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## The Problem of Official Discretion in Anti-Terrorism Law: Comment on Khawajah

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**The Problem of Official Discretion in Anti-Terrorism Law:**  
**a comment on R. v. KHAWAJA**

By W. Wesley Pue & Robert Russo<sup>1</sup>

Canada's *Anti-Terrorism Act (ATA)* was passed with great haste in the immediate wake of the notorious September 11 attacks on the United States. The Act made extensive amendments to Canada's Criminal Code in order to curtail some forms of terrorist activity.<sup>2</sup> Its form and substance are complicated considerably by its global reach and by its efforts to criminalize terrorist support networks as well as terrorists themselves.

Moreover, not all acts of violence or disruption, even within Canada, amount to "terrorism." One distinguishing feature is that, in order to qualify as "terrorist activity", specified acts or omissions must "in whole or in part" be aimed at furthering "a political, religious or ideological purpose, objective or cause."<sup>3</sup> The legislation's authors emphasized their desire to target only "terrorists, and not minorities or religious groups" and the Act contains an express exclusion from the realm of "terrorist activity" of "the expression of political, religious or ideological ideas that are not intended to cause the various forms of harm set out in the definition."<sup>4</sup>

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<sup>2</sup> No country has entirely disavowed fomenting actions that would otherwise be deemed "terrorist" when directed against its enemies. Political rhetoric obscures this, but this simple fact explains much of the complexity in most anti-terrorism codes.

<sup>3</sup> *Anti-Terrorism Act* Section 83.01(1)(b)(i)(A). ("ATA")

<sup>4</sup> Department of Justice, online: <[http://www.justice.gc.ca/en/anti\\_terr/context.html](http://www.justice.gc.ca/en/anti_terr/context.html)>

The preponderance of independent expert opinion views the Act's wording as dangerously vague, overly-broad, inviting racial and religious screening by state authorities.<sup>5</sup> Such issues came before the courts for the first time by way of preliminary motion in criminal proceedings. The adage that hard facts make bad law is called to mind by the case as Mr. Mohammad Momin Khawaja stands accused of truly heinous crimes. The allegations against him are such as to render him an unlikely candidate for judicial sympathy. In *R v. Khawaja*<sup>6</sup> Mr. Justice Rutherford had to determine whether the ATA's provisions dealing with the financing, participating, facilitating, instructing and harbouring of terrorism or terrorist activities were unconstitutional on account of over-breadth or vagueness. Widely perceived "as a strong law-and-order judge who's tough on crime," Mr. Justice Rutherford surprised at least some observers<sup>7</sup> when he concluded that Canada's legislated definition of "terrorist activity" was unconstitutional to the extent that it required "proof that a person was motivated by ideological, religious or political purpose in the activity for which they've been charged."<sup>8</sup>

Mr. Justice Rutherford stressed his unease with a "procedure whereby a single, appointed judge of a seriously under-resourced trial court is asked to review and declare provisions of federal legislation recently enacted to deal with a most pressing problem to be unconstitutional on the basis only of written opinions without a specific factual foundation or expert evidence on which to base such a finding."<sup>9</sup> Prudent judges hesitate to reach too far and Mr. Justice Rutherford's ruling is, unsurprisingly, notable

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<sup>5</sup> In addition to the sources cited in the Khawaja ruling, see, for example: Mark Burgess, "Terrorism: The Problem of Definition" (August 1, 2003), online: Center for Defense Information [http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1564&from\\_page=../program/document.cfm](http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1564&from_page=../program/document.cfm); W. Wesley Pue, "War on Terror: Constitutional Governance in a State of Permanent Warfare" (2002 Laskin Lecture in Public Law, Osgoode Hall Law School), (2003) 41 *Osgoode Hall Law Journal* (Special Issue on *Civil Disobedience, Civil Liberties, and Civil Resistance*, edited by Harry Glasbeek and Judy Fudge), 267-292.

<sup>6</sup> *R. v. Khawaja* 2006 WL 3031774 (Ont. S.C.J.) ("*Khawaja*")

<sup>7</sup> Sean McKibbin, "Some Strange Cases in Ottawa's Courts This Year" (29 December 2006) *Ottawa Sun*, online: <<http://cnews.canoe.ca/CNEWS/WeirdNews/2006/12/29/3078907-sun.html>>

<sup>8</sup> Katerina Ossenova, "Canada Judge Rules Terror Definition In Anti-Terror Law Unconstitutional" (24 October 2006), online: Jurist <http://jurist.law.pitt.edu/paperchase/2006/10/canada-judge-rules-terror-definition.php> So far so good. The spokesperson's further observation that "[e]ssentially, this ruling means there is no definition of terrorism," verges on the hysterical, however.

<sup>9</sup> *Khawaja* at para 5.

for its caution and, indeed, conservatism. Though “striking down” a key component of Parliament’s definition of terrorist activity is high drama of sorts, the “main story” lies elsewhere. The ruling is more notable for the deference shown to Parliament than for its boldness in seeking to ensure Parliament’s respect for the rule of law. With the single exception of the motive clause, the constitutionality of the Anti-Terrorism Act was affirmed. Significantly, *only* that portion of the Act setting out a requirement for ideological, religious or political motivations (s. 83.01) was deemed unconstitutional.<sup>10</sup>

Momin Khawaja, an Ottawa software designer in his mid-20s at the relevant time, was charged under sections 83.18 (participation in terrorist activity) and 83.19 (facilitating terrorist activity) of the Criminal Code of Canada. The prosecution commenced under a cloud of secrecy. The RCMP revealed only that Mr. Khawaja was arrested in March 2004 under *Project Awaken*, an operation involving coordination with the Ottawa Police Service<sup>11</sup> and that the ATA’s preventive arrest provisions had not been used.<sup>12</sup> A ban was imposed on “publication of all but the most basic facts related to Momin Khawaja’s arrest and continued imprisonment,”<sup>13</sup> extending even to information and arguments presented during court proceedings. Though it was acknowledged that the matter was related to alleged “terrorist activity” in London, England,<sup>14</sup> no detailed information was divulged within Canada. The RCMP assured Ottawa’s Muslim Community that the force “has a zero tolerance policy towards racial profiling and racially biased policing...The RCMP does not target individuals or groups based on their racial, cultural or religious backgrounds.”<sup>15</sup>

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<sup>10</sup> Ibid. at para. 9. The specific section is 83.01(1)(b)(i)(A).

<sup>11</sup> “RCMP statement regarding the case of Mohammad Momin Khawaja” (2 April 2004) RCMP News Release, online: <[http://www.cbc.ca/news/background/cdnsecurity/rcmp\\_release040402.html](http://www.cbc.ca/news/background/cdnsecurity/rcmp_release040402.html)>

<sup>12</sup> “RCMP Lays Charges under Sections 83.18 and 83.19 of the Criminal Code” (30 March 2004) RCMP News Release, online <[http://www.rcmp-grc.gc.ca/news/2004/n\\_0413\\_e.htm](http://www.rcmp-grc.gc.ca/news/2004/n_0413_e.htm)>

<sup>13</sup> Chris Cobb, “Ottawa Man Faces 5 New Terror Charges” (21 December 2005) *Ottawa Citizen*, online: <<http://www.canada.com/ottawacitizen/story.html?id=10921549-749a-4a61-bf02-0a41ee4dd07d&k=87993>>. In the lead-up to the trial, Justice Department spokesman Patrick Charette speculated: “It’s difficult to speculate where this could go...but yes, technically a total ban could be imposed (for security reasons).”

<sup>14</sup> *Supra* note 12.

<sup>15</sup> Ibid.

The shape of the thing began to emerge only as information came out concerning the trial of seven individuals charged with terrorism offences in the United Kingdom. It was revealed during the course of legal proceedings there that Khawaja was thought to have played a "vital role" in a terrorist plot to attack Britain's electricity supply, pubs, nightclubs and trains.<sup>16</sup> The Crown's opening statement in *R. v. Khyam, Garcia, Hussain, Akbar, Mahmood, Mahmood, and Amin* asserted that "Momin Khawaja constitutes the Canadian end of the conspiracy. He awaits trial in Canada in relation to items found in his home in Ontario, and indeed in relation to his contact with the defendants you are concerned with and his vital role in this plot."<sup>17</sup>

Khawaja was brought to trial on the Attorney General of Canada's direct indictment, by-passing the normal preliminary inquiry process. Seven offences were alleged to have been committed between January 2002 and March 2004,<sup>18</sup> each count identifying the British defendant "Omar Khyam" and "others" as the "terrorist group" with which Khawaja conspired. The allegations included development of an explosive detonator, contributing to terrorist groups with the intent of causing damage to persons and property, and facilitating terrorist activity<sup>19</sup> in Canada, the United Kingdom and Pakistan. When an application was filed questioning the constitutional validity of various provisions in the *ATA* Mr. Justice Rutherford was called upon to rule on two key issues.

### **"Motive" and Racial Profiling**

First, he assessed the "motivation" clause, comparing the provision with

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<sup>16</sup> Canadian Helped Prepare U.K. Bomb Plot" (21 March 2006) CTV, online:

<[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060321/khawaja\\_trial\\_060321?s\\_name=&no\\_ads=>](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060321/khawaja_trial_060321?s_name=&no_ads=>)

<sup>17</sup> 'Momin Khawaja constitutes the Canadian end of the conspiracy' canada.com Published: Thursday, March 23, 2006

Prepared text of the Crown's opening statement in the trial of seven men alleged to have plotted to bomb London: "Regina v. Omar Khyam, Anthony Garcia, Nabeel Hussain, Jawad Akbar, Waheed Mahmood, Shujah-Ud-Din Mahmood, Salahuddin Amin, Opening Note" (<http://www.canada.com/ottawacitizen/news/story.html?id=408dc2ed-d950-4ee5-a4b7-392eb5faaf34&k=75162> )

<sup>18</sup> the counts alleged violations of Sections 81(1)(a), 81(1)(d), 83.01(1), 83.03(a), 83.18, 83.18(1), 83.19, 83.2, 83.21(1) (all under the Terrorism Part of the Canadian Criminal Code)

<sup>19</sup> *Khawaja* at paras. 1(1)-1(7).

conventional notions of criminal responsibility,<sup>20</sup> and assessing the effect of approaching the definition of a criminal offence by reference to motivation (rather than by action and intent) on the day-to-day world of criminal justice. The Act provides:

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

"terrorist activity" means

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

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

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

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

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

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition

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<sup>20</sup> Lawyers, in Canada, draw distinctions between speech, motive, and intent. The general law on motive is that "Motives do not excuse the commission of crime or even mitigate its punishment. Some motives such as hate bias are, however, deemed aggravating factors in sentencing." (Kent Roach, *The New Terrorism Offences in Canadian Criminal Law*, (2002) 14 N.C.J.L. 115 at 124, as cited by Mr. Justice Rutherford, *Khawaja* at para. 34)

“terrorist activity” in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.<sup>21</sup>

Although the nature of the proceedings meant that Rutherford J. lacked the benefit of either "specific factual foundation or expert evidence,"<sup>22</sup> he approached the matter carefully and fully, engaging in a thorough survey of both scholarly literature and comparative anti-terrorism legislation. His frame of reference here was the real world of police work, intelligence gathering, imperfect information, and human interactions. The "motive" clause was ruled unconstitutional because it does nothing to enhance the effectiveness of state authorities in counter-terrorist work, and yet it produces an increased likelihood of inappropriate targeting of minority groups “through racial or ethnic profiling and prejudice.”<sup>23</sup> The net result in this aspect is that “the Crown now has one less element of the criminal offence which it has to prove beyond a reasonable doubt.”<sup>24</sup>

### **Overbreadth and Vagueness**

Secondly, the court considered Khawaja’s argument that the Anti-Terrorism provisions as a whole are so ill-defined, vague, and over-broad as to be unconstitutional *in toto*. Although it is pervasively imprecise, Mr. Justice Rutherford held that the overall legislative scheme passes constitutional muster.

The two portions of Rutherford J.’s ruling sit uneasily together, yet each is logically developed, faithful to authority, and thoughtful on its own terms. The inconsistency within the ruling points to a fundamental incoherence in the substrata of

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<sup>21</sup> ATA S. 83.01 ([http://laws.justice.gc.ca/fr/ShowDoc/cs/C-46/bo-ga:l\\_II\\_1::bo-ga:l\\_III/fr?page=3&isPrinting=false#codese:83\\_01](http://laws.justice.gc.ca/fr/ShowDoc/cs/C-46/bo-ga:l_II_1::bo-ga:l_III/fr?page=3&isPrinting=false#codese:83_01))

<sup>22</sup> *Khawaja* at para. 5.

<sup>23</sup> *Khawaja* at para. 52.

<sup>24</sup> Final Report of the Subcommittee on Public Safety and National Security of the Standing Committee on Public Safety and National Security (2007), *Rights, Limits, Security: A Comprehensive Review Of The Anti-Terrorism Act And Related Issues Chapter One: Introduction* ([http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2798914/sterrp07/09\\_Chap2\\_Eng.htm](http://cmte.parl.gc.ca/Content/HOC/committee/391/secu/reports/rp2798914/sterrp07/09_Chap2_Eng.htm)) The Subcommittee stated its opinion that the “inclusion of motive as a part of a criminal offence to be proven beyond a reasonable doubt is unusual, if not unprecedented in Canada, it constitutes a safeguard in this context. For these reasons, the Subcommittee has concluded that the political, religious, or ideological motive element of the definition of terrorist activity should be retained.”

Canadian constitutional law. Whereas the courts focus much on social facts in certain “Charter” areas, they tend to remain resolutely formalist and highly deferential to Parliament in other fields. Mr. Justice Rutherford’s ruling breaks on this fault line. His approach to the constitutionality of the “motive” element in terrorism offences reflects a deep concern with how law actually works in real life. This portion of the ruling is concerned with law “in action,” with real life. It focuses, not on words on paper or on how they *might be constitutionally construed in the rarefied atmosphere of superior courts*, but with the daily rituals of implementation that play themselves out as state bureaucrats, security officials, police officers, and investigators interact with each other and with those subject to their power on a day-to-day basis. If police and security officials are told to look for religious or political motivations as part of the definition of crimes, their inclination to focus disproportionate attention on minority religious or political groups will be accentuated. The presumed context of social interactions, of the micro-physics of power, is front-and-centre of Mr. Justice Rutherford’s reasoning.

When it comes to the inherent vagueness of the terrorism provisions *in toto*, however, the quotidian realm gives way to another. This alternative world is inhabited exclusively by learned lawyers, Superior Court justices, and the sort of well-meaning, well-informed, state officials who read obscure constitutional law treatises in their spare time, who contemplate the finer points of the *Oakes*<sup>25</sup> test in quiet moments – and who understand it. The beat cop in this world has legal learning on par with Superior Court Justices, the patience of Job, and the wisdom of Solomon. In stark contrast to his ruling on the “motivation” provisions, the possibility that state officials might be insufficiently guided or even lead astray by poorly chosen statutory language is not treated as a serious possibility in this domain. The focus here is the courtroom where judges are able to insist upon constitutional constructions of words that admit freely of many other alternatives. Any sense of “law in action” is gone. The fundamental legal realist

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<sup>25</sup>R. v. *Oakes* [1986] 1 S.C.R. 103.

appreciation that many nasty things can occur without Superior Courts ever being called into action is entirely absent.

The cleavage between these two portions of the ruling is stark: a critically informed legal realism is met by an equal and opposite force. This inconsistency is the most noteworthy - and surely the most curious – feature of Mr. Justice Rutherford’s ruling. It is forced upon him higher authority. The legal standards established by the Supreme Court of Canada on vagueness and overbreadth, allow for the creation of offences even by words so uncertain as to provide no meaningful guidance to persons subject to them.<sup>26</sup> In fact, a single-minded determination to find precision of meaning where the “plain language” reveals none is the only approach capable sustaining the Anti-Terrorism Act. This is a disturbing outcome because a system of government based on imprecise rules violates a fundamental principle of legality.

Canada's standard of constitutional vagueness is extremely low and irrationally court-focused. The test is only whether lawyers will be "able to debate the potential boundaries of the provisions in court."<sup>27</sup>

Lawyers, of course, are well able to debate most anything.

### **The Rule of Law**

Although there is no explicit provision in Canada’s written constitution requiring legislative clarity, something equivalent flows from the principle of the rule of law.<sup>28</sup> At its core the vagueness doctrine seeks to ensure confidence that the laws governing

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<sup>26</sup> *Khawaja* at paras. 6, 14-27; see discussion in W. Wesley Pue, “Protecting Constitutionalism in Treacherous Times: Why “Rights” Don’t Matter”, in Miriam Gani and Penelope Mathew, eds., *Ensuring Accountability: Terrorist Challenges and State Responses in a Free Society* (Canberra, Australia: Australian National University-E Press, 2008)

<sup>27</sup> *Khawaja* at para. 18; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.) (“*Canadian Pacific*”)

<sup>28</sup> The status of the rule of law as a foundation principle of the Canadian constitution, is implied in the Constitutions Act, 1867 and explicitly reaffirmed in the preamble of the 1982 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. See also *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

Canadians “must meet a certain level of precision.”<sup>29</sup> The rule of law, as Albert Venn Dicey famously observed, requires

that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.<sup>30</sup>

The Supreme Court of Canada assigns the doctrine status as an interpretive principle to be applied to other Charter provisions, most notably sections 7 and 1. Section 7 guarantees the right to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 1 provides that all of the Charter’s rights and freedoms are subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>31</sup> Imprecision of statutory wording is addressed in the first place by means of canons of statutory interpretation (classically, the principle that penal statutes are strictly construed) and constitutional law as such becomes relevant when ordinary interpretive principles prove insufficient. The vagueness doctrine comes into play when a statute that violates the Charter fails to find justification under s.1 because it is so imprecise as to fail to amount to a “limit prescribed by law.” Imprecision can also lead to unconstitutional overbreadth violating the required proportionality between rights infringement and legislative objectives.<sup>32</sup>

The principles at stake here are both simple and important. It is important not to lose sight of them as the complexities inherent in their working-out are encountered.

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<sup>29</sup> Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: University of British Columbia Press, 2004) at 1.

<sup>30</sup> *Introduction to the Study of the Law of the Constitution* (1897) 5<sup>th</sup> Edition, London Macmillan And Co., Limited New York: The Macmillan Company 1897 ([http://olldownload.libertyfund.org/Texts/LFBooks/Dicey0089/LawOfConstitution1897ed/1316\\_Bk.pdf](http://olldownload.libertyfund.org/Texts/LFBooks/Dicey0089/LawOfConstitution1897ed/1316_Bk.pdf)) (179-180)

<sup>31</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 1. (“*Charter of Rights and Freedoms*”)

<sup>32</sup> *R. v. Oakes*, supra note 25. (Under section 1 analysis, or “OAKES test,” there must be proportionality between the rights violation and the legislative objective, which includes that the violation be as minimal as reasonably possible).

Clarity in law-making is required in order to provide fair notice to those subject to the law and to limit the arbitrary exercise of power by state officials. The rule of law seeks restraints on the discretion of law enforcement in order to constrain human bias, to ensure the “even-handedness in the administration of justice” and, consequently, to reduce the arbitrary application of power.<sup>33</sup>

In *R. v. Nova Scotia Pharmaceutical Society*<sup>34</sup> the Supreme Court of Canada articulated the modern doctrine of overbreadth and vagueness. The Court held that offences must be defined through statute rather than by judges (anything else amounts to ex post facto law-making) and that statutes must have some limits in scope. So far, so good. In *Pharmaceutical Society*, the Court zeroed in on the absolute legal dimensions of “fair notice.” In doing so the court unfortunately qualified the seemingly clear principles it had articulated. The principles were lost entirely in encountering complexities in application. It was not, the court said, necessary for individuals to actually know the law – or, it might be said, have the capacity to learn it – provided only that they could subjectively understand that their conduct is regulated by law in a way that is consistent with the “substratum of values” in Canadian society:

The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society... I do not wish to suggest that the State can only intervene through law when some non-legal basis for intervention exists. Many enactments are relatively narrow in scope and echo little of society at large; this is the case with many regulatory enactments. The weakness or the absence of substantive [page635] notice before the enactment can be compensated by bringing to the attention of the public the actual terms of the law, so that substantive notice will be achieved.... A certain connection between the formal and substantive aspects of fair notice can be seen here. Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values

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<sup>33</sup> Ribeiro supra note 29 at 40.

<sup>34</sup> *Canada v. Pharmaceutical Society (Nova Scotia)* [1992] 2 S.C.R. 606 (S.C.C.).

held by society. It is no coincidence that these enactments are often found vague.<sup>35</sup>

In other words, imprecise prohibitions could be sustained if connection with Canada's "substratum of values" would be clear to any non-lawyer ("it's disapproved; I should assume its illegal") or if the fair notice concerns have been met by publicity campaigns prior to any law enforcement.<sup>36</sup> Gonthier J. declined to consider hypothetical scenarios arising from vague wording, stating that a law should "only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible."<sup>37</sup>

Canadian legal doctrine in the "anti-terrorism" area in particular has developed considerably since the 2001 attacks on the United States. Approximately eight months after the September 11 attacks, the Supreme Court of Canada issued judgment in two cases dealing with the deportation of alleged terrorists on the theory that their actions before coming to Canada endangered Canadian security. In both *Ahani v. Canada*<sup>38</sup> and *Suresh v. Canada*<sup>39</sup> the Supreme Court heard arguments that phrases such as "danger to the security of Canada" and "terrorism" in deportation provisions of the Immigration Act were unconstitutionally vague. The Court did not agree with these arguments, citing its 1992 precedent in *R. v. Nova Scotia Pharmaceutical Society* that a law would be found unconstitutionally vague only "if it so lacks in precision as not to give sufficient guidance for legal debate."<sup>40</sup>

With respect to the doctrine of overbreadth, there are several constitutional principles that be heeded. For the purposes of legislation interpretation, legislative statutes "are to be read in their entire context and in their grammatical

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<sup>35</sup> Ibid. at paras. 48-50.

<sup>36</sup> Supra note 34 at 639

<sup>37</sup> *R. v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031 (S.C.C.) at para. 79,

<sup>38</sup> *Ahani v. Canada* (2002) 208 D.L.R. (4th) 66, 156 O.A.C. 37, 91 C.R.R. (2d) 145

<sup>39</sup> *Suresh v. Canada* [2002] 1 S.C.R. 3, 2002 SCC 1

<sup>40</sup> Supra note 34 at para. 71.

and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”<sup>41</sup> This is an approach that is explicitly designed to minimize the alleged overbreadth in question. There is also the presumption that a provision should be read constitutionally – that is, that Parliament had *intended* to enact legislative provisions that are not unconstitutional.<sup>42</sup> This general presumption can also be extended to mean that the use of “broad and general terms in legislation may be justified. In identifying what they wish to legislate against, legislators cannot be expected to identify every variation of the factual situations they envisage.”<sup>43</sup>

Two principles guide the Canadian judiciary’s approach to broad or vague legislation – absurdity and deference. In *Ontario v. Canadian Pacific Ltd.* the majority explained the principle that statutes should be “interpreted to avoid absurd results means that where a provision is open to more than one possible meaning, Parliament is presumed not to have intended to attach penal consequences to trivial or minimal violations of it. The absurdity principle allows for the narrowing of the scope of the provision”<sup>44</sup> (after the judges have ruled, it might be added). And in determining whether a provision is overbroad, the judiciary has adopted a measure of deference to the methods selected by the legislature in effecting its policy goals.<sup>45</sup>

This leaves unanswered the question of how to control for the practical dangers associated with leaving policy-making decisions in the hands of law enforcement officials:

A law must set an intelligible standard both for the citizens it governs

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<sup>41</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 74, quoting from *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994).

<sup>42</sup> *R. v. Sharpe* at 74.

<sup>43</sup> *R. v. Lindsay*, [2004] O.J. No. 845 (Ont. S.C.J.) at para. 41. Fuerst J. goes on to determine that the judiciary “is expected to determine whether legislation applies in particular fact situations.” She notes the Supreme Court of Canada’s decision in *R. v. Sharpe*, supra, the majority determined that a purposive approach to the child pornography legislation appeared to exclude many of the alleged examples of its overbreadth, finding, for example that works aimed at describing various aspects of life that incidentally touched on illegal acts with children were unlikely to be caught by the provision.”

<sup>44</sup> *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, 99 C.C.C. (3d) 97 PG PARA ##

<sup>45</sup> *R. v. Heywood*, [(1994), 94 C.C.C. (3d) 481 (S.C.C.)].

and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."<sup>46</sup>

The Court's concern respecting vagueness is thus directed to fair notice to those subject to the law on one hand and the limitation of arbitrary power on the other. More generally, the Court sought to strike a balance between executive or administrative flexibility and the rule of law. No one can fault the principles here.

But the actual outcome reached by the Supreme Court of Canada sets a very high threshold for "vagueness" or, conversely, a very low threshold for rule of law values. The doctrine's basis – the need to provide "fair notice" to those individuals whose conduct may be regulated by law and placing limits on law enforcement officials' discretion – has been fatally undermined by a formulation that puts court interpretation in front of social life. This ensures that, in the ordinary course of events, enormously vague and unconstrained powers will be exercised by officials, invisibly to the courts, for years and possibly for decades. It leaves officials in the uncomfortable position of exercising powers without the benefit of clear Parliamentary direction and enjoying only the modest comfort of looking forward to *ex post facto* endorsement or condemnation of their actions by the courts. Even the stance of deference to Parliament is illusory at best. As vague wording is at issue, the deference accorded can only, in fact, be official discretion unfettered (because the empowering words are vague) by Parliamentary

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<sup>46</sup> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4 at para. 16. [quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109]

guidance. Paradoxically, deferring to Parliament's establishment of such a scheme relegates Parliament itself to the sidelines. Only executive power emerges triumphant.

### Application in *Khawaja*

Because Khawaja's application was presented without the benefit of having heard evidence,<sup>47</sup> his counsel, Edward Greenspon, made several hypothetical arguments pointing to the ways in which individuals entirely lacking in moral culpability for anything approaching terrorist acts could nonetheless find themselves in contravention of the *ATA*'s prohibition on facilitating terrorist groups: even the term "facilitate" itself was said to be vague and over-broad.<sup>48</sup>

Greenspon specifically criticized s. 83.01(1)(b), arguing that existing federal laws in the *Criminal Code of Canada* were "broad enough to catch and provide for prosecution of virtually all of the terrorist acts" foreseen by the *ATA*.<sup>49</sup> He criticized the breadth of clause 83.01(1) (b) (i) (A), that the act be committed, "in whole or in part for a political, religious or ideological purpose, objective or cause," and again for the use of "in whole or in part" in 83.01(1) (b)(i)(B), arguing that virtually any act will be at least in some part for such purposes, and that a partial intention, no matter how small, is inadequate to circumscribe the area of risk and leaves the legislation excessively broad.<sup>50</sup> Essentially, he argued that the *ATA* provisions were too broad and too vague to be considered constitutional.

Mr. Justice Rutherford noted, citing the Saskatchewan Court of Appeal's decision in *R. v. Spindloe*,<sup>51</sup> that laws are rarely declared unconstitutional on account of vagueness in Canada. He correctly cited the two pillars of the doctrine, namely the

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<sup>47</sup> *Khawaja* at para. 2

<sup>48</sup> *Khawaja* at 22. See also Pue, supra note 5; Evangelical Fellowship of Canada: Brief on Bill C-36 to the Justice Committee (2001) (<http://files.efc-canada.net/si/Religious%20Freedom%20in%20Canada/EFC/Anti-Terrorism%20Bill%20C-36.pdf>)

<sup>49</sup> *Khawaja* at paras. 14-15.

<sup>50</sup> *Khawaja* at para. 15.

<sup>51</sup> *R. v. Spindloe* (2001), 154 C.C.C. (3d) 8 (Sask. C.A.)

need to provide “fair notice” and the need to curb the discretion of law enforcement officials at least to the extent that convictions will not “automatically flow from the decision to prosecute”<sup>52</sup> (a stunningly low threshold). Following the reasoning laid by Gonthier J. in *Pharmaceutical Society*, he sought to uncouple the degree of precision sufficient to escape unconstitutional voidness from certainty of outcome.<sup>53</sup> “The degree of precision required in our laws is not, however, to lay out a prescription such that one can predict with certainty the outcome of all conceivable factual situations. There are not enough draftspersons to accomplish anything like that.”<sup>54</sup> This formulation is a counsel of despair that comes perilously close to justifying governance by administrative fiat merely because perfect foresight and absolute linguistic certainty are unattainable goals.

The provisions were upheld because Mr. Justice Rutherford believed that they “describe conduct in a fashion that provides notice of what is prohibited and set an intelligible standard for both citizen and law enforcement officials...The prohibited actions are all spelled out with reasonable precision in terms of their intended harmful consequences in 83.01(1)(b)(ii) (A) - (E) of the definition.”<sup>55</sup> Following *R. v. Canadian Pacific Ltd.* he declined to entertain “hypothetical circumstances that test the periphery of a legislated prohibition,” holding that the clear identification and application to a “core of misconduct” is all that is relevant.<sup>56</sup>

The conclusion is reached that conduct described with the use of terms such as “in whole or in part”, “directly or indirectly”, “serious”, and “substantial” are not impermissibly vague.<sup>57</sup> “The criminal law has long been challenged to differentiate between degrees of harm. Such terms as bodily harm, aggravated assault, and criminal negligence have been interpreted and applied on a case-by-case basis so that the boundaries and contents of the provisions are sufficiently clear to comport with

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<sup>52</sup> *Khawaja* at para. 16.

<sup>53</sup> *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) by Gonthier J. at 639

<sup>54</sup> *Khawaja* at paras. 16-17.

<sup>55</sup> *Khawaja* at para. 18.

<sup>56</sup> *Khawaja* at para. 19; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.) at para. 79

<sup>57</sup> *Khawaja* at paras. 20-21

fundamental justice. So too can these adjectives in the impugned provisions.”<sup>58</sup>

With respect to the over breadth and potential unconstitutionality of the *ATA* provisions, Mr. Justice Rutherford relied heavily upon the reasoning of Fuerst J. in *R. v. Lindsay*, correctly pointing out that Madam Justice Fuerst had encountered arguments similar to those presented in the Khawaja application. He endorsed her conclusions that verbs and adjectives such as “to facilitate” and “serious” have “sufficiently clear meaning” to escape the finding of unconstitutional overbreadth or vagueness.

Here too, he declined to entertain the hypothetical examples offered by Khawaja’s counsel, opting for a case-by-case application of the “absurdity principle” in dealing with situations where the accused might be considered a terrorist group unto himself, for example.<sup>59</sup> Such an application, of course, does little to prevent law-enforcement officials from continuing to charge individuals in such cases, and nothing to constrain intrusive police or official actions conducted in the shadow of the law. This presents a jarring contrast with Mr. Justice Rutherford’s approach to the “motivation” portion of the Anti-Terrorism Act. In the final analysis, and within the particular constraints of a preliminary motion his Lordship accepted that the current legislation contains sufficient clarity to meet the fundamental constitutional requirement that people not be convicted of crimes (including terrorist crimes) unless they “intended” wrong-doing.

The outcome of the *Khawaja* case will be pleasing to prosecutors. Liberal Member of Parliament Irwin Cotler, a human-rights expert and former justice minister, pointed to irony in the fact that “it’s defence counsel that is moving to impugn that provision, when in fact the prosecution may find that it will facilitate prosecutions without that provision.”<sup>60</sup> And, speculating as to possible appeals, Conservative Justice Minister Vic Toews suggested that “[p]erhaps it may be the defence who would want to

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<sup>58</sup> Ibid.

<sup>59</sup> *Khawaja* at 26.

<sup>60</sup> Alex Dobrota And Gloria Galloway, “Portion of law on terror struck down: Convictions will be easier, experts say.” (National News). *Globe & Mail* (Toronto, Canada) (Oct 25, 2006) at A1

appeal that decision.”<sup>61</sup>

## Conclusion

Although the Act was upheld on its first courtroom test, the outcome is not a satisfactory one from the perspective of Canadian government principles. Many portions of the Anti-Terrorism Act have an Alice-in-Wonderland character. To take just one example, a person is said to "*knowingly*" facilitate terrorist activity even if:

1. the facilitator does not *know* whether any particular terrorist activity "is facilitated,"
2. no terrorist activity "was foreseen or planned", and
3. no terrorist activity "was actually carried out." (s. 83.19(1)).

There is little doubt that Ottawa's draftspersons are good enough to do better than this if they set their minds to it.

Rights are affected powerfully by police, security officials, immigration officials, and others in many, many circumstances that never come before the courts. While Canadians wait for a decision on the Defense's request for a Leave to Appeal and a government request for a cross-appeal, Parliament has thus far not seen the need to clarify any provisions of the ATA<sup>62</sup>. With respect, there is an enormous difference between recognizing the impossibility of drafting statutory language that allows of no ambiguity and a judicial approach to statutory interpretation that encourages sloppy

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<sup>61</sup> Ibid. In the end, Khawaja's appeal was dismissed by the Supreme Court of Canada.

(<http://www.canada.com/nationalpost/news/story.html?id=de427053-4c81-4c2c-b40d-8c028d2cc227&k=65686>)

<sup>62</sup> Two of the Criminal Code provisions enacted by the ATA, the investigative hearing and recognizance with conditions (known as the preventive arrest provision) powers were scheduled to sunset on March 1, 2007. Prime Minister's Stephen Harper's minority Conservative government attempted to extend the provisions for another three years, but the attempt failed due to opposition by the Liberals, NDP and Bloc Quebecois. In February 2007, the Supreme Court of Canada ruled that Security Certificate provisions, used to indefinitely detain individuals deemed a threat to national security, were invalid. The government has since proposed to modify the security certificate regime by adding a 'special advocate' mandated to represent the interests of the person held under a security certificate, who would have access to the secret evidence but could not communicate with the person involved. In May 2007, the government also appealed a Federal Court decision ordering it to hand over 73 documents as well as summaries of information contained in more than 400 other documents to Khawaja's lawyers. In October 2007, the Federal Court of Appeal ruled partially in the government's favour by allowing a revised schedule of document summaries to be produced.

draftspersonship. One can hope that the Supreme Court of Canada will revise its vagueness and overbreadth doctrines to bring their operations more fully into compliance with the principles that generate such doctrines in the first place. Parliament too has responsibilities, however, as the principle trustee for Canadian constitutionalism. Since the Charter came into place, politicians have often elected to avoid controversial and difficult matters by leaving it to the courts to work things out. It is, however, Parliament's job to define standards clearly, citizens' right to expect that, and the obligation of the Courts to insist upon it.

Canada's Parliament has let Canadians down badly by failing to provide clear direction to either citizens or security officials under our Anti-Terrorism legislation. Despite the unattractive biography of Momin Khawaja, Mr. Justice Rutherford's ruling in this case points to the need to reassess Anti-Terrorism legislation from a perspective informed by an appreciation and understanding of the Rule of Law. This transcends party politics and has nothing to do with being "soft on terrorists". A review that starts from fundamentals is needed and Parliament should have the courage to lead it.