 18 decisions “were generally upheld by the Supreme Court of Canada...when the accused’s appeal in *Khawaja* was dismissed and then in February 2013 when the three applications for leave to appeal...were dismissed.”<sup>118</sup> In the result, the Toronto 18 cases (especially *Amara*, *Khalid* and *Gaya*) and the Ontario Court of Appeal’s decision in *Khawaja* have taken on a precedential value similar to the Supreme Court of Canada’s decision in *Khawaja*, in part because they are said to have its explicit or implicit blessing.<sup>119</sup> And the Toronto 18 judgements – as well as subsequent judgements – have tended to support the Ontario Court of Appeal’s assertion in *Khawaja* that terrorism is somehow different than other offences, even if the Supreme Court has never explicitly said so: “To be sure, terrorism is a crime unto itself. It has no equal.”<sup>120</sup> According to the Ontario Court of Appeal in

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<sup>115</sup> *Khawaja SCC*, *supra* note 9 at para 115.

<sup>116</sup> *Ibid* at para 124.

<sup>117</sup> See *R v Amara*, 2010 ONCA 858, 266 CCC (3d) 422 [*Amara ONCA*]; *Khalid ONCA*, *supra* note 44; *Gaya ONCA*, *supra* note 41.

<sup>118</sup> *Esseghaier*, *supra* note 32 at para 96.

<sup>119</sup> See *Esseghaier*, *ibid*, which states: “Since these appellate decisions were released, judges of this Court have interpreted and applied the relevant sentencing principles in terrorism trials on a number of occasions.” The Court in *Esseghaier* then cites *Abdelhaleem*, *Ahmed*, and *Hersi* for support (at para 96).

<sup>120</sup> *Khawaja ONCA*, *supra* note 26 at para 231. See also *Khalid ONCA*, *supra* note 44 at para 32. Or, as the Ontario Court of Appeal stated in *Khawaja*, sentencing terrorism was not “business as usual.” See *Khawaja ONCA*, *supra* note 26 at para 212.

*Khawaja*, Parliament was aware that terrorism was different – that it had no equal. It followed from this moral distinction between crimes that the seriousness of terrorism had to receive “special consideration” from the outset; terrorism should “be treated differently for sentencing purposes”,<sup>121</sup> even if the Supreme Court of Canada’s dictate holds that the normal principles of sentencing apply.

Arguably the result – that terrorism is unique and uniquely serious – does not directly contradict the Supreme Court’s assertion that the normal principles of sentencing apply in terrorism cases. What the Ontario Court of Appeal and virtually all other trial-level judgements to date actually said was that terrorism should be “distinguish[ed]...from other crimes” in terms of its gravity and thus terrorism is placed “in a category of its own”.<sup>122</sup> Read so as to be consistent with the Supreme Court’s ruling on the application of the fundamental principle of sentencing to terrorism cases, the assertion here is that while the normal principles of sentencing apply, the practical weighing of the fundamental principle will recognize the extreme gravity of the offence

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<sup>121</sup> *Khawaja ONCA*, *supra* note 26 at paras 218-219. See also *R v Thambathurai*, 2011 BCCA 137 at para 20 [*Thambathurai BCCA*]. See also *Ahmed ONSC*, *supra* note 34 at para 64.

<sup>122</sup> Of the twenty-four reported sentencing decisions in terrorism cases, nineteen have expressly remarked on the uniquely serious nature of terrorism offences: *R v Khawaja*, 248 CCC (3d) 233 at para 24 [*Khawaja Sentencing*], [2009] OJ No 4279, quoting *R v Martin*, (1999) 1 Cr App R (S) 477 at 48; *Khawaja ONCA*, *supra* note 26 at paras 230 – 238 & 251; *Khawaja SCC*, *supra* note 9 at para 126; *Alizadeh*, *supra* note 48 at para 1; *Thambathurai BCCA*, *ibid* at para 19 – 21; *R v Khalid*, 2009 CarswellOnt 9874 at para 108 [*Khalid ONSC*], [2009] OJ No 6414; *Khalid ONCA*, *supra* note 44 at para 3; *NY*, *supra* note 11 at para 24; *R v Gaya*, 2010 ONSC 434 at para 117 – 118 [*Gaya ONSC*]; *Gaya ONCA*, *supra* note 41 at para 19; *Amara*, *supra* note 38 at paras 140 – 142; *Abdelhaleem*, *supra* note 37 at para 62; *Dirie*, *supra* note 40 at para 32; *Habib*, *supra* note 37 at paras 37 – 41; *Larmond*, *supra* note 45 at para 4; *Hersi*, *supra* note 33 at paras 52 – 54 & 63; *Esseghaier*, *supra* note 32 at para 97; *Namouh*, *supra* note 31 at para 36, citing *Khawaja* at para 24; *Ahmed ONSC*, *supra* note 34 at para 77 – 80. Three decisions simply allude to the special seriousness of terrorism offences, noting the unique harms flowing from terrorism instead (see *Thambathurai*, *supra* note 49 at para 16; *Amara ONCA*, *supra* note 117 at para 18; *Ahmad*, *supra* note 39 at paras 52 & 58). Just two of the reported sentencing decisions neither expressly reference the special seriousness of terrorism offences nor their harmful effects (see *Chand*, *supra* note 29; *Ahmed ONCA*, *supra* note 19). The silence in *Chand* on this point may result from the timing of its release, which was one month before the Ontario Court of Appeal released its decision in *Khawaja* outlining the uniquely serious nature of terrorism offences (see *Khawaja ONCA*, *supra* note 26 at paras 230 – 238 & 251). Other decisions outside of terrorism cases have also remarked on the uniquely harmful nature of terrorism offences, although some have compared the harm from terrorism to other offences. See, for instance, *R v Reyat*, 2011 BCSC 14 at para 71 where the court defines terrorism as “an existential threat to Canadian society in a way that murder, assault and other crimes are not...terrorists reject and challenge the very foundations of Canadian society” (see Canada, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air Indian Flight 182, a Canadian Tragedy* (Ottawa: Public Works & Government Services Canada, 2009), vol 1).



(what we have called the left side of the fundamental principle’s ledger). Put another way, when weighing the proportionality principle, it is important to recognize the extreme and “unique”<sup>123</sup> gravity of terrorism offences. The fundamental principle of sentencing has thus not changed, but it is “in a category of its own” when applying the fundamental principle.

Of course, there is not one terrorism offence and not all terrorism offences are made the same.<sup>124</sup> Rather, there are a series of different terrorism offences with different elements and penalty ranges; as such, there is a spectrum of moral culpability that attaches to various terrorism offences and to different terrorist acts.<sup>125</sup> The Supreme Court said as much in *Khawaja*, though not with reference to the weighing of the gravity of any terrorism offence.<sup>126</sup> But lower courts have not tended to be so nuanced, at least explicitly. Instead, the starting point from which lower courts have begun their analysis of the gravity of terrorism offences has fairly consistently been, perhaps unconsciously, to subtly generalize with regard to the seriousness of terrorism and the complicity of “terrorists.” Terrorism was treated by the Ontario Court of Appeal in *Khawaja* as a “unique” crime<sup>127</sup> and of the worst sort as a starting point – before one begins the analysis of the specific offence, the specific actions of the individuals, and so on.<sup>128</sup> Perhaps the most

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<sup>123</sup> See *Khawaja ONCA*, *supra* note 26 at para 19: “The unique nature of [presumably all] terrorism-related offences, and the special danger that these crimes pose to Canadian society”.

<sup>124</sup> For an excellent review of this proposition, see Robert Diab, “Fraught Question,” *supra* note 6 at 606-612.

<sup>125</sup> The Supreme Court in *Khawaja* recognized this in principle of course. At the same time, it spoke, as other courts have done, in theory about the need to evaluate on a “case-by-case” basis where the discretion is left with the trial judge, while simultaneously second-guessing that exercise of discretion to increase *Khawaja*’s sentence from 10-years to life, in part because the trial judge failed to properly exercise his discretion. See for example paras 124, 128-130. Likewise, the Court recognized that all terrorism cases were different (para 124) while simultaneously speaking of the crime of terrorism. Aside from *Khawaja*, two other terrorism offenders have had their sentences increased on appeal. In both cases, the Ontario Court of Appeal second-guessed a sentencing judge’s discretion on the grounds that their sentences reflected a lack of attention to the seriousness of terrorism offences and an overemphasis on mitigating factors particular to the accused. Saad Gaya’s sentence was increased from 12 years to 18 years on this basis (*Gaya ONCA*, *supra* note 41 at paras 19 – 20). Saad Khalid’s sentence was also increased from 14 years to 20 years for this reason (*Khalid ONCA*, *supra* note 44 at para 60).

<sup>126</sup> *Khawaja SCC*, *supra* note 9 at para 124.

<sup>127</sup> *Khawaja ONCA*, *supra* note 26 at para 231: “To be sure, terrorism is a crime unto itself.”

<sup>128</sup> The following cases mention the seriousness of terrorism offences but not at the beginning of the case’s analysis of the appropriate sentence: *NY*, *supra* note 11 at para 24; *Khalid ONSC*, *supra* note 122 at para 108; *Gaya Sentencing*, *supra* note GSN at para 117 – 118; *Amara*, *supra* note 38 at paras 140 – 142; *Dirie*, *supra* note 40 at para 32. Note that *Dirie*, *Amara*, *Khalid* and *Gaya* mention the seriousness of terrorism offences while applying the applicable sentencing principles, although this section follows several paragraphs on the aggravating and mitigating factors present in the case. *Chand* is the sole case where the seriousness of terrorism offences in general is not discussed.

provocative statement in this regard comes from the Ontario Superior Court of Justice in the 2014 case of *R v. Hersi*, which went so far as to find that, “terrorists are the worst kind of cowards...The message needs to be sent out that anyone who aspires to become part of such evil must pay a heavy price.”<sup>129</sup>

In the result, we might summarize the general approach of Canadian courts to sentencing terrorism as follows. First, the fundamental principle of sentencing applies in terrorism cases, as per the Supreme Court of Canada in *Khawaja*. Second, following from the Toronto 18 line of cases and the Ontario Court of Appeal’s decision in *Khawaja*, terrorism, usually as a general concept, is then treated as uniquely serious when analyzing what we have called the left side of the foundational sentencing principle, the gravity of the offence. The unique gravity of the offence and the courts’ focus on it is thus what differentiates the crime for sentencing purposes, not the overall approach. Third and finally, the unique gravity of terrorism in turn requires that judges analyze and measure the fundamental principle of sentencing by honing in on three considerations in particular, as articulated by the Court of Appeal in *Khawaja*:

- 1) **“The unique nature of [presumably all] terrorism-related offences, and the special danger that *these crimes* pose to Canadian society;**
- 2) The degree of continuing danger that the offender presents to society; and,
- 3) The need for the sentence imposed to send a clear message [general deterrence] to would-be terrorists that Canada is not a safe haven from which to pursue their violent and subversive ambitions.”<sup>130</sup>

Soon after the resolution of the case and sentence in *Khawaja*, an important 2015 case from the Ontario Superior Court of Justice, *R. v Esseghaier*, built on the above findings and articulated five principles of terrorism sentencing. These are:

1. that in terrorism cases denunciation and deterrence are the predominant principles in sentencing;

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<sup>129</sup> See *Hersi*, *supra* note 33 at para 63. The resort to biblical language like good and evil is not unique to *Hersi*. In the *Larmond* sentencing decision, the trial judge referred to the offenders as “Devils” (see *Larmond*, *supra* note 45 at para 4).

<sup>130</sup> *Khawaja ONCA*, *supra* note 26 at para 192.

2. that all general sentencing principles apply, including rehabilitation, but that defence carries a “tactical burden” of showing that the accused is no longer committed to violent extremism to avoid an assumption of ongoing dangerousness.
3. that in terrorism cases there can exist a sentencing floor of 20-years incarceration, which applies when the inchoate terrorism behavior could have resulted in the indiscriminate loss of life;
4. that the sentencing floor can directly result in life sentences for an accused; and finally,
5. that the application of the sentencing floor sets a minimum of 20-years where there are strong mitigating factors related to the accused but nevertheless there is, again, the threat of the indiscriminate loss of life.<sup>131</sup>

The Court in *Esseghaier* asserted that these five principles simply provide a taxonomy of the themes that could be drawn from the *Khawaja* and Toronto 18 lines of cases – and several subsequent terrorism cases that adopted the same approach.<sup>132</sup> The Court’s assertion in *Esseghaier* was certainly true of the first two principles it articulated, which flow naturally from the Ontario Court of Appeal’s three factors, above, and in particular the focus first and foremost on the “unique” gravity of terrorism offences in general and on prioritizing the principles of denunciation and deterrence. Indeed, even the Supreme Court of Canada has never said that terrorism is *not* uniquely grave but rather has implied the opposite: like the Ontario Court of Appeal in *Khawaja* and the Ontario Superior Court of Justice in *Esseghaier*, the Supreme Court of Canada made special note of the importance of denunciation and deterrence in the context of terrorism offences.<sup>133</sup>

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<sup>131</sup> *Ibid* at para 97.

<sup>132</sup> In so doing, the court stated that it was merely applying the sentencing themes found in *Khawaja*, which were being applied in *Gaya* and *Khalid*. See *Esseghaier*, *supra* note 32 at para 97; see also para 6.

<sup>133</sup> *Khawaja SCC*, *supra* note 9 at para 130. In contrast to lower court decisions the Supreme Court was again more nuanced, if a little unclear given the case law and controversies that followed; in particular, the Supreme Court was especially careful to make clear that terrorism does not attract special rules in this context, though again that can be read consistently with the lower court decisions, which simply require that terrorism be seen as more grave in applying the normal rules.

However, the final three principles articulated in *Esseghaier*, which relate to what might be called a sentencing floor, were less obvious expressions of the three *Khawaja* factors. It is true that the Supreme Court of Canada in *Khawaja* had ultimately upheld the Ontario Court of Appeal's decision to increase *Khawaja*'s sentence from 10.5 years to life, in part by stating that: "the heightened gravity of the terrorism offences at issue in this case was sufficient to justify imposition of consecutive sentences running over 20 years without violating the totality principle."<sup>134</sup> However, *Khawaja* does not explicitly mandate a sentencing floor and certainly the Supreme Court of Canada's reasoning does not seem to imply anything beyond the assertion that 20-plus years is eminently *possible* in the right circumstances.

In any event, there is little doubt that the court in *Esseghaier* was drawing on other intervening case law, and most explicitly the Toronto 18 series of cases, rather than the Supreme Court.<sup>135</sup> These cases certainly could be seen to imply that the Supreme Court in *Khawaja* had normalized sentences "in excess" of 20-years where the terrorist plot threatened human life, even if none of these cases articulated the sentencing floor in the mandatory terms of *Esseghaier*.<sup>136</sup>

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<sup>134</sup> *Khawaja SCC*, *supra* note 9 at para 126. In so doing, the Supreme Court also upheld the constitutionality of section 83.26 of the *Criminal Code*, which requires consecutive sentences for terrorism offences. In particular, the Court asserted that section 83.26 did not run afoul of the well-known "totality principle, found in section 718.1 of the *Criminal Code*, which states that: where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh."

<sup>135</sup> Indeed, the Court cites for its support the Ontario Court of Appeal decision in *Khawaja*, as well as the *Khalid* and *Amara* decisions from the Toronto 18 line of cases. See *Esseghaier*, *supra* note 32 at para 97.

<sup>136</sup> Though *Esseghaier* was the clearest articulation of this minimum floor, the sentencing decision was clearly drawing on decisions in *Khalid*, *Gaya* and later starkly influenced the decision in *Ahmed*. See *Esseghaier*, *supra* note 32 at paras 6 and 97 for its articulation of the cases and thinking on which it drew. For a discussion, see Kent Roach, "Be Careful What You Wish For? Terrorism Prosecutions in Post-9/11 Canada" (2014) 40:1 *Queen's LJ* 99 at 136 [Roach, "Careful What You Wish For"]. Nevertheless, according to *Esseghaier*, the sentencing floor was the clear implication of the trend in terrorism sentencing, starting with *Khawaja*. It works as follows. Terrorism offences generally apply to inchoate activity – planning or facilitating something to happen.

<sup>136</sup> When the disrupted plan or facilitated activity could have resulted in the indiscriminate loss of life – in the case of *Esseghaier*, blowing up a commuter train between Toronto and York – then there is a *de facto* minimum sentence of at least 20-years. *Esseghaier* thus received the longest sentence of any accused to date, that being two concurrent life sentences and an additional concurrent sentence of 24-years.

The resultant sentencing floor effectively creates a non-legislative mandatory minimum for certain types of terrorist behaviour.<sup>137</sup> However, other terrorism sentencing decisions have not applied a similar range – a minimum of 20-years to a maximum of life in this case – though that is perhaps because there have been few opportunities to do so given that the *Esseghaier* decision was reached in 2015. Whether other courts ultimately expand the gravity of terrorism offences to include a sentencing floor or something similar thereto thus remains to be seen, though it certainly runs against the grain of sentencing in Canada outside the terrorism context. Put in that context, while legislators have placed a mandatory minimum sentence of life in prison with no possibility of parole for 25-years for first degree murder,<sup>138</sup> the *Criminal Code* places no such mandatory minimum on any terrorism offence because, at least in part, the range of behavior that might fall under each offence is much broader – and thus carries a greater divergence of seriousness and, surely, individual moral culpability. But, as we have seen, the starting point for the judiciary has been to treat terrorism as a monolith – a singular and singularly grave crime – before it moves to break down terrorism offences and their differences. This starting point seems to have allowed the court in *Esseghaier* to elide the distinctions that would otherwise make a sentencing floor inconceivable, as it did for Parliament. In the end, even as the Supreme Court of Canada strikes down mandatory minimum penalties for discrete offences in other situations,<sup>139</sup> and the Canadian government debates removing mandatory minimum penalties from many or all crimes at the consistent insistence of academics,<sup>140</sup> the court in

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<sup>137</sup> See *R v Esseghaier*, *supra* note 32 at page 19, referencing for further support the decisions in *Gaya* and *Khalid*.

<sup>138</sup> *Criminal Code*, *supra* note 2, s 231.

<sup>139</sup> *R v Nur*, 2015 SCC 15 at para 4, [2015] 1 SCR 773 [*Nur*]. See also *Canada (Attorney General) v Bedford*, 2013 at paras 93 – 123 [*Bedford*], [2013] 3 SCR 1101 and *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 83 – 92 [*Carter*], [2015] 1 SCR 331. See also *R v Lloyd*, [2016] 1 SCR 130, 2016 SCC 13 at para 56, which held that the one-year mandatory minimum for drug trafficking under s 5(2)(a)(i)(D) of the *Controlled Drugs and Substances Act* to be unconstitutional. For more of a discussion on Canada's rejection of mandatory minimums see Sean Fine, "Court Strikes 'Blunt Instrument' Law of Mandatory Sentencing," *The Globe and Mail* (14 April 2015) online: <<https://www.theglobeandmail.com/news/politics/supreme-court-deals-new-blow-to-mandatory-sentencing-rules/article23957270/>>.

<sup>140</sup> To read more arguments for the ending of mandatory minimums, see Debra Parkes, "Mandatory Minimum Sentences For Murder Should Be Abolished," *The Globe and Mail* (25 September 2018), online: <<https://www.theglobeandmail.com/opinion/article-mandatory-minimum-sentences-for-murder-should-be-abolished/>>; Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) Appeal at 89; Elizabeth Sheehy & Isabel Grant, "Senator Kim Pate's bill freeing judges from the constraints of mandatory minimum sentences will help address overincarceration and court delays" *The Globe and Mail* (8 May

*Esseghaier* moved towards a rule that in principle is hard to distinguish from a mandatory minimum penalty for a range of terrorist actions that might be thought to cause future indiscriminate loss of life.

Where does all of this leave us in terms of the logic of sentencing terrorism? Let us take stock up until this point. First, the normal rules of sentencing apply from the outset just as they do with respect to all crimes in Canada, meaning in practice that courts are to abide by the fundamental principle of sentencing.<sup>141</sup> Second, courts then consider the seriousness of the terrorism crimes – the “left side” of the proportionality ledger – just as the factors listed in *Khawaja* and *Esseghaier* make clear that they must.<sup>142</sup> In that way, terrorism offences are normal in theory, albeit uniquely serious crimes. Third, the gravity of terrorism tends to be measured in general terms, so that the initial judicial analysis is framed by the extraordinary and unique nature of the concept of terrorism, “a crime unto itself”.<sup>143</sup> In so doing, terrorism is placed “in a category of its own”, just as it was in *Khawaja*,<sup>144</sup> even though terrorism is not one offence or act. Fourth, the seriousness of the offence is given preeminence over other considerations<sup>145</sup> because, as the

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2018), online: <[policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess/](http://policyoptions.irpp.org/magazines/may-2018/cleaning-up-the-mandatory-minimums-mess/)>. For news commentary, see also “Mandatory-minimum sentencing rules unravelling into patchwork” *The Globe and Mail* (6 March 2018), online: <<https://www.theglobeandmail.com/news/national/mandatory-minimum-sentencing-rules-unravelling-into-patchwork/article38205652/>>. See also Mary Allen, “Mandatory minimum penalties: An analysis of criminal justice system outcome for selected offences” (29 August 2017), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54844-eng.htm>. See also Jacques Gallant, *The Toronto Star*, “Federal government urged to rein in mandatory minimum sentences” (10 July 2018), online: <<https://www.thestar.com/news/canada/2018/07/10/federal-government-urged-to-rethink-reliance-on-mandatory-minimum-sentences.html>>. See also, Daniel Brown, “Trudeau government is falling short on justice reform”, *The Toronto Star* (30 January 2018), online: <<https://www.thestar.com/opinion/contributors/2018/01/30/trudeau-government-is-falling-short-on-justice-reform.html>>.

<sup>141</sup> See also *Khalid ONCA*, *supra* note 44 at para 104.

<sup>142</sup> The analysis in the following cases establishes first that the general principles of sentencing before turning to the seriousness of terrorism offences as the first consideration: *Habib*, *supra* note 37 at paras 37 – 41; *Hersi*, *supra* note 33 at paras 52 – 54; *Esseghaier*, *supra* note 32 at para 97; *Ahmed ONSC*, *supra* note 34 at para 77. Two sentencing decisions simply lead off mentioning the seriousness of the offence: *Alizadeh*, *supra* note 48 at para 1, *Larmond*, *supra* note 45 at para 4. However, the analysis in four decisions mentions first the applicable mitigating and aggravating factors before applying the principles of sentencing and mentioning the seriousness of terrorism offences: *Khalid ONSC*, *supra* note 122 at para 108; *Gaya ONSC*, *supra* note 121 at para 117 – 118; *Amara*, *supra* note 38 at paras 140 – 142; *Dirie*, *supra* note 40 at para 32.

<sup>143</sup> *Khawaja ONCA*, *supra* note 26 at 231.

<sup>144</sup> See *Khawaja ONCA*, *supra* note 26 at para. 219. See also *Khalid ONCA*, *supra* note 44 at para 32 (“the unique nature of terrorism-related crimes.”)

<sup>145</sup> See *Khalid ONSC*, *supra* note 122 at para 40.

Ontario Superior Court of Justice said in *R v Ahmed*, “deterrence and denunciation are the primary considerations in terrorism sentences”.<sup>146</sup> Of course, if the reasoning in *Esseghaier* is followed in future trials, a judicially-mandated sentencing floor will also set the baseline for the punishment of terrorist offences that might result in the arbitrary loss of human life.

The result is that the gravity of “the crime” is set from the outset as extremely, perhaps uniquely, high in all terrorism cases in Canada, at least to date. The process is framed from the beginning by a focus on the generalized seriousness of what terrorism can be and how “evil” the acts and even the individuals are.<sup>147</sup> This analysis in turn frames the judicial analysis in a way that tends toward the general rather than the specific – what terrorism is in general rather than what the offence and activities are specifically. When combined with the fact that deterrence and denunciation are then made, by logical extension, the primary sentencing principles to be considered in most if not all terrorism cases, the conceptual move away from the individual and towards the general is made tangible. Deterrence and denunciation happen to be those sentencing principles relating most closely with the seriousness of the offence and most disconnected from the moral culpability of the individual. Put another way, denunciation and deterrence are outward facing objectives in that the sentence itself is targeted beyond the

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<sup>146</sup> *Ahmed ONSC*, *supra* note 34 at para 79. Recall that the first factor to be considered in sentencing terrorism, as expressed by the Ontario Court of Appeal in *Khawaja*, was the third consideration. In an excellent study of the Toronto 18 terror trials, Reem Zaia similarly concludes that denunciation and deterrence “are the hallmarks of sentencing for terrorism.” See Reem Zaia, “Mental Health Experts in Terrorism Cases: Reclaiming the Status of Rehabilitation as a Sentencing Principle”, (2017) 64:4 *Crim LQ* 548 at 548 [Zaia, “Mental Health Experts in Terrorism Cases.” See also Diab, “Fraught Question,” *supra* note 6 at 590. See also *Khawaja ONCA*, *supra* note 26 at para 192, talking about the importance of deterrence; *Esseghaier*, *supra* note 32; *Ahmed ONSC*, *supra* note 34 at para 79, 81. Interestingly, McClachin CJ, for the Supreme Court in *Khawaja* was slightly more restrained in stating the importance of deterrence and denunciation.

“Without suggesting that terrorism offences attract special sentencing rules or goals, I agree that denunciation and deterrence, both specific and general, are important principles in sentencing of terrorism offences, give their seriousness: see 718.2(a)(v) of the Criminal Code [...]”

See *Khawaja SCC*, *supra* note 9 at para 130.

<sup>147</sup> As the sentencing judge stated in *Larmond* reiterating his own reasoning in the *Alizadeh* sentencing decision, “involvement in jihadist terrorist activity effectively amounted to the crime of treason.” He goes on to call it “evil” and “those that embrace ISIL are embracing the Devil.” See *Larmond*, *supra* note 45 at para 4. Certainly one can be sympathetic to the sentiment, though seeing the overtly biblical language is unusual in modern Canadian judgements and decisions.

individual and towards the community in the hope of deterring others through the denunciation of particularly heinous acts – or, in this case, in denouncing all of terrorism.<sup>148</sup>

While all of the logic summarized herein might seem eminently justifiable as a series of discrete propositions, sentencing decisions are better seen as a complex formula that is engaged to measure a series of moving, intermingling factors associated with both the offence committed and the individual alleged to have so committed the offence. The observer should thus evaluate not the discrete propositions employed by the court, but how the logical string of argument comes together. In this case, the logical string of moves by the courts in sentencing terrorism provides for a series of subtle shifts away from the individual and from the specific offence. The result undermines the intent behind setting the fundamental principle of sentencing as a balancing between the general and the specific, the crime and the harm and the individual's discrete actions and moral culpability.

Let us then move to the other half of the proportionality principle,<sup>149</sup> that being the “right side of the ledger” or the individual moral culpability of the accused, to see how the individual is brought back into the analysis. This is where we now turn.

*ii. The “Right Side of the (Proportionality) Ledger and the Reduced Effect of the Individual*

The importance of re-inserting the individual into the sentencing equation itself takes on added gravity precisely because the focus thus far has been largely on terrorism in general and the heinous nature of terrorist acts, on treating these offences as unique and exceptional even within the context of other violent crimes. Put another way, the individual must take their proper and contextual place alongside the seriousness of the offence of which they are accused in order to ensure that the proportionality analysis is properly restrained by what actually took place.

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<sup>148</sup> As Kent Roach noted in 2001, “Denunciation focuses on the gravity of the offence committed without regard to the moral responsibility of the offender.” See also Roach, “Searching for Smith: The Constitutionality of Mandatory Minimum Sentences” (2001) 39:2 Osgoode Hall LJ at 397.

<sup>149</sup> *Criminal Code*, *supra* note 2, s 718.1.



Fortunately, in every sentencing decision to date, judges have considered the individual and his context in elucidating their reasons for sentence. In this way, judges continue to apply the fundamental principle of sentencing and continue to search for the individual culpability of the accused. Unfortunately, while context and the individual accused are clearly playing a role – we have already seen that leaders of terrorist plots received the harshest sentences, for example – individual accused are also being minimized in a way not seen with other offences. Moreover, certain fundamental mitigating factors that the *Criminal Code* mandates shall be considered at sentencing are often minimized in terrorist sentencing proceedings, or perhaps even treated as aggravating factors. In particular, the judicial treatment of the youthfulness of the offender, his criminal record, and his potential for rehabilitation have all shifted in the context of terrorism trials in a way not seen with other crimes. With this in mind, it might be less surprising now to state that guilty pleas, normally signs of individual remorse and cooperation on behalf of the accused, would appear to be having a minimal impact on sentence length, as we have already noted.<sup>150</sup>

*a. The Youthful First-Time Offender*

Saad Khalid was a member of the notorious Toronto 18 terrorist group. The Toronto 18 plot, hatched in the Greater Toronto area between 2005 and 2006, resulted in 18 arrests: 14 adults and 4 youth in 2006. Collectively the group was accused of planning to bomb several sites in or around Toronto, including the Toronto stock exchange, CSIS headquarters, and a third, unspecified military base.<sup>151</sup> During the process of the investigation the 18 broke up into two groups, named the “bomb plot” group and the “camp plot” group by the Ontario Court of Appeal.<sup>152</sup> The bomb plot was led by Zakaria Amara, and the camp plot was led by Fahim Ahmad.

Saad Khalid fell into Amara’s group and, for his participation in group’s activities, was first sentenced by the Ontario Superior Court of Justice when he was 22-years old for committing an offence contrary to section 83.2 of the *Criminal Code* (“commission of offence for terrorist

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<sup>150</sup> See page 12 above for a discussion.

<sup>151</sup> *Amara*, *supra* note 38 at para 20.

<sup>152</sup> *Ibid* at paras 4-5.

group”)<sup>153</sup>. At sentencing, he had been subject to a psychiatric examination by a Dr. Ramshaw which said that, “[the respondent’s] motivation [for committing the crime did] not flow from anti-sociality, impulsivity or psychopathy, but rather from his religious beliefs, his sympathy toward the extreme Muslim cause and his perceived need to take steps to stand up against the Western world, and to influence change”.<sup>154</sup> At the Ontario Superior Court of Justice, Justice Durno placed considerable weight upon this medical evaluation, and noted that Khalid was well-supported in the community and would benefit from that support on release.<sup>155</sup> Mr. Khalid was sentenced to seven years imprisonment in addition to seven-year credit for pre-trial custody. The Crown appealed that sentence to the Ontario Court of Appeal.

Saad Gaya, also a member of the Toronto 18, was originally sentenced by the Ontario Superior Court of Justice not long after Mr. Khalid for his role in Amara’s bomb plot; he was 18 at the time of his arrest. Like Khalid, Gaya was the subject of a forensic psychiatric report written by the same Dr. Ramshaw and by Dr. Cohen; the reports were similar in type and finding: “the respondent was naïve and immature when he joined up with Amara...[noting that] ‘maybe he was the one person God [had] chosen who was going to make a difference and that he [the respondent] would be a hero in the eyes of God’”.<sup>156</sup> Mr. Gaya was sentenced to 12 years, which the judge (also Durno) called significant, especially in light of his youth, but the Crown successfully appealed that sentence to the Ontario Court of Appeal.<sup>157</sup>

The analysis used to sentence both Mr. Gaya and Mr. Khalid was highly similar; in fact, the first two paragraphs of the analysis from the Khalid decision are copied verbatim into the Gaya decision.<sup>158</sup> Of note are Justice Durno’s treatment of both offenders’ youthfulness.<sup>159</sup> Each

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<sup>153</sup> *Khalid ONCA*, *supra* note 44 at paras 1-8.

<sup>154</sup> *Khalid ONSC*, *supra* note 122 at para 20.

<sup>155</sup> *Ibid* at paras 60-63.

<sup>156</sup> *Gaya ONSC*, *supra* note 122, at para 43.

<sup>157</sup> *Ibid* at para 137

<sup>158</sup> See, for example, *Khalid ONSC*, *supra* note 122 at para 34-35, and *Gaya ONSC*, *supra* note 122 at para 44-46. The rest of the Gaya decision follows a similar structure to the Khalid decision, and lists the same aggravating and mitigating factors in virtually the same order.

<sup>159</sup> *Gaya ONSC*, *supra* note 122 at paras 63-64 and *Khalid ONSC*, *supra* note 122 at para 20 are almost identical in their analysis of the role of youth in each case.

section on youth ends with the following phrase: “However, the more serious the offence, the mitigating effect of age decreases but is not obliterated”.<sup>160</sup> In both cases then, the importance of youth at the provincial court level was seen as limited due to the seriousness of the terrorism offence, which is consistent with case law on other serious offences, though in this context of the cases reintroduce the generalized conception of terrorism as a uniquely grave offence.

Yet it was found on appeal in both cases that Justice Durno had actually over-emphasized mitigating factors in sentencing, including Gaya and Khalid’s youth and their status as first-time offenders. In *R v Khalid*, the Ontario Court of Appeal noted that, “short of actually committing mass murder, the respondent’s crime ranks extremely high on the scale of serious crimes”<sup>161</sup> and therefore the sentencing judge should have given far less significance to the accused’s lack of criminal record and youth.<sup>162</sup> Here, the Ontario Court of Appeal cannot see the mitigating factor of youth but through a return to the generalized and unique gravity of terrorism – perhaps no surprise given how terrorism cases are framed from the outset. In this context, it is also perhaps not surprising that the court actually found that a more punitive approach was necessary for youthful first-time offenders. It suggested that young people should not be granted leeway in sentencing for terrorism offences because their “vulnerability” and “youth” make them harder to detect by authorities, and also more attractive to would-be terrorist recruiters.<sup>163</sup> In the end, this is a logic that punishes youth for the predatory actions of the (older) leaders and recruiters. In both cases, the Ontario Court of Appeal increased the sentences by six years.<sup>164</sup>

The Ontario Court of Appeal’s sentencing decisions in *Gaya* and *Khalid* are not exceptional; they are consistent with the general approach taken by Canadian courts in sentencing terrorism.<sup>165</sup> In fact, the Ontario Court of Appeal’s decisions were informed by the

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<sup>160</sup> *Gaya ONSC, supra* note 122 at para 64; *Khalid ONSC, supra* note 122 at para 50.

<sup>161</sup> *Khalid ONSC, supra* note 33 at para 43.

<sup>162</sup> *Khalid ONCA, supra* note 44 at para 41.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Gaya ONCA, supra* note 41 at paras 18-20.

<sup>165</sup> See Roach, “Careful What You Wish For,” *supra* note 136 at 136: “despite its admirable recognition of the importance of individualized sentencing, *Khawaja* has inspired further increases in sentences in Canada... such

Supreme Court of Canada's decision in *Khawaja* which, as Kent Roach has said, gave "primacy to the need to deter and denounce terrorism...[and thereby]...assume that the terrorist label is more important than the youth and prior record of the accused."<sup>166</sup> As asserted by Roach, the logic used in the Supreme Court's decision in *Khawaja* is the same logic which the Ontario Court of Appeal then used to increase Mr. Khalid's sentence – the Court of Appeal was following the Supreme Court's approach to sentencing and its priorities, not breaking ground, in limiting the impact of youth and the first-time offender status of the accused.<sup>167</sup> We are thus left, in the end, with a Canadian jurisprudence that at best treats youth as significantly less of a mitigating factor in terrorism cases, but more often than not as a neutral factor because terrorism is so serious. Moreover, the approach frames youth and the prior criminal record of the accused primarily through the lens of terrorism in general, rather than through the lens of the individual. It is an approach that against serves to subtly minimize the individual while returning the discourse to the seriousness of terrorism.

*b. The (Similar) Diminution of Rehabilitation as a Mitigating Factor*

The Supreme Court in *Khawaja* rejected the Court of Appeal's notion that the importance of rehabilitation was "significantly reduced" in terrorism trials given the seriousness of "the crime".<sup>168</sup> Instead, McLachlin CJC as she then was, writing for the court, suggested that, "the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis."<sup>169</sup> On the one hand, the suggestion here is that rehabilitation remains an important consideration in sentencing terrorism as with other offences and that the determination as to what weight it should be given is rightly left with the trial judge. On the other hand, the Supreme Court does not explicitly go so far as to *mandate* consideration of rehabilitation. Now, mandating the consideration of the prospects of rehabilitation may seem

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sentences give primacy to the need to deter and denounce terrorism...they also assume that the terrorist label is more important than the youth and prior record of the accused".

<sup>166</sup> For an analysis, see Roach, "Careful What You Wish For," *supra* note 136 at 136.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Khawaja ONCA*, *supra* note 26 at para 201.

<sup>169</sup> *Khawaja SCC*, *supra* note at para 9 at para 124.

redundant in that it is mandated already by the *Criminal Code*. However, given the judgements of the Ontario Court of Appeal and other lower courts in Ontario that limited or negated the role of rehabilitation in sentencing terrorism,<sup>170</sup> one might have thought it prudent that the Supreme Court be more direct in this regard. Moreover, upon claiming that the prospects of rehabilitation are best left to the trial judge to determine in the context of any specific case, the Supreme Court in *Khawaja* then admonished Rutherford J. for the weight put on Khawaja’s prospects for rehabilitation; instead, the Supreme Court concurred with the Ontario Court of Appeal that the Superior Court underestimated the seriousness of the offence and Khawaja’s culpability.<sup>171</sup> So the starting point for analyzing the prospects of rehabilitation in the context of terrorism sentencing is that it *can* be considered – it might indeed be relevant. But in practice the Ontario Court of Appeal has been more likely to follow the Supreme Court’s ultimate action – it has tended to scale back trial judges’ determinations about the prospects for rehabilitation, just as the Supreme Court did in *Khawaja*, leaving one to wonder the extent to which the decision is really being left to trial judges “on a case-by-case basis”.<sup>172</sup>

However, the ultimate analysis of rehabilitation in the context of terrorism offences is more subtle than all that. The Court of Appeal in *Khawaja* found that the sentencing judge had treated a lack of information about the accused’s potential for rehabilitation as a neutral factor

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<sup>170</sup> For an overview of rehabilitation as interpreted in *Khawaja*, *Gaya*, *Khalid* and other Toronto 18 cases, see Diab, “Sentencing of Terrorism Offences,” *supra* note 2. See also Zaia, “Mental Health Experts in Terrorism Cases,” *supra* note 146.

<sup>171</sup> See *Khawaja SCC*, *supra* note 9 at para 124.

<sup>172</sup> The following appeal decisions overruled the sentencing judge for putting too erring in the weight accorded to rehabilitative prospects: *Gaya ONCA*, *supra* note 41 at para 22; *Khalid ONCA*, *supra* note 44 at para 60; *Khawaja ONCA*, *supra* 26 at paras 200 – 203, *aff’d* in part *Khawaja SCC*, *supra* note 9 at paras 122 – 124. The Supreme Court of Canada in *Khawaja* disagreed with the Ontario Court of Appeal that the importance of rehabilitation is significantly reduced in terrorism cases. However, the Supreme Court of Canada agreed that the lack of evidence on an offender’s rehabilitative prospects should be treated as an aggravating factor and so the Supreme Court also held the sentencing judge erred on that point (see *Khawaja SCC*, *supra* note 9 at para 124). Not all sentencing appeals have resulted in increased sentences, however. In *Amara*, the sentencing judge’s sentence was affirmed on appeal because the sentencing judge adhered to the framework the Ontario Court of Appeal established in *Khawaja* (*R v Amara*, 2010 ONCA 858, at para 18 [*Amara ONCA*]). The British Columbia Court of Appeal also upheld the sentencing judge’s sentence in *Thambaithurai*, finding that the sentence followed the framework in *Khawaja ONCA* and fit the seriousness of the Thambaithurai’s offence (*Thambaithurai BCCA*, *supra* note 121 at para 21 & 24). Finally, in *Ahmed*, the Ontario Court of Appeal affirmed Ahmed’s sentence, holding the diminished weight the sentencing judge placed on Ahmed’s rehabilitative prospects was appropriate (see *Ahmed ONCA*, *supra* note 19 at paras 74 & 116).

in sentencing – as is the normal practice in sentencing in Canada. However, the Court of Appeal disagreed with the sentencing judge’s approach; it found instead that things were different in terrorism cases and that the lack of information about the potential for rehabilitation could actually be considered an aggravating factor on sentencing.<sup>173</sup> The Supreme Court subsequently agreed:

The absence of evidence on the appellant’s likelihood of re-offending gave the trial judge no assurance that he was no longer committed to violent jihad and terrorism, or that there was any chance that, over time, he could change and be released from state control without undue risk of harm to the population. The lack of information on a person’s probability of re-offending, in the face of compelling evidence of dangerousness, is sufficient to justify a stiffer sentence.<sup>174</sup>

This approach to treating a lack of evidence about potential for rehabilitation as an aggravating factor has continued in subsequent terrorism cases in Canada.<sup>175</sup> This is particularly troubling because, despite the fact that aggravating factors must typically be proven beyond a reasonable doubt by the Crown,<sup>176</sup> here, an aggravating factor was imputed from a complete absence of information on Khawaja’s rehabilitative prospects.

The Ontario Superior Court of Justice in *R v Esseghaier* subsequently minimized the implication of this shifting burden, calling it a mere shift to the defence of a “tactical burden”.<sup>177</sup>

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<sup>173</sup> *Khawaja ONCA*, *supra* note 26 at paras 199-201. See also the Supreme Court’s summary of the Ontario Court of Appeal’s position at para 114. A lack of information as to a factor cannot typically be used as an aggravating factor, as aggravating factors must be proven beyond a reasonable doubt. See *Ruby*, *supra* note 92.

<sup>174</sup> *Khawaja SCC*, *supra* note 9 at para 125. See also para 123. This followed, though arguably extended the reasoning in the Ontario Court of Appeal, which had noted that: “[...] the import of rehabilitation as a mitigating circumstance is significantly reduced in this context given the unique nature of the crime of terrorism and the grave and far-reaching threat that it poses to the foundations of our democratic society [...]”. See *Khawaja ONCA*, *supra* note 26 at para 201.

<sup>175</sup> See *Khawaja SCC*, *supra* note 9 at para 124; *Hersi*, *supra* note 33 at paras 66-67; *Habib*, *supra* note 37 at para 35; *Esseghaier*, *supra* note 32 at para 97.

<sup>176</sup> *Ruby*, *supra* note 92.

<sup>177</sup> See *Esseghaier*, *supra* note 32 at para 97. The failure to meet this “tactical burden” led to a stiffer sentence in *Hersi*. The sentencing judge in *Hersi* cited this point expressly as a reason to increase *Hersi*’s sentence (see *Hersi*, *supra* note 33 at paras 66 – 67). In contrast, the sentencing judge in *Habib* noted that the absence of evidence on rehabilitative prospects can justify a stiffer sentence, although the judge did not appear to raise *Habib*’s sentence for this reason despite the lack of evidence on rehabilitation in that case (see *Habib*, *supra* note 37 at para 35). In

But, again, the shift did more than that: it created an aggravating factor out of a traditional mitigating factor (rehabilitation) and then, presumably because rehabilitation is not a traditional aggravating factor in sentencing, did not require the Crown to prove it beyond a reasonable doubt as is normally required for aggravated factors. In so doing, the court shifted the analysis from the capacity of the individual for reform to the seriousness of terrorism in general to the threat to the very “foundations of our democratic society”.<sup>178</sup> The result is the presumption that an offender cannot be rehabilitated, which is aggravating on sentencing, unless the defence can demonstrate that rehabilitation is possible. Of course, the defendant’s capacity for rehabilitation is seen through the lens of terrorism and the survival of our democratic society, and thus rarely has defence evidence of potential for rehabilitation been accepted by the court – ensuring again that the default is an aggravating factor in sentencing.<sup>179</sup>

The Supreme Court in *Khawaja* had a more nuanced explanation for the shifting burden: it treated the lack of information about rehabilitative prospects as speaking to section 718.2(a)(c) of the *Criminal Code*, or the need to separate offenders from society where necessary.<sup>180</sup> The Supreme Court’s approach amounted to an assertion that the absence of evidence pertaining to the potential for rehabilitation can indeed be aggravating in sentencing, at least in terrorism cases, where there is simultaneous evidence as to the dangerousness of the accused. This approach avoids the debate about shifting burdens, but is nevertheless problematic because it shifts the analysis of the potential for rehabilitation (an individual factor to be considered) away from the individual and back to the seriousness of the offence, which is again invariably treated as uniquely serious. Given that the dangerousness of the accused will almost always be at issue in these kinds of cases, the very concept of rehabilitation is, in practical effect, overwritten by yet

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*Esseghaier*, while Justice Code did not cite this as a reason for increasing Jaser and Esseghaier’s sentence, he found the two offenders had *poor* rehabilitative prospects and cited this as a reason for lengthier sentences (see, for instance, *Esseghaier*, *supra* note 32 at paras 105 & 111 – 113).

<sup>178</sup> Quoting *Khawaja ONCA*, *supra* note 79, at para 201. See also, for example, *Amara ONCA*, where evidence of the accused’s “capacity to change” was presented, though it was minimized in the face of the risk posed by terrorism (see *Amara ONCA*, *supra* note 117 at paras 12-19).

<sup>179</sup> See also Zaia, “Mental Health Experts in Terrorism Cases,” *supra* 146 and Diab “Fraught Question,” *supra* note 6 at 590.

<sup>180</sup> *Khawaja SCC*, *supra* note 9 at para 122.

another evaluation of the seriousness of terrorism in general. In the result, though the justification in *Esseghaier* and at the Supreme Court in *Khawaja* is subtly different, the result is for the accused is the same and, it must be said, is otherwise unprecedented in Canada.

At the same time, the Supreme Court in *Khawaja* did break from the precedent established by both the Ontario Court of Appeal and other commonwealth jurisdictions and found that, in general, it was inappropriate to assert that rehabilitation would *never* apply to terrorists.<sup>181</sup> In the result, a defendant's prospects for rehabilitation do continue to matter in theory, it is just on the defence to make the case – and to do so in a context where the court is required to consider the prospects against the collapse of “our democratic society”, which not surprisingly has led courts to consistently reject defence evidence of reasonable prospects for rehabilitation.<sup>182</sup> In the result, although rehabilitation remains theoretically applicable,<sup>183</sup> the possibilities thereof are treated with skepticism by the courts<sup>184</sup> and, as such, the defence must go to some lengths to show it remains a possibility – or risk the idea of rehabilitation turning into another aggravating factor.<sup>185</sup>

Along with the prioritization of the seriousness of the offence, we have now also seen the diminution of certain classic mitigating factors associated with the right side of the ledger, or the individual moral culpability, those being youthfulness of the offender, first-time offender status, and capacity for rehabilitation. We turn now to the treatment of aggravating factors found in the

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<sup>181</sup> As the Supreme Court of Canada said in *Khawaja SCC*, *supra* note 9 at para 124: due to the “very wide variety of conduct” that might fall under terrorism offences, “the weight to be given to rehabilitation in a given case is best left to the reasoned discretion of trial judges on a case-by-case basis.”

<sup>182</sup> See Zaia, “Mental Health Experts in Terrorism Case,” *supra* note 146. For an interesting analysis of this approach with respect to the “Toronto 18” terrorism cases, see Diab, “Fraught Question,” *supra* note 6 at 590.

<sup>183</sup> See, for example, *Ahmed ONCA*, *supra* note 19 at para 7 & 61, where the Court of Appeal found that for the sentencing judge to downplay rehabilitation for a youthful offender (18) was *contra Khawaja*.

<sup>184</sup> There is at least one case in Canada where more skepticism was warranted. Mr. Dirie was sentenced in 2011 for 2-years less a day (*Dirie*, *supra* note 40 at para 26). The sentencing judge actually seemed to reduce this from 4.5 years, to which the judge said he would have been entitled, but allowed for mitigating factors like rehabilitation to lessen the sentence. However, upon release Mr. Dirie fled to Syria, took up terrorism again in joining ISIS, and was subsequently reportedly killed. See Kent Roach and Craig Forcese, “Legislating in Fearful and Politicized Times: The Limits of Bill C-51’s Disruption Powers in Making Us Safer” in Edward M Iacobucci & Stephen J Toope, eds, *After the Paris Attacks: Responses in Canada, Europe and Around the Globe* (Toronto: University of Toronto Press, 2015) at pp 143-144.

<sup>185</sup> See generally Zaia, “Mental Health Experts in Terrorism Case,” *supra* note 146.



*Criminal Code*, and particularly the role that section 718.2(a)(v) plays in the sentencing of terrorist offenders.

iii. *Moral Blameworthiness and the Application of Aggravating Factors as found in section 718.2 of the Criminal Code*

Section 718.2(a)(v), as has been briefly discussed, requires that terrorism “shall” be considered an aggravating factor in sentencing, when proved by the Crown.<sup>186</sup> This provision is unique in the *Criminal Code* in that it makes an element of the crime a mandatory aggravating factor in the sentencing of that crime. Now, this aggravating factor can be applied regardless of whether the person is convicted of a terrorist offence<sup>187</sup> or an ordinary crime, meaning that acts that on their face seem like terrorism but where the charge is something else (murder, for example), can be sentenced like terrorism crimes.<sup>188</sup> However, for our purposes, it is only necessary to consider the former instance, that is, where terrorism is used as an aggravating factor in sentencing hearings for terrorism offences.<sup>189</sup>

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<sup>186</sup> For further details, see *Khawaja SCC*, *supra* note 9 at para 29.

<sup>187</sup> For more on whether section 718.2(a)(v) of the *Criminal Code* should apply in terrorism cases, see *supra* note 19.

<sup>188</sup> See Mohammed Saif-Alden Wattad, “Is Terrorism a Crime or an Aggravated Factor in Sentencing?” (2006) JICJ 1017 for a discussion of why this is conceptually problematic. This phenomenon has been discussed frequently in the news lately, with the high-profile prosecution of Alexandre Bissonnette for the Quebec City mosque attack and the laying of charges against Abdulai Hasan Sharif in relation to the Edmonton terror attack. In both cases the public cried out for charges of terrorism to be laid, but instead Mr. Bissonnette plead guilty 6 counts of murder and 40 counts of attempted murder, while Mr. Sharif is facing 11 charges, including 5 counts of attempted murder. See “Man Charged with 5 Counts of Attempted Murder for Edmonton Attacks” *CBC News* (2 October 2017), online: <[www.cbc.ca/news/canada/edmonton/terrorism-charges-edmonton-attacks-1.4316450](http://www.cbc.ca/news/canada/edmonton/terrorism-charges-edmonton-attacks-1.4316450)>, Jessica Chin, “Alexandre Bissonnette Charges in Quebec Mosque Shooting Do Not Include Terrorism” *The Huffington Post* (October 4 2017) online: <[www.huffingtonpost.ca/2017/10/04/alexandre-bissonnette-charges-terrorism-quebec-mosque-shooting\\_a\\_23232839/](http://www.huffingtonpost.ca/2017/10/04/alexandre-bissonnette-charges-terrorism-quebec-mosque-shooting_a_23232839/)>; Jacques Boissinot, “Quebec Mosque Shooting Suspect Alexandre Bisonnette Pleads Guilty” *The Globe and Mail* (28 March 2018), online: <<https://www.theglobeandmail.com/canada/article-bissonnette-pleads-guilty-to-first-degree-murder-in-quebec-shootings/>>.

<sup>189</sup> For an example of how this might happen, consider the case of *R v El-Merhebi*, in which Mr. El-Merhebi pled guilty to arson for firebombing the library of a Jewish school in Montreal (see *R v El-Mehrebi*, 2005 CanLII 893 (QCCQ) at para 1, [2005] RJQ 671 [*El-Merhebi*]). In this case, Mr. El-Merhebi claimed that he committed the offence as a response to the violent death of a Palestinian leader, Sheik Ahmed Yasmine, for which he blamed Israel (*El-Merhebi*, at para 2). When the sentencing judge explained the aggravating factors that impacted his sentencing decision, he referred to both section of the *Criminal Code* designating terrorism as aggravating, as well as Mr. El-Merhebi’s actions as an act of terrorism motivated by religion or ideology (*El-Mehrebi*, at para 18-22). It is impossible to know whether Mr. El-Mehrebi plead guilty to arson to avoid a terrorism prosecution or whether the Crown intended to proceed with an arson charge regardless of Mr. El-Mehrebi’s guilty plea, but either way it means that there are two ways to prosecute terrorism, as terrorism, or as other crime that looks like terrorism.

Section 718.2(a)(i) is likewise relevant to our analysis. Section 718.2(a)(i), like section 718.2(a)(v), is a mandatory aggravating factor to be considered by the court in cases where there is evidence a crime was motivated by hate or prejudice.<sup>190</sup> To date, it has been explicitly applied in almost a third of all available terrorism sentencing decisions (see table, below). It is salient to terrorism sentencing for the following reason. Every terrorism offence found in Part II.1 of the *Criminal Code* incorporates its definition of “terrorism offence” in one of two ways:<sup>191</sup> (1) by directly making it an element of the offence (e.g. section 83.19 criminalizing the facilitation of a “terrorist activity”); or, (2) indirectly through the *Criminal Code*’s definition of a terrorist group, which is either a listed entity or a group “that has as one of its purposes or activities facilitating or carrying out any *terrorist activity*.”<sup>192</sup> The *Criminal Code* incorporates a motive clause, which states that the activity in question cannot be terrorist activity unless it is committed, “in whole or in part for a political, religious or ideological purpose, objective or cause...”.<sup>193</sup> In practice, the religious or ideological purpose in particular will often coincide in the context of terrorism trials with motivation by “hate” or “prejudice”, which again are aggravating factors under section 718.2(a)(i). For this reason, it is not surprising to see in the chart below that in 50% of the available terrorism sentencing decisions where the judge considered “terrorism” aggravating, he or she also considered the existence of bias or hate as aggravating factors.<sup>194</sup>

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<sup>190</sup> An example of its application outside of the terrorism context is a case called *R v Sandouga*, 2002 ABCA 196 [Sandouga].

<sup>191</sup> Note that section 83.221, advocating or promoting the commission of a terrorism offence, is the one exception, though arguably it too will consider whether the advocated offence amounts to terrorist activity for the reasons mentioned above.

<sup>192</sup> See *Criminal Code*, section 83.01(1)(a), definition of “terrorist group”. An example is section 83.18 of the *Criminal Code*, which makes it a crime to participate in a “terrorist group”, which is then defined as a group which has as one of its purposes a terrorist activity.

<sup>193</sup> See section 83.01(b)(i)(A) of the *Criminal Code*, *supra* note 2.

<sup>194</sup> That being said, the factor has been applied in 6 cases, sometimes with little explanation. For example, in *Chand*, *supra* note 29 at para 74, the judge simply notes that evidence existed which showed that the offence was motivated by bias, prejudice or hate, but does not specifically say what evidence was being relied upon. The decision in *Ahmed ONSC*, *supra* note 34 at para 63 is similar, in that the factor is listed as one that must be considered and also present, but not explored in depth. The same can be said of *Ansari*, *supra* note 11 at para 7, and *Abdelhaleem*, *supra* note 27 at para 60, and *Ahmad*, *supra* note 39, at para 47. The decisions in *Chand*, *Abdelhaleem*, and *Ahmad* all use the same paragraph to refer to the two aggravating factors mandated by the *Criminal Code*. The factor was considered with more detail in *Namouh*, *supra* note 31 at para 74 case, where the judge referred to a specific portion of the expert report that described the offender as having a “hatred” for the West and apostates.

So, to summarize, to convict an accused of terrorism where the predicate is a “terrorist activity” (as opposed to the predicate being a terrorist group), the judge will have to consider the political, religious or ideological motive, which in turn will often overlap with hate or bias as a motivating factor. Even where the predicate for the offence is a “terrorist group”, the judge will still have to consider whether the group harboured ambitions to carry out a terrorist activity, which in turn will often require a consideration of whether that political or ideological motive was concomitant with a hateful or biased motive as well. Now, that hatred might not then be imputed to the offender – it might simply be that the terrorist group was hateful and that the offender, while wanting to help the group, was not motivated by hate. But the presence or absence of an accused’s hate or bias (on race, national or ethnic origin, language, colour, religion, etc.) will certainly be a consideration during trial that might be considered during sentencing, even if it is ultimately found that the accused was not motivated by hate or bias.

The table below offers a list of all offenders convicted to date of discrete terrorism offences and whether section 718.2(a)(v) or section 718.2(a)(i) was applied, either separately or in combination. Note that in a number of cases the application of these aggravating factors is unknown because the sentencing decisions are unavailable, and it is therefore impossible to know which aggravating and mitigating factors were applied.

<b>Name</b>	<b>Applied s. 718.2(a)(v)</b>	<b>Applied s.718.2(a)(i)</b>
<b>Momin Khawaja</b>	Yes <sup>195</sup>	No
<b>Shareef Abdelhaleem</b>	Yes <sup>196</sup>	Yes <sup>197</sup>
<b>Fahim Ahmad</b>	Yes <sup>198</sup>	Yes <sup>199</sup>
<b>Zakaria Amara</b>	Yes <sup>200</sup>	No
<b>Asad Ansari</b>	Yes <sup>201</sup>	Yes <sup>202</sup>

<sup>195</sup> *Khawaja SCC*, *supra* note 9 at para 29.

<sup>196</sup> *Abdelhaleem*, *supra* note 27 at para 60.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ahmad*, *supra* note 39 at para 47.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Amara*, *supra* note 38 at para 111.

<sup>201</sup> *Ansari*, *supra* note 11 at para 6.

<sup>202</sup> *Ibid.*

<b>Steven Vikash Chand</b>	Yes <sup>203</sup>	Yes <sup>204</sup>
<b>Mohammed Ali Dirie</b>	No	No
<b>Amin Mohamed Durrani</b>	Unknown <sup>205</sup>	Unknown
<b>Saad Gaya</b>	Yes <sup>206</sup>	No
<b>Jahmaal James</b>	Unknown <sup>207</sup>	Unknown
<b>Saad Khalid</b>	No	No
<b>Said Namouh</b>	Yes <sup>208</sup>	Yes <sup>209</sup>
<b>Mohamed Hassan Hersi</b>	No	No
<b>Misbahuddin Ahmed</b>	Yes <sup>210</sup>	Yes <sup>211</sup>
<b>Chibeb Esseghaier</b>	No	No
<b>Raed Jaser</b>	No	No
<b>Ashton Larmond</b>	No	No
<b>Carlos Larmond</b>	No	No
<b>Suliman Mohamed</b>	No	No
<b>Prapaharan Thambaithurai</b>	Yes <sup>212</sup>	No
<b>Ismael Habib</b>	Yes <sup>213</sup>	No
<b>Kevin Omar Mohammed</b>	Unknown <sup>214</sup>	Unknown
<b>Youth (LSJPA)</b>	Unknown <sup>215</sup>	Unknown
<b>Manitoba Youth</b>	Unknown <sup>216</sup>	Unknown
<b>Nishathan Yogakrishnan</b>	Yes <sup>217</sup>	No
<b>Hiva Mohammed Alizadeh</b>	Unknown <sup>218</sup>	Unknown

Interestingly, despite the mandatory language of “shall”, as the table shows, not all sentencing decisions for terrorism decisions have noted terrorism (or hate and bias) as an

<sup>203</sup> *Chand*, *supra* note 29 at para 75.

<sup>204</sup> *Ibid.*

<sup>205</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>206</sup> *Gaya ONSC*, *supra* note 122 at para 50.

<sup>207</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>208</sup> *Namouh*, *supra* note 31 at para 29.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ahmed ONSC*, *supra* note 34 at para 63.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Thambaithurai*, *supra* note 49 at para 9.

<sup>213</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>214</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>215</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>216</sup> It is unknown whether this was considered as the sentencing decision is not available.

<sup>217</sup> *NY*, *supra* note 11 at para 22.

<sup>218</sup> It is unknown whether this was considered as the sentencing decision is not available. Although we do have comments on sentence, *Alizadeh*, *supra* note 48, these comments provide no analysis.

aggravating factor in sentencing. This raises the question of why “terrorism” was not considered an aggravating factor in terrorism sentences when it is mandatory to do so. It would seem that we have a fairly serious legal error here. Either section 718.2(a)(v) is not always applied, which is a legal error because section 718.2 uses the mandatory word “shall” with respect to the aggravating factor; it is then impossible to imagine how there is not “evidence that the offence was a terrorism offence” for the purposes of sentencing when the sentencing is taking place because the person is being sentenced for a terrorism offence.<sup>219</sup> Or, section 718.2(a)(v) is always applied in terrorism cases, but half of the time sentencing judges have not seen fit to discuss or mention it as an aggravating factor, which makes it impossible to know *how* it was applied, but also poses a possible legal error, as it is hard to determine how the court meaningfully took it “into consideration” if they did not discuss it the reasons for sentence.

However, for our purposes, it is more important to see how the aggravating factors outlined in section 718.2, particularly 718.2(a)(i) and (v), have allowed the courts to further stack the seriousness of the offence upon the same seriousness of the offence for the purposes of balancing proportionality in the sentencing of terrorism. The approach taken in *R v Ansari*, another well-known Toronto 18 sentencing decision, provides a representative example.

Ansari was viewed as having played a serious role in the Toronto 18 plot. Ansari was in Fahim Ahmad’s group (the “camp plot” group) and attended the Washago winter training camp and assisted in editing some video shot there.<sup>220</sup> He was charged with participating in or contributing to the activities of a terrorist group contrary to section 83.18(1)(a) of the *Criminal Code*.<sup>221</sup> Ansari was convicted by a jury and sentenced to only one additional day of incarceration. (He had served, by the time of his conviction, an effective sentence of six years and five months.)

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<sup>219</sup> See, for example, *Sandouga*, *supra* note 192. Here, the the accused pled guilty to arson after throwing two Molotov cocktails at a synagogue in Edmonton, on appeal the court found that 718.2(a)(i) of the Criminal Code must be applied in that case because there was a “clear link between his enmity towards or prejudice against the Jewish people and his commission of the crime” (see para 16). The sentencing judge’s failure to apply that aggravating factor constituted an error in principle (at para 18).

<sup>220</sup> *Ansari*, *supra* note 11 at paras 9-10

<sup>221</sup> *Ibid*, at para 1.

For current purposes, what is interesting is the stated reasons for this sentence. In the Ontario Superior Court of Justice's *Reasons for Sentence*, Dawson J. wrote:

Section 718.2 provides that a sentence is to be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence and the offender. Certain factors are then specified, but the list is not a closed one. According to this provision evidence that an offence is a terrorist offence is to be considered an aggravating factor as is evidence that the offence was motivated by bias, prejudice or hate based on, amongst other things, national or ethnic origin or religion. These factors are present in this case...<sup>222</sup>

The result is that the offence of terrorism is an aggravating factor when considering offences of terrorism – a completely new circularity introduced to the 2001 ATA that applies only to sentencing of terrorism offences.

Further, Ansari was charged with 83.18(1)(a), which necessarily incorporates the definition of terrorist activity and the accompanying motive clause, requiring the act to be committed for a political, ideological or religious motive. So, it necessarily incorporates the subsequent aggravating factor mentioned by Dawson J. in *Ansari*: that being the motivation of bias, prejudice or hate against based on religion or national or ethnic origin.

In the end, we are left with a logical string as follows. Terrorist offences are given specific sentencing ranges based on the *general* seriousness of the offence, which again are always treated as among the most serious. Some of the most relevant mitigating factors, like youth, take on a diminished importance while the possibility of rehabilitation is seen through the lens of the dangerousness of terrorism and can become a reverse onus aggravating factor rather than a mitigating factor. Not only are the fundamental individual characteristics of the accused minimized, but they are done so in a context that requires those individual factors to be analyzed with respect, once again, to the seriousness of terrorism. They are qualified, in other words, because terrorism is so serious in general. Then, by virtue of 718.2(a)(v), terrorist offences are to be treated with greater seriousness since they are, by definition, terrorism offences. Next, by virtue of 718.2(a)(i), terrorism offences are to be treated with even greater seriousness because

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<sup>222</sup> *Ibid*, at para 7.

they involve hate, prejudice or bias. This factor necessarily applies when the offender is convicted of an offence involving the element of “terrorist activity.” Thus, the offender faces a lengthier sentence in light of the general seriousness of the offence and the operation of two aggravating factors. In the result, terrorist offences are aggravated if they are terrorist offences (section 718.2(a)(v)), which are again aggravated if they meet the definition of a terrorist offence (section 718.2(a)(i)).

The result is that the seriousness of offence is considered three times at least. The seriousness of the offence is considered first when the court pinpoints the seriousness of the offence – the left side of the ledger. It is then considered a second time when the aggravating factors – those being primarily terrorism and motivated by hate – are considered on the right side of the ledger. It is then considered a third time when the sentencing judge reviews the mitigating factors associated with an offender. Here, mitigating factors are framed against the seriousness of the offence in general. This framing creates a micro-proportionality analysis, where mitigating factors are weighed against the seriousness of the offence, resembling the general proportionality analysis that weighs an individual’s moral culpability against the seriousness of their offence. This focus on the seriousness of the offence cancels out the mitigating factor’s minimizing effect on an offender’s sentence. Youth, for instance, is downplayed and rehabilitation discounted in favour of deterrence and denunciation. The result is that the general seriousness of the offence, normally found only on the left side of the sentencing ledger, is considered, in aggravating succession (pun intended), three times over, at least.

Not surprisingly then we can harken back to the empirical analysis in Part I of this paper and see a series of results that now look all but inevitable: all terrorists get time in jail, while the majority of criminal offenders in Canada do not; youths are charged as adults and receive relatively lengthy custodial sentences; guilty pleas make a minimal difference in the ultimate punishment for terrorism even where this is not the case for other crimes; and sentences tend toward the judicially-mandated ceiling. In one case (*Esseghaier*), we have even seen the imposition of a sentencing floor – a result that looks surprisingly like the judicial imposition of a

mandatory minimum penalty for terrorism even as the courts move away from mandatory minimum penalties in other areas.<sup>223</sup>

### **Part 3: Framing Effects, Path Dependency, and Cognitive Biases in the Reasoning Process**

Thus far we have seen a unique approach to sentencing. This approach considers the gravity of terrorism in general at multiple stages of the sentencing analysis. This results in proportionality analyses that occur throughout the sentencing process. One occurs during the judicial evaluation of mitigating factors like age, rehabilitation, or a limited or non-existent criminal record. These traditional mitigating factors on the right-side of the sentencing ledger are analyzed not in relation to the individual but in relation to the gravity of terrorism as a crime. A second micro-proportionality analysis occurs once the sentencing judge turns to aggravating factors. Here, the seriousness of terrorism in general is weighed again because terrorism (section 718.2(a)(v)) and a hateful motive (section 718.2(a)(i)) are treated as mandatory aggravating factors. The sentencing process concludes with the final proportionality analysis taking place between the output from the micro-proportionality analyses on the right side of the sentencing ledger and, once again, the seriousness of the offence. The end result is an explicit commitment

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<sup>223</sup> See *supra* note 128 for cases that have shut down mandatory minimum penalties. See *Nur, supra* note 140 at para 4. See also *Bedford, supra* note 140 at paras 93 to 123 and *Carter, supra* note 140 at paras 83 to 92. See also *Lloyd, supra* note 140 at para 56, which held the one-year mandatory minimum for drug trafficking under s 5(2)(a)(i)(D) of the *Controlled Drugs and Substances Act* to be unconstitutional. See also Kent Roach et al, “Mandatory Minimum Sentencing Should Be Trudeau’s First Resolution” *The Globe and Mail* (2 January 2018) online: <<https://www.theglobeandmail.com/opinion/mandatory-minimum-sentencing-should-be-trudeaus-first-resolution/article37465763/>> (“Mandatory-minimum sentences are a bad idea. Parliament cannot possibly know all of the varieties of offences and offenders caught by them. They are blind to whether offenders live in abject poverty, have intellectual disabilities or mental-health issues, have experienced racism and abuse in the past or have children who rely on them. The mandatory-minimum sentence does not allow a judge to decide if incarceration is necessary to deter, rehabilitate or punish the particular offender”). See also Debra Parkes, “Mandatory minimum sentences for murder should be abolished,” *The Globe and Mail* (25 September 2018), online: <<https://www.theglobeandmail.com/opinion/article-mandatory-minimum-sentences-for-murder-should-be-abolished/>>.



to punishing all terrorism offences seriously with a continued, though reduced regard for the factors that brought the individual accused before the court.<sup>224</sup>

The problem in the first instance is not that terrorism is treated seriously or punished harshly; the legislature and judiciary are entitled to treat certain offences as more serious than other crimes, and few would argue against the proposition that terrorism, in general or not, is serious. Rather, the first problem here is that the judicial means adopted to achieve this punitive end have upended the fundamental principle of sentencing; the practice in terrorism cases bears little resemblance to its 'starting point' as articulated by the Supreme Court in *Khawaja*, that being the theoretical commitment to the fundamental principle. Proportionality is not being evaluated only as between the seriousness of the offence and the moral culpability of the individual. Rather than balancing the left-side of sentencing ledger, that being the seriousness of the offence, with the right side of the ledger, that being the factors relevant to the individual's moral culpability, the seriousness of the offence is inserted at each stage of the analysis to increasingly aggravate the sentence. The culmination is not a proportionality analysis as between the seriousness of the offence and the individual moral culpability of the defendant, as the fundamental principle of sentencing requires; rather, the result is a series of micro-proportionality analyses that balance all considerations on the right side of the sentencing ledger against the seriousness of the offence, before the final proportionality analysis takes place as between the output from the micro-proportionality analyses on the right side of the sentencing ledger and, once again, the seriousness of the offence. In this way, the seriousness of the terrorism offence is reinserted throughout the judicial analysis to increasingly aggravate the outcome.

But there is a second and more pernicious problem with the current approach to sentencing terrorism cases in Canada. That is, the judicial framing of terrorism to deemphasize the individual while repeatedly focusing on the *general* nature of terrorism introduces an

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<sup>224</sup> It is perhaps not surprising to find that similar trends have emerged in other jurisdictions as well. For a constructive analysis of sentencing terrorism in Australia that similarly finds a focus on the seriousness of the offence, deterrence and denunciation coupled with a diminution of rehabilitation as a mitigating factor, see Nicola McGarrity, "Let the Punishment Meet the Offence: Determining Sentences for Australian Terrorists" (2013) 2:1 Int J Crime & Justice 1.

exacerbated risk of cognitive biases in judicial decision-making. Even when a judge sincerely maintains a commitment to sentencing the individual at hand, these biases can result in a subconscious tendency to sentence based in part on a fear of terrorism and its attendant risks in general, and to overvalue the risks associated with any particular terrorist plot as well as the likelihood that it will come to pass. These cognitive biases can subvert the sentencing process both because they introduce implicit assumptions into the judgement process that are never explicitly reckoned with, and because they elide the extent to which sentencing decisions are based on implicit assumptions about terrorism writ large as opposed to explicit reasoning and judgement of the individual before the court.

To demonstrate how Canada's approach to sentencing terrorism offences is uniquely prone to introducing these cognitive biases in a way that the usual judicial approach to the fundamental principle of sentencing serves to help avoid, consider the substantial literature in psychology and economics on behavioural decision-making demonstrating that people often employ "heuristics" (rules of thumb) when making decisions. As first identified by Amos Tversky and Daniel Kahneman,<sup>225</sup> these unconscious heuristics facilitate decision making and reduce the cognitive load of various decisions by focusing an individual on the most at-hand information. These heuristics stand in contrast to other models of decision-making (notably the rational decision maker model used in economics) by recognizing that individuals may not consider all information relating to the decisions. Rather, individuals frequently use only readily available information, make judgements based on relative (rather than absolute) changes, and think in terms of categories (rather than considering the specifics of a given decision). While these heuristics facilitate decision-making, the challenge is that their use can lead to systematic biases of intuition relative to a rational decision-making model.<sup>226</sup>

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<sup>225</sup> See Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases," in Daniel Kahneman & Amos Tversky, eds, *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982)[Tversky & Kahneman, "Judgement Under Uncertainty"]. For a readable summation of (some of) their work, see Daniel Kahneman, *Thinking, Fast and Slow* (Toronto: Doubleday Canada, 2011).

<sup>226</sup> Tversky & Kahneman, "Judgment Under Uncertainty," *ibid.*

Of particular importance here is the presence of “framing effects” in decisions making, in which people react differently to identical choices whether those choices are framed in the positive or negative, as a gain or a loss. In terms of heuristic decision-making, these framing effects arise as people “code” and value outcomes not by their absolute value, but rather by their value relative to a reference point or the status quo.<sup>227</sup> That is, individuals make decisions more easily and faster when they think in terms of relative changes than absolute valuations. As an example, consider the now classic experiment from Tversky and Kahneman (1981): Participants were asked to choose between two treatments for 600 people affected by a deadly disease. In the positive framing treatment, participants were told that treatment A would save 200 lives, whereas treatment B had a 33% of saving 600 lives but a 66% chance of saving no one. In the negative framing treatment, participants were told that treatment A would result in 400 deaths while treatment B had a 33% chance of no one dying and a 66% chance that everyone would die. While these two treatments are numerically equivalent (treatment A saves 200 people and treatment B has a 33% of saving 600 and a 66% chance of saving no one), participants responded differently to the options: in the positive frame 72% of participants chose treatment A as their most preferred treatment, a preference that dropped to 22% of participants in the negative frame.<sup>228</sup> The key insight here is that individuals are evaluating the options relative to a reference point (ostensibly, zero deaths). The positive frame (focusing on saving lives) leads participants to display risk aversion in their preferences. However, because a loss looms larger than an equal sized gain in individuals’ psyche, the negative frame (focusing on deaths) results in risk taking behaviour.<sup>229</sup>

This type of coding (valuing outcomes in terms of gains or losses relative to a point of reference) has been replicated in many studies and is an accepted part of psychological and economic research.<sup>230</sup> Of particular importance in this research has been the insight that

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<sup>227</sup> See Kahneman, Knetsch, & Thaler, “The Endowment Effect, Loss Aversion, and the Status Quo Bias,” (1991) 5:1 J Economic Perspectives 193.

<sup>228</sup> Amos Tversky & Daniel Kahneman, “The Framing of Decisions and the Psychology of Choice,” (1981) 211:4481 Science 453 at 453.

<sup>229</sup> *Ibid* at 453.

<sup>230</sup> See Nicholas C Barberis, “Thirty Years of Prospect Theory in Economics,” (2013) 27:1 J Economic Perspectives 173.

individuals: (i) display a smaller increase in well-being or utility from a specified gain (e.g., money in experiments) than the decrease they experience from an equal loss of resources (a phenomena referred to as loss aversion); and, (ii) display risk averse behaviour when facing gains and risk taking behaviour when facing losses.<sup>231</sup>

Thus, consider the role of framing effects in the context of sentencing for terrorism offenses. When one considers a terrorism offence, particularly one focused on inchoate crimes where terrorism is treated as a singular act, which is the vast majority of Canadian cases to date,<sup>232</sup> the whole process is “framed” by a focus that engages these cognitive biases. These serious, generalized, inchoate crimes are viewed as potential losses of life and property (how many people would have died in the attack or from the actions of the accused). These are coded as losses that have larger negative effects than would a corresponding gain. As a result, this framing points the judge toward treating the offence as particularly serious (as losses bear large). Given that such a loss receives greater cognitive and judgmental weight, there is a natural tendency to equate this side of the sentencing equation – the seriousness of the offence – with a correspondingly large penalty. By returning once again to the gravity of terrorism in general on the right side of the proportionality equation, and then again when balancing the seriousness of the offence with mitigating factors, there is likewise a tendency to associate and equate the left side of the sentencing equation with a correspondingly large penalty, one that might be less serious if only it were framed differently.

The framing effect is then exacerbated by other important heuristics as they relate to terrorism because it is, or certainly can be, a very serious crime. Consider for example the “availability heuristic,” where an individual uses immediate examples that come to mind when evaluating a given topic. As an example, consider which profession is more dangerous: police officer or timber logger? Because people can readily think of examples in which police officers

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<sup>231</sup> See Daniel Kahneman & Amos Tversky, “Prospect Theory: An Analysis of Decision Under Risk,” (1979) 47:2 *Econometrica* 263.

<sup>232</sup> For more on the focus on inchoate crimes in terrorism offences, see Nesbitt, “Empirical Paper, *supra* note 1 at 21 – 28. As discussed there, the *Criminal Code*’s terrorism offences target preparatory activities and not just acts of violence, which means the vast majority of terrorism prosecutions to date have concerned activity short of actual violence.

are hurt, most individuals assume that the profession of police officer is more dangerous, even though statistics show that logging is more dangerous.<sup>233</sup>

For a significant proportion of the population, the most available example or recollection of terrorism is the 2001 September 11 attacks (9/11 attacks) in the United States. The severity and long-lasting consequences of this event make the 9/11 attacks easy to recall from memory, and thereby this event is often the first people consider when asked about terrorism.<sup>234</sup> Moreover, the salience of this event, or a similar event, leads individuals to overestimate the likelihood of fatalities from terrorism offences – particularly when those offences are framed generally, which allows the judge to eschew the factual matrix before her in favour of most available recollection of terrorism.<sup>235</sup> In terms of sentencing, attaching the mere title of terrorism to the charge is likely to bring up recollections (i.e. images, vivid memories) that may be unrelated to the offence over which a judge is presiding.<sup>236</sup> This leads to a focus on the general terrorism offence, rather than the particulars about the case at hand, a tendency that has been repeated in sentencing decisions in Canada to date. Thus, from the outset the frame of the 9/11 attacks, or other serious attacks that might come quickly to the mind of a judge, casts a pall on all forms of terrorism offences, particularly where the judges consider terrorism as a singular, generalized offence in the first instance, as they seem to be doing thus far in Canada. The result is an implicit bias, an association in this example between the acts that brought the individual on trial before the courts and the 9/11 or similar attacks. Of course, the more that a sentencing decision lingers on the general and minimizes the case at hand, the greater the role that the implicit role of more serious terrorist attacks will play. Rather than countering this implicit bias

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<sup>233</sup> See US Bureau of Labor Statistics, News Release, “Current Population Survey, Census of Fatal Occupational Injuries (19 December 2017), online: US Department of Labor <<https://www.bls.gov/news.release/pdf/cfoi.pdf>>.

<sup>234</sup> See Amos Tversky & Daniel Kahneman, “Availability: A Heuristic for Judging Frequency and Probability,” (1973) 5:2 *Cognitive Psychology* 207. More recent research has focused on the role of the availability heuristic specific to perceptions of terrorist risk: see Denovan et al, “Perceptions of Risk and Terrorism Related Behavior Change,” (2017) 8:1721 *Frontiers of Psychology*; and Kip Viscusi & Richard Zeckhauser, “Recollection Bias and the Combat of Terrorism,” (2005) 34:1 *J Leg Stud* 27.

<sup>235</sup> See Qingxuan, Yunru & Anab, “Heuristics, Uncertainty and Terrorism: Estimations of the Likelihood of Fatalities Due to Terrorist Events,” (2017) London School of Economics Working Paper.

<sup>236</sup> Indeed, even without introducing the unique structure to the sentencing of terrorism offences, the availability heuristic may be a particular challenge in these sentencing decisions because the severity of easily recalled terrorist events are often extreme and may therefore skew any proportionality analysis the judge considers.

by returning to the individual and the plot at hand at every stage of the judicial analysis, to date Canadian decisions have tended to do quite the opposite, which serves to exacerbate the risk of attendant bias rather than help to minimize it.

Moreover, Kahneman and Tversky famously posited that, “[p]eople tend to assess the relative importance of issues by the ease with which they are retrieved from memory – and this is largely determined by the extent of coverage in the media”.<sup>237</sup> In other words, by reporting more frequently on certain types of events (e.g., the dangers facing police officers, terrorist events) the media facilitates, and some would argue prime, the availability heuristic towards more serious types of events. To put this into context, terrorism acts or attempts, being extreme, are regularly covered in dramatic detail by the media. But in 2017, for example, there were more deaths *each day* from intoxicated driving than there was all year from terrorist events.<sup>238</sup> Intoxicated driving is statistically more serious, more prevalent, and much more dangerous to the average Canadian than current terrorist threats. Yet, while Public Safety Canada’s newly minted *Centre for Community Engagement and Prevention of Violence*, as well as its *Community Resilience Fund*,<sup>239</sup> both focus on deradicalization and the terrorist threat in Canada, no such operations exist for the vast majority of other more prevalent – and statistically more dangerous – crimes. This is not to diminish the importance of countering terrorism or the threat that it poses. Rather, it is to posit that terrorism plays an exaggerated role in our perception of threats to public safety in Canada even before an accused terrorist is brought before a court of law.

The fundamental principle of sentencing can actually serve to reintroduce the individual and his particular crime into the equation, thereby theoretically causing the sentencing judge to linger on new set of facts before her and move away from the most easily recalled and seemingly important event. In this way, the fundamental principle of sentencing can be seen to build in a bulwark against at least some implicit bias. But as we have seen, the judicial approach to

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<sup>237</sup> Kahneman, *Thinking, Fast and Slow*, *supra* note 225 at page 8.

<sup>238</sup> MADD states that 4 people are killed in Canada each day from intoxicated driving. See MADD, “Statistics” (2018), online: <[madd.ca/pages/impaired-driving/overview/statistics/](http://madd.ca/pages/impaired-driving/overview/statistics/)>. Six people were killed in Alexandre Bissonnette’s attack in Québec mosque, although Bissonnette was only charged with first degree murder. Aside from Bissonnette’s attack, no one else in Canada died in an attack bearing the hallmarks of terrorism.

<sup>239</sup> For an overview of these programs see, Public Safety Canada, online: <https://www.publicsafety.gc.ca/cnt/bt/cc/index-en.aspx>.

sentencing terrorism has served thus far in Canada to reintroduce the seriousness of the (generalized) offence at each stage of the sentencing analysis in terrorism cases, including as a balancing consideration for the individual mitigating factors in any given case. In the result, the approach to sentencing terrorism serves to further dislocate the individual from the cognitive analysis of culpability in a way that the fundamental principle of sentencing might actually protect against under ordinary circumstances. It goes without saying that the Canadian legal system should be looking for unique ways of minimizing the availability heuristic rather than implicitly exacerbating its effect as might be the case in terrorism sentencing.

A further heuristic that may affect decision making in light of terrorism offences comes about through the ways in which individuals view social interactions and events through the lens of their personal or social identities.<sup>240</sup> The acts of terrorism in recent memory are laced with religion, ideology, and social structures that naturally cause individuals to think in terms of in-groups and out-groups. Indeed, to prove a “terrorist activity”, s.83.01(1)(b)(i)(A) of the *Criminal Code* obligates prosecutors to prove the “motive requirement”, which demands that: “an act or omission, in or outside Canada, [is] committed in whole or in part for a political, religious or ideological purpose, objective or cause”.<sup>241</sup> Moreover, section 83.05 of the *Criminal Code* gives discretion to the Governor in Council,

by regulation [to] establish a list on which [he or she] may place any entity if, on the recommendation on the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or (b) the entity is knowingly acting on behalf of, at the discretion of or in association with an entity referred to in paragraph (a).<sup>242</sup>

Social identity theory posits that, among other things, individuals will display favoritism towards members of their in-group relative to members of other groups (out-groups). Recent research has demonstrated that framing a decision or outcome in terms of social identities (e.g.,

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<sup>240</sup> See Reicher, Spears, & Haslam, “The Social Identity Approach to Social Psychology,” in Chandra Mohanty & Margaret Wetherell, eds, *SAGE Handbook of Identities* (London: SAGE Publishing).

<sup>241</sup> *Criminal Code*, *supra* note 2, s 83.01(1)(b)(i)(A).

<sup>242</sup> *Ibid*, s 83.05.

the relative performance of men versus women, the relative outcomes accruing to native and foreign-language speakers) can give rise to heuristics wherein individuals of the in-group are treated more generously and out-group members are treated more harshly.<sup>243</sup>

As terrorism offences are frequently cast in social identity terms by virtue of the very definition of terrorism (e.g., the term “radical Islamic terrorism”, the use of national identity to motivate legislative and judicial reforms of terrorism laws), this serves as another framing bias that leads individuals to view those accused of terrorism offences as members of an out-group, elevating the accused’s social group and divorcing the individual specific characteristics in the sentencing equation. In terms of sentencing, it may therefore be natural (and unconscious) for a judge to think in terms of the social groups related to the offence before her. In sentencing an inchoate terrorist offence on domestic soil, a judge may view the accused as a member of an out-group. Thus, a severe sentence may arise as a response that benefits her in-group and punishes the out-group. The challenge here is again that the underlying psychology of sentencing minimizes the individual characteristics and mitigating circumstances of the accused. Unfortunately, this heuristic may have, in the context of terrorism trials, a disproportionate effect on minority groups or vulnerable populations that might otherwise already be viewed as “out-groups”.

This availability heuristic is frequently exacerbated in the context of terrorism by what is called “dread risk”,<sup>244</sup> which is defined in part as “unfamiliar” and “often catastrophic”<sup>245</sup> events which, by virtue of these characteristics, play an outsized role in the human imagination (and risk

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<sup>243</sup> See Dominic Abrams and Michael Hogg, “Language Attitudes, Frames of Reference, and Social Identity,” (1987) 6:3 *J Language & Social Psychology* 201; Blanton, Christie & Dye, “Social Identity versus Reference Frame Comparisons,” (2002) 38:3 *J Experimental Social Psychology* 253; Antonio Filippin & Francesco Guala, “Group Identity as a Social Heuristic,” (2016) University of Milan Working Paper.

<sup>244</sup> See Paul Slovic, “What’s fear got to do with it? It’s affect we need to worry about.” (2004) 69:971 *Missouri LJ* at 985.

<sup>245</sup> Paul Slovic, “Perception of Risk” (1987) in Paul Slovic, ed, *The Perception of Risk* (London: Earthscan Publications, 2000) at 221–222.



perception).<sup>246</sup> Terrorist attacks are designed to play on this dread risk – indeed, terrorism as a tactic depends on it.

Theoretically, these cognitive heuristics, and their accompanying biases, are a greater risk in terrorism cases than perhaps any other crime. As *Khawaja* noted, there is thought to be something unique about terrorism; or as the judge said in *Khalid*, it is surely thought of like no other crime – a proposition that lightly holds weight outside the formal legal system as well. Taken together, this means that the mere application of the term “terrorism” to a crime will amplify the risk of biases that might otherwise be present in more typical crimes and sentencing decisions. For example, the above framing effects can cause the focus of the sentencing judge to linger (arguably at least three times over) on the general crime of terrorism before considering individual factors relevant to a proportionality analysis. As the judge lingers repeatedly on the unique nature of terrorism as a crime, there is a human tendency to focus on dramatic and easily retrievable memories, activating the availability heuristic and placing undue importance on critical and exciting issues that provide drama for the memory<sup>247</sup> -- all at the expense of the individual. So when the mind wanders to the general crime of terrorism, individual moral factors (e.g., age and other factors relating to culpability) are necessarily pushed to the background while salient memories that tend to be the most dramatic (e.g., the events of 9/11) are moved to the foreground.<sup>248</sup> Overall, this removes attentional focus from the specifics of the case at hand to a more general context of punishing and deterring terrorism while protecting national interests.

This cognitive behavioural theory of terrorism sentencing decisions suggests that sentences will be longer relative to other crimes, terrorism will tend to be treated as unique and generalized, the individual will likely be (implicitly) minimized in the process while the general threat is elevated, and so on. While we cannot prove the role that cognitive biases have had on judges engaged in terrorism sentencing to date, we are able to say that a review of all sentences in Canadian terrorism cases to date has confirmed that the expected outcome, that being a

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<sup>246</sup> For a brief, but very good discussion, of terrorism and ‘dread risk’ as well as the ‘availability bias’, see Jennifer Chandler, “Privacy versus National Security: Clarifying the Trade-off” in Kerr, Steeves, & Lucock, eds, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford: Oxford University Press, 2009).

<sup>247</sup> Kahneman, *Thinking, Fast and Slow*, *supra* note 225 at 8-9.

<sup>248</sup> Kahneman, *Thinking, Fast and Slow*, *ibid*.

tendency to move towards generalizations and away from the individual, thereby resulting in long sentences and relatively harsh punishments, is indeed bearing out in practice.

All this being said, there are myriad reasons to trust in judges to overcome these intuitive tendencies. First, judges are skilled at their jobs and are trained to be objective in the face of legal proceedings. Second, in the words of Kahneman, in issuing sentencing judgements, judges are trying to think “slowly” rather than intuitively. They are deliberating towards an answer rather than relying on reflexive intuition, at least in theory.

However, there is evidence that even physicians, statisticians, policy-makers, and trial judges in the United States are prone to the use of heuristics and therefore display the biases they engender.<sup>249</sup> With respect to sentencing decisions, there are several reasons why this may arise. First, the ‘art’ of sentencing involves a complex amalgam of considerations (aggravating factors) and counter-considerations (mitigating factors), parceled together to measure both the moral blameworthiness of an individual with the seriousness of the crime. When it comes to sentencing, judges are given a wide berth of discretion so long as that discretion is exercised within the framework of sentencing. While this may be appropriate given the responsibilities and status awarded to judges, the fact that judges are rarely given strict parameters for their sentencing decisions makes it more likely for these types of biases to be manifest. In the case of sentencing terrorism offences to date, the thrice-over consideration of terrorism makes sentencing more about the (writ large) seriousness of the offence and less about the proportionality framework built into the fundamental principle. In this way, the frame of reference in terrorism sentences drives the decision in ways not seen in other crimes. Second, though judges are thinking – or at the very least writing – slowly before issuing a terrorism-related sentence, that does not mean that intuition plays no role. Rather, the wide berth awarded to judges in their decisions may make the recommendations and constraints around sentencing decisions vague, creating more room for intuition, personal judgements, and hence an emphasis

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<sup>249</sup> See, for example, Scott Plous, *The Psychology of Judgement and Decision Making* (New York: McGraw-Hill, 1993) and Musseiler, English, & Strack, “Anchoring Effects,” in Rüdiger Pohl, ed, *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgement and Memory* (New York: Taylor & Francis, 2004) and Julian Marewski & Gerd Gigerenzer, “Heuristic Decision Making in Medicine,” (2012) 14:1 *Dialogues in Clinical Neuroscience* 77.

on heuristics. Finally, given that judges are appointed, in general, later in their careers, they may actually be more prone to patterned and habitual heuristics than are younger people.<sup>250</sup>

To treat judges as immune from such persistent biases is no better than to hold onto the “rational man” theory long assumed in classical economics.<sup>251</sup> Moreover, there is anecdotal evidence in the sentencing judgements to date to suggest that precisely this sort of generalized, non-offender specific approach to the seriousness of the idea of terrorism – rather than the particular crime in the particular context as perpetrated by the particular accused – is playing a very prominent role in decision-making. For example, in each of the *Ansari*, *Chand*, *Abdelhaleem*, *Ahmed* and *Namouh* cases, the triple-dip on the seriousness of terrorism is foregrounded in the reasons for judgement. The seriousness of the crime, the aggravating factor that it is a terrorism crime, and the aggravating factor that the definition of terrorism was met, are all considered before the reasons for sentence make it to the individual factors that might mitigate or otherwise aggravate the sentence, such as age of the accused.<sup>252</sup>

In the end, it is perhaps not surprising that one can detect a certain amount of sentencing by form in terrorism decisions to date: they all have the same structures in terms of how the sentences are considered; all order the priority of the considerations in approximately the same manner, starting with the serious of the offence and aggravating factors related to the seriousness of the offence; and indeed all use almost precisely the same language, in some cases cut-and-pasted across decisions. The risk in the current approach to terrorism sentencing in Canada is of losing the individual and unintentionally increasing the sentence through a series of logical steps that serve to import cognitive biases, rather than limit them. Minority groups and vulnerable populations (“out-groups”) are likely the most negatively affected in such a scenario

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<sup>250</sup> Ellen Peters et al, "The Bearable Lightness of Aging: Judgment and Decision Processes in Older Adults" in Paul C Stern & Laura L Carstensen, eds, *The Aging Mind: Opportunities in Cognitive Research* (Washington, DC: National Academy Press, 2000).

<sup>251</sup> As Kahneman explained in *Thinking, Fast and Slow*, “Social scientists in the 1970s broadly accepted two ideas about human nature. First, people are generally rational, and their thinking is normally sound. Second, emotions such as fear, affection, and hatred explain most of the occasions on which people depart from rationality. Our article [see Tversky & Kahneman, “Availability” *supra* note 236] challenged both those assumptions.” See Kahneman, *Thinking, Fast and Slow*, *supra* note 225 at 8.

<sup>252</sup> See *Chand*, *supra* note 29, at paras 73-93. See *Ahmad*, *supra* note 39 at paras 46-72. See *Ahmed ONSC*, *supra* note 34 at paras 77-86. See *Abdelhaleem*, *supra* note 27 at paras 60-83. See *Namouh*, *supra* note 31 at paras 72- 98.

and unfortunately, they are also the most vulnerable to police oversight and then prosecution in the first place. In the end, it should come as no surprise that terrorism sentences have been uniformly long. That may continue regardless of the judicial approach to sentencing. But right now, there is too great a risk that the Canadian approach to sentencing terrorists is indeed different from other crimes and that it is framed in a way that almost perfectly draws on implicit biases, rather than explicit judicial decisions that place the individual and his context front and centre.

## Conclusions

The *Anti-Terrorism Act (2001)* introduced a host of new and complex terrorism offences to Canada's *Criminal Code* and, to a lesser extent, the associated sentencing regime. Since then, sentencing decisions at the trial and appeal levels have recognized that terrorism offences are different from other criminal offences. The spectre of terrorism raises fear, anger and awareness unlike any other crime and in a manner that far outweighs – thankfully for now – the actual day-to-day risk. We have seen that both the courts and the legislators – through the *Criminal Code* provisions 83.26 and 718.2(a)(v) – have deemed terrorism offences worthy of relatively harsh punishment. Yet the idea both in the *Criminal Code* and as seen in judicial decisions is that the fundamental principle of sentencing holds sway for all crimes, even if judges are allowed a great deal of discretion in measuring the sentencing equation and determining what is appropriate in a particular case.

Yet this paper has shown that sentencing is not merely treated differently in application but in principle. Under so-called 'normal' sentencing principles, proportionality between the seriousness of the offence and the individual culpability remains fundamental. The proportionality principle does not mean that full equality must be achieved as between the gravity of the crime and the moral blameworthiness of the accused, nor that either side of the proportionality equation sets an upper-limit on the sentence, as the Supreme Court in *Lacasse* made clear. Instead, the idea is to consider the gravity of the offence and the moral culpability of the accused, engage with how they interrelate, and fashion a sentence that strikes a proportional

balance between the two. Judges are given a broad discretion to properly fashion that balance, but they are restricted by the requirement that they maintain a fidelity to the principles of sentencing as articulated in the *Criminal Code* and elaborated by the courts.

However, the approach taken by the courts to sentencing terrorism has skewed that balancing act whereby the gravity of the offence is given primary, secondary and tertiary importance, and the moral culpability of the accused is seen first and foremost through the refracting lens of the seriousness of the offence. Rather than toggling back-and-forth between the two sides of the equation, the judicial toggling is happening one way – with the weight and thus length of the sentence skewing towards the seriousness of the offence. This is a judicial approach to sentencing terrorism offences that struggles to reconcile its purported commitment to the fundamental principle of sentencing: in determining the moral culpability of the individual it loses sight of the individual in order to repeatedly prioritize the heinous nature of terrorism in general. In the end, the sentencing of terrorism offences in Canada, particularly at the trial court and court of appeal levels, do not reflect the contextual instantiation of the fundamental principle of proportionality. Rather, the decisions to date offer the beginning of a different principle altogether, one that diminishes the individual and amplifies the threat of terrorism. In form and substance, the sentencing decisions have tended to foreground repeatedly, at each stage of the sentencing analysis, the seriousness of the offence while pushing individual factors related to the accused, such as youth, or the possibility of rehabilitation, to the background in terms of mitigating importance.

In the end, it is no surprise that we have seen, at least by the sentences ranges evaluated at the start of this paper, sentences that tend towards the higher end of what is possible; long sentences for youths and youthful offenders; and even relative parity between the sentences for those who have plead guilty and those that did not. In the context of terrorism offences, we have seen a judicially-imposed mandatory minimum taking shape, despite a general judicial hesitancy towards mandatory minimum sentences.

The process as set-up by the *Criminal Code's* aggravating factors and elaborated by the courts has also led to something else that appears entirely unique, and uniquely problematic, in

terms of sentencing in terrorism cases: the process is framed so as to depersonalize the defendant and, as mentioned, foreground terrorism as a concept. The resultant framing effect risks skewing judgements towards fear-based and risk-averse sentencing decision-making. It leaves room for cognitive biases to seep in, biases that in the context of terrorism may be particularly acute and will certainly reinforce the idea that terrorism sentences should be both depersonalized and harsh. It is no surprise again that we see cutting-and-pasting as between decisions, as was seen in the *Gaya* and *Khalid* judgements: the form is reproduced from one decision to the next and the process is generalizable even as between different actors charged with different (terrorism) offences. Terrorism is not an ordinary crime, as Canadian courts have repeatedly asserted, even if the Supreme Court in *Khawaja* said otherwise.

It may be that courts and/or legislators prefer the current approach to sentencing in terrorism. The problem is that they have failed to articulate, in both cases, that a truly unique approach to measuring the appropriateness of sentences is indeed their preference. Rather, they have implicitly framed the problem to lead to a particular outcome: sentences at the top of their ranges. Moreover, they have used the framework in a way that offers little resemblance to the normal fundamental principle of sentencing while maintaining a stated fidelity to that very principle. The legislature can have harsh sentences for terrorism, as can courts, but that preferred outcome should be stated explicitly and rely on clear principles rather than a frame and form that skews the principles upon which judgements are said to rely. If Parliament wants harsher sentences due to the seriousness of the crime, there are legislative methods for accomplishing this while also ensuring that sentences are duly and fairly harsh for the worst offenders and lighter for those offenders with the right mitigating circumstances. Put another way, it is better to be explicit and extend the maximum penalties, while also adjusting the process to allow for the possibility of more lenient sentences for youthful, first time offenders with a meaningful prospect of rehabilitation. Relying on implicit cognitive biases to get us to those long custodial terms is not only disproportionate, it is also fundamentally unjust.

Terrorism is already a crime that is likely to provoke fear and overreaction; implicit biases should be front of mind under even the best of circumstances when terrorism is involved. In designing the framework for the prosecution and sentencing of terrorism offences, the

legislature and the judiciary should seek to counterbalance these biases, not inflame them. This aim should inform the judiciary's approach to one aspect of the sentencing framework: the application of section 718.2(a)(v). An approach to terrorism sentencing that tried to counter-act cognitive biases would bar the application of section 718.2(a)(v) in terrorism cases. Such an approach to terrorism sentencing would also lead to a more robust application of the fundamental principle, one which gave full credit to an individual's particular circumstances. This result is not only desirable because it would lead to fairer sentences. It is also necessary to bring terrorism sentencing in line with the Supreme Court's holding *Khawaja*, which made clear that the fundamental principle fully applies in terrorism sentencing.<sup>253</sup> To give this ruling effect, judges must first recognize and then act to counter the threat of cognitive biases that are acutely at play in the sentencing of terrorism offences in Canada.

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<sup>253</sup> *Khawaja SCC*, *supra* note 9 at para 115.