CITATION: R. v. Khawaja, 2010 ONCA 862
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COURT OF APPEAL FOR ONTARIO

Doherty, Moldaver and Cronk JJ.A.

BETWEEN

Her Majesty the Queen

Respondent
(Appellant by way of cross-appeal)

and

Mohammad Momin Khawaja

Appellant
(Respondent by way of cross-appeal)

Lawrence Greenspon and Eric Granger, for the appellant

Beverly Wilton, Nicholas E. Devlin and Ian Bell, for the respondent

Heard: May 18 to 20, 2010

On appeal from the constitutional ruling of Justice Douglas J. A. Rutherford of the Superior Court of Justice, dated October 24, 2006, with reasons reported at (2006), 214 C.C.C. (3d) 399, and the convictions entered by Justice Rutherford, sitting without a jury, on October 29, 2008, with reasons reported at (2008), 238 C.C.C. (3d) 114, and on appeal and cross-appeal from the sentences imposed by Justice Rutherford on March 12, 2009, with reasons reported at (2009), 248 C.C.C. (3d) 233.

By the Court:

Overview of the Proceedings

[1] In the aftermath of the horrific terrorist attacks in the United States on September 11, 2001, Canada, like many other democracies, enacted a comprehensive anti-terrorism law. Bill C-36, the *Anti-terrorism Act*, S.C. 2001, c. 41, received Royal Assent on December 18, 2001. The Act made significant amendments to the *Criminal Code*, R.S.C. 1985, c. C-46, gave the police new investigative powers, and created several new offences targeting terrorist activities and terrorist groups.

[2] The application of the terrorism-related offences introduced by Bill C-36 hinges on the commission of "terrorist activity" as defined in s. 83.01(1) of the *Criminal Code.* The central issues in these proceedings involve: (1) the constitutionality and interpretation of

the statutory definition of "terrorist activity" set out in s. 83.01(1)(b); and (2) the proper approach to be taken in sentencing those convicted of terrorism-related offences.[1]

[3] These important questions are matters of first impression for this court. The appellant is the first person to be tried for terrorism-related offences in Ontario. After a lengthy trial before a judge alone, which included several pre-trial motions, the appellant was acquitted on two of the terrorism charges (counts 1 and 2), although he was convicted of included offences that did not require proof of terrorist activity. The appellant was convicted of five terrorism offences (counts 3 to 7). He received sentences totalling 10 ½ years, having spent almost five years in custody prior to his sentencing.

[4] The appellant appeals his convictions and alternatively seeks leave to appeal and, if leave is granted, appeals the sentences imposed. The Crown seeks leave to appeal the sentences and, if leave is granted, appeals those sentences by way of cross-appeal.

[5] For the reasons that follow, we would dismiss the conviction appeal. We would grant the Crown leave to appeal sentence, allow the cross-appeal and impose a life sentence. We would dismiss the appellant's sentence appeal as moot.

Overview of the Charges and the Verdicts

[6] The *Criminal Code* does not criminalize terrorist activity *per se* and does not make membership in a terrorist group a crime. It does, however, create a series of crimes which, broadly speaking, make it an offence to engage in conduct that facilitates,

[1] Refer to Appendix A to these reasons for the statutory definition of "terrorist activity" and related provisions, as well as the terrorism-related offences with which the appellant was charged.

promotes, assists or otherwise encourages terrorist activities or terrorist groups. The terms, "terrorist activity" and "terrorist group", are both defined in Part II.1 of the *Criminal Code*.[2] Those definitions are integral to the description of terrorism offences created in Part II.1 of the *Criminal Code*.

[7] The charges against the appellant alleged that he acted for the benefit of and in conjunction with a group of persons in England led by a person named Omar Khyam (the "Khyam group"). The Crown alleged that the Khyam group constituted a "terrorist group" within the meaning of the *Criminal Code* and that the group was engaged in "terrorist activity" as defined in the *Criminal Code*.

[8] Counts 1 and 2 in the indictment alleged offences under s. 83.2. That section creates the crime of committing an indictable offence "for the benefit of, at the direction of or in association with a terrorist group". Counts 1 and 2 in the indictment can be summarized as follows:

Count 1	developing a device to activate a detonator, with intent to cause an explosion of an explosive substance likely to cause serious bodily harm or death to persons or serious damage to property, contrary to s. 81(1)(a), and committing the said indictable offence for the benefit of or in association with a terrorist group, namely Omar Khyam and others, contrary to s. 83.2 of the *Criminal Code*; and
Count 2	making or possessing an explosive substance with intent to enable another person to endanger life or cause serious damage to property for the benefit of a terrorist group, contrary to ss. 81(1)(d) and 83.2 of the *Criminal Code*.

[2] See Appendix A to these reasons.

[9] The trial judge concluded that the Crown had proved the appellant's commission of the underlying indictable offences alleged in counts 1 and 2, but had failed to prove that the appellant, in committing those indictable offences, had intended to facilitate or otherwise assist in the Khyam group's specific plot, which was referred to in the evidence as the "U.K. fertilizer bomb plot". The details of this plot are discussed below. The trial judge held that, without that specific purpose, the appellant could not be convicted of the full offences in counts 1 and 2. He did, however, convict on the included offences of developing a device with the intent to cause an explosion likely to cause serious bodily harm or death (count 1) and making an explosive substance with intent to enable another person to endanger life (count 2).

[10] Counts 3 to 7 alleged specific terrorism offences. Those counts can be summarized as follows:

Count 3	knowingly participating in or contributing to the activity of a terrorist group by receiving training for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*;
Count 4	knowingly instructing a person to carry out financial activity for the benefit of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, contrary to s. 83.21(1) of the *Criminal Code*;
Count 5	providing and making available property and financial services to persons, intending or knowing that they would be used, in whole or in part, for the purpose of facilitating or carrying out terrorist activity, contrary to s. 83.03(a) of the *Criminal Code*;
Count 6	knowingly participating in or contributing to an activity of a terrorist

	group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity, by participating in dialogue, meetings or exchanges of information relating to the development of an explosive device intended to endanger life or cause serious damage to property, contrary to s. 83.18 of the *Criminal Code*; and
Count 7	knowingly facilitating a terrorist activity, contrary to s. 83.19 of the *Criminal Code*.

[11] The trial judge convicted the appellant on counts 3 through 7. Counts 3, 4 and 6 required proof that the appellant's conduct was done for the purpose of enhancing the ability of a "terrorist group" to facilitate or carry out "terrorist activity". Counts 5 and 7 required proof that the appellant engaged in conduct knowing that it would facilitate "terrorist activity".

Background to the Charges Against the Appellant

[12] The appellant, Mohammad Momin Khawaja, was born in Ottawa in 1979. During his childhood, he and his siblings spent several years living with their parents in various Muslim countries, including Libya, Pakistan and Saudi Arabia. While the appellant was still a teenager, his family returned to live in Canada. At the time of his arrest in 2004, the appellant was almost 25 years of age and was living in the family home in Ottawa with his three brothers and a younger sister. He was employed by a company doing contract work for the Canadian Department of Foreign Affairs and International Trade on a computer software-related project.

[13] The appellant came to the attention of Canadian law enforcement authorities as a result of "Operation Crevice", an investigation of suspected terrorists in London, England

conducted by the London police and the British Security Service. Operation Crevice involved both physical and electronic audiovisual surveillance of the targeted suspects. Evidence gathered during Operation Crevice revealed that, while visiting London in February 2004, the appellant met with Khyam and several of his associates and discussed with them a remote explosive detonator device that he was building in Ottawa at Khyam's instigation for later use in bombing unspecified targets in the United Kingdom or elsewhere.

[14] The appellant was arrested by the RCMP on March 29, 2004 and charged with terrorism-related offences under the *Criminal Code*.

[15] On March 30, 2004, the day after the appellant's arrest, Khyam and five others – Anthony Garcia ("Garcia"), Shujah Mahmood ("S. Mahmood"), Waheed Mahmood ("W. Mahmood"), Jawad Akbar ("Akbar") and Nabeel Hussain ("Hussain") – were arrested in London and charged with conspiring to commit several terrorism-related offences under the *Explosive Substances Act, 1883*, (U.K.), 46 & 47 Vict. c. 3 and the *Terrorism Act 2000*, (U.K.), 2000, c. 11 of the United Kingdom. A seventh man – Salahuddin Amin ("Amin") – was arrested in the United Kingdom in February 2005 and charged as a co-conspirator.

[16] The appellant was named as an unindicted co-conspirator in the London conspiracy case. Evidence of his involvement with the Khyam group was introduced at

the conspiracy trial of the members of that group and later admitted at his own criminal trial in Ontario.

[17] Evidence at the conspiracy trial in London established that, in November 2003, Garcia had purchased 600 kilograms of explosives material – ammonium nitrate-rich fertilizer – which Khyam then placed in storage. Khyam and others had obtained access to information disclosing the location of high pressure gas and electric system sites and equipment in the United Kingdom. Surveillance evidence also revealed discussions among members of the Khyam group concerning aspects of violent Islamic "Jihad" and possible public facility bomb targets, including airports, large nightclubs and gas, water and power utilities in London and elsewhere in the United Kingdom (the U.K. fertilizer bomb plot).

[18] On April 30, 2007, following a trial by judge and jury, Khyam, Garcia, W. Mahmood, Akbar and Amin were convicted of conspiracy to cause explosions likely to endanger life or cause serious injury to property. Khyam and Garcia were also convicted of related offences. All five men were sentenced to life imprisonment. Hussain and S. Mahmood were acquitted of all charges: see *R. v. Khyam*, [2008] EWCA Crim. 1612.

The Appellant's Trial

[19] At the appellant's trial, most of the background facts were undisputed. The central issues concerned the available inferences regarding the appellant's knowledge and intent to be drawn from the established facts and the legal consequences of those inferences. In

this context, it is sufficient to outline the more salient facts that are pertinent to the issues before this court.

(1) The Appellant's Commitment to Violent Jihad

[20] It was the Crown's position at trial that the appellant was ideologically committed to the advancement of violent "Jihad" and that he acted in Canada and elsewhere to further his involvement in Jihad-inspired terrorist activities. Thus, an appreciation of the appellant's attitude and approach to the concept of Jihad is key to understanding the issues at his trial.

[21] On the trial judge's findings, Jihad can mean "anything from an internal struggle one has within one's self, such as with a perceived weakness, ... a struggle with one's faith, and ... a physical fight or battle." The appellant's avowed view of Jihad is both sinister and disturbing. The trial judge found that, for the appellant, Jihad means "a violent struggle with the objective of establishing Islamic dominance, wherever possible."

[22] The Crown relied at trial on voluminous email correspondence authored by the appellant that disclosed, in graphic detail, his active commitment to violent Jihad. An email he wrote on December 27, 2003, coupled with travel documents also admitted at trial, established that the appellant travelled to Pakistan in 2002 with "some bros [brothers] from UK and else [elsewhere]" for the purpose of "support[ing] Jihad in

Afghanistan". The following excerpt from the email contains this self-proclamation by the appellant:[3]

> lemme tell u sumthin bout me … few yrs ago, when the kuffar[4] amreekans invaded Afghanistan, that was … the most painful time in my whole life cuz I loved the … mujahideen and our bros in afghanistan so so much that I couldn't … stand it. it would tear my heart knowing these filthy kaafir dog … americans were bombing our muslim bros and sisters, besides that, … Shaykh Usama bin laden is like the most beloved person to me in the … whole world, after Allah … I love … Shaykh Usama most in the world, i wish i could even kiss his blessed … hand. So I hooked up wit some bros from UK and else, and we all … went over to pakistan to support Jihad in Afghanistan in 2002. we … got there and stayed bout 3 months there, till Allah willed we came … back. Then we had problems that none of the foreign mujahideen bro's … could get jihadi training cuz all the jihad training camps were shut … down in Pakistan cuz of those Munafiqeen government of Musharraf, ...

[23] Other emails written by the appellant in August 2003 to Zeba Khan ("Khan") – a young woman who, for a time, was his fiancée – illustrate his dedication to violent Jihad and what he termed "Islamic Activism":

> As for my goals in life, My main goal is to live as a Muslim in a state that Allah is pleased with me. … I strongly believe in the concept of Hijra and Jihad. Basically, migrating to preserve and build our Deen, and *supporting our oppressed brothers and sisters in any and every way possible, whether physically, financially, or morally, in deterring those who wish to destroy Islam and the Muslims.*
>
> …

[3] Quotes in these reasons from the appellant's emails are verbatim and have not been amended for spelling or other errors.

[4] "Kuffar" is a derogatory word referring to non-Muslims.

> *I'm just a wanna-be gung-ho Islamic. I'm kinda looking for someone more active than I am so I can join them in Islamic Activism*. [Emphasis added.]

[24] That the appellant's stance on Jihad is far from benign, and expressly extends to a willingness to engage in violent activities, was revealed by a series of chilling emails that he wrote to Khan in September and October 2003. In these emails, the appellant expressed his support for preparing for Jihad by training in warfare and the use of weaponry, by adopting a "war-like mentality" against those at "war with Islam", and by "bringing down … the enemy … by whatever means available or necessary". The appellant wrote:

> For a sincere Muslim, guns, warfare, and weaponry are a means of defense, a means of deliverance, and something which enables him to carry out the obligation of Jihad. … *So engaging in Jihad also requires us to prepare in the best of ways*. Not only spiritually in Deen, *but also train with excellence in warfare and the best of weaponry … A war-like mentality is needed against the Kuffar (governments, armies, supporters) because they 'are' at war with us*. America is at war with Islam. Israel is at war with Islam, so we do not treat Ariel Sharon and George Bush with compassion, do we? They have slaughtered tens of thousands of our brothers and sisters. The blood of the Ummah has been spilt. … *This is the precise reason for the Jihad, the training, warfare, weaponry, and war-like mentality against those who commit acts of aggression*.
>
> …
>
> So under certain specific circumstances, a major sin becomes a praiseworthy, noble, and mandatory action … True economic J is when we go after the governments and various institutions and scam large, pulling off elaborate scams worth millions and using that for the J. *Its about bringing down the*

kuffar enemy dealing blow after blow, by whatever means available or necessary ... picture this, a young bro wearing an explosive vest walks into a busy Israeli nightclub and in midst of all the partying, he presses a button and detonates, killing himself and dozens around him. Suicide or Martyrdom? … Now think about this, Islam forbids suicide as a heinous crime, a very major sin. So how on earth can such a huge sin be considered one of the most noble acts, martyrdom? … *The reason why this is permissible and noble is because there is absolutely NO other way of fighting them except this* … So sometimes things that seem wrong from face-value due to our lack of info or understanding, such as certain operations that Muj carry out against the kuffar, may in fact be very noble deeds with great long-term benefits for the Muslim Ummah.

…

[W]e know that the only way the Kuffar support their wars are with their economies. *So we have to come up with a way that we can drain their economy of all its resources, cripple their industries, and bankrupt their systems in place*. All so that they are forced to withdraw their troops, so they cannot afford to wage war, get them so entangled with problems at home that they dare not worry about attacking us or supporting others in attacking us. We need constant economic J, blow after blow, until they cripple and fall, never to rise again. … *What did Sept. 11 do to America? ... Would you not say that the actions of 19 men on Sept. 11 are the most accurate, effective, and honorable way of conducting economic J? Imagine if there were 10 Sept 11's, wouldn't that accurately bring America down, never to rise again? Yes, I understand that innocent human beings died, but there is absolutely no other way of achieving the same objective with the same effect. ... Allah ta'ala willed for events to occur in this manner, so they're happening as decreed. Our job is to contribute as best as possible the destruction of the enemies of Allah, and help out the cause of Deen so that the word of Allah dominates over all other ways*. [Emphasis added.]

(2) The Appellant's 2003 Activities

[25] In July 2003, the appellant returned to Pakistan, via London. He remained in Pakistan for approximately two weeks. Prior to this trip, he had entered into a form of covert email correspondence with Junaid Babar ("Babar"), a 34-year old American of Pakistani descent who eventually pled guilty in New York City to five counts of providing material support or resources to al Qa'eda. Babar testified for the Crown at the appellant's trial. His evidence about the appellant's activities was especially damning.

[26] According to Babar, the appellant stayed at his residence while in Pakistan in July 2003. Khyam was also present. The appellant and Khyam spent several days at a small arms training camp that Babar and others had earlier established in northern Pakistan. After his trip to the training camp, the appellant excitedly relayed to Babar that he had fired the available camp weaponry, including a rocket-propelled grenade launcher, an AK47 and a light machine gun.

[27] Babar said that Khyam planned to use the training camp for explosives training. To that end, after the appellant left Pakistan, Khyam, Babar and others returned to the training camp and, using previously assembled ingredients, successfully detonated an improvised explosive device, producing a small crater in the earth.

[28] Although the explosives material was present in Babar's home when the appellant stayed there, and the appellant attended the training camp and used the weapons cached there, Babar testified that Khyam's plan to use the camp for explosives training was unknown to the appellant.

[29] However, Babar also said that while the appellant was in Pakistan, he gave Khyam money that was intended partially for "zakat" – a charitable gift to the poor – and partially for the use of "the brothers" in an explosives operation in the United Kingdom or Europe planned by Khyam.

[30] In October 2003, the appellant returned to Pakistan, via London, for a third time. He brought supplies obtained by him in London from Khyam, including a medical kit, invisible ink pens, two SIM cards[5] and 800-1000 pounds sterling and a quantity of Canadian currency. He delivered the SIM cards to Babar and the cash to Amin, with whom he met while in Islamabad. Babar understood that he was to use the SIM cards to remain in contact with Khyam when transporting detonators from Pakistan to Europe.

[31] The appellant also travelled with Babar to the training camp that he had attended in July, as he wished to again fire the grenade launcher stored at the camp. When this proved impossible due to a shortage of ammunition, the appellant returned to Islamabad and flew back to Ottawa shortly thereafter. Before his departure, Amin told the appellant to keep him informed of his activities through Khyam.

[32] The appellant's assistance to members of the Khyam group did not end there. The trial judge found that, prior to his July 2003 trip to Pakistan, the appellant made available a residence in Pakistan owned by his parents to members of the Khyam group.

[5] A SIM card is a "Subscriber Identity Module" - a portable memory chip used in cellular phones that allows users to switch from one phone to another.

[33] The trial judge also found that, throughout 2003 and 2004, the appellant provided additional funds – beyond those given by him to Amin in October 2003 – to support Babar, Khyam "and the bros' in their jihadist efforts". For this purpose, the appellant recruited and used a young Muslim woman in Ottawa to assist in opening an Ottawa bank account and instructed her to transfer money to Khyam and his associates in the United Kingdom from that account and other sources on multiple occasions.

(3) Development of Remote Detonator Devices

[34] The appellant reported to Khyam by email on his October 2003 trip to Pakistan. He began discussing the development of a remote detonator device. In an October 2003 email to Khyam, the appellant said:

> Also bro, I will start on the remote devices thing right away, and will let u know once we have it ready for testing, and I find some of the things for testing, Urea, nitro phosphate, anything else we need?

[35] In the same email, the appellant offered to purchase night vision goggles in Canada "for the bros" and inquired: "[A]nything else bro that we need to do, or any help needed with anything?"

[36] In a subsequent email to Khyam sent later the same month, the appellant made the disturbing proposal that a supporter of the Khyam group – "Immy", a man who appears to have been mentally challenged – be sent to Israel on a suicide mission. The appellant wrote:

> also bro, when I was in PK me and kash [Babar] talked about immy, wats he gonna do there? … we have a suggestion, to use the bro for a one-way operation [suicide mission] to the most high … maybe in Yahoodi land [Israel] … what do you think?

[37] In a series of other emails exchanged with Khyam throughout the fall of 2003 and the early winter of 2004, the appellant confirmed that he was working on the design of a remote detonator device with the intent of smuggling the device into London. The evidence indicated that both the appellant and his older brother, Qasim Khawaja, were involved in this effort.

[38] In his emails to Khyam, the appellant stated that, after testing the device: "[W]e can start making lots of these." He also said: "[W]e're startin to work on a few other much more sophisticated projects that can be of great benefit to the J. i'll speak to you about them when we meet."

[39] In other emails between the appellant and Khyam in February 2004, the appellant repeatedly raised the issue of how he could bring the remote detonator device he was working on into the United Kingdom without it being detected by the responsible authorities. Khyam ultimately told him: "[A]bout the device its better we leave it wil xplain later we will discuss it and maybe show pics at most."

[40] On February 20, 2004, the appellant flew to London for two days where he met with Khyam and S. Mahmood. Unbeknownst to the appellant, both men were under

surveillance by the British authorities. As a result, the appellant's activities were monitored and many of his conversations were intercepted and recorded.

[41] The surveillance evidence established that, while in London, the appellant showed Khyam and S. Mahmood a digital photograph of the device he had built in Ottawa, which he called the "hifidigimonster". Intercepted conversations between Khyam and the appellant left no doubt that the hifidigimonster was a prototype device intended for potential inner-city use. For instance, the appellant described the frequency of the device to Khyam in these terms: "[I]t's actually impossible for them near urban areas to block it out because they literally use a lot of that themselves."

[42] The surveillance evidence further indicated that, during this visit to London, the appellant suggested that S. Mahmood and others travel to Canada to "go shooting and stuff" for weapons training. He also volunteered to train Khyam and others in the use of the hifidigimonster. In one recorded conversation with Khyam, the appellant stated:

> I can teach you the theory of it. Cover all the facts and all those other bits, then in the summer I'll set up a course together, someone can deliver it to the grunts of course … the theory will be covered in two or three days, you know like how to calculate electric surge, voltage.

[43] The appellant and Khyam also discussed possible further trips to Pakistan and the smuggling of outdoor clothing and gear into that country. When the appellant told Khyam of a Canadian company that regularly shipped outdoor equipment and clothing to Pakistan, Khyam directed him to "[f]ind out the details from your side."

[44] On his return to Ottawa from London, the appellant continued a steady stream of emails to Khyam in which he renewed his offers of assistance to the Khyam group. In a March 2004 email, the appellant suggested that he again travel to meet with Khyam, inquiring: "[I]s there activities I cud help out with?" and "[I]f u think it would be a good idea for me to pack up and head down with u niggas.[6] of course, i would do loads of shopping for the niggas first."

[45] Shortly thereafter, the appellant sent this incriminating email to Khyam:

> im putting together up to 30 devices for u niggas, we will test out stuff too … also, we can manufacture our own torches, the LED ones, with headset, for very cheap from right here. … also, will get supplies for the niggas … is there anythign specific u bros want? … u bros need anything? … we can get military gear, like vests, bags, magazine vests, etc. stuff like that from here for cheap, so let me know if u need anything.

(4) Police Seizure of the Hifidigimonster and Related Items

[46] The RCMP searched the appellant's residence on March 29, 2004, the day of his arrest, and seized various items. These included: an array of electronic components and devices; electronics instructional literature and tools; an electric model airplane engine; a model airplane in parts; three non-restricted semi-automatic 7.62 calibre military rifles registered to the appellant and 640 rounds of the same calibre ammunition; a pellet rifle; a paintball gun; two knives; five computer hard drives; $10,300 in one-hundred dollar bills found under the mattress in his brother Qasim's bedroom; and military and Jihad-related books discovered in the appellant's bedroom.

[6] As explained by Babar: "'nigga' is a slang term used to refer to a person, or persons if plural, whose identity would be apparent in the context of the communication": trial judge's reasons, para. 21.

[47] The hifidigimonster was also seized from Qasim's room. Seized invoices and delivery documents from electronics suppliers corroborated the handmade assembly process used for the device. The seized hifidigimonster had been modified in several respects from the photographed version of the device that the appellant had showed to Khyam and S. Mahmood during his February 2004 trip to London.

(5) Expert Evidence Concerning the Hifidigimonster

[48] Sergeant Sylvain Fiset, an RCMP explosives expert, testified at trial regarding his construction and testing of devices similar to the hifidigimonster, both as photographed by the appellant and as seized by the police. Based on his testing of these replica devices, Sergeant Fiset said that the photographed hifidigimonster had a radio frequency range of "some 300 metres in open terrain, and about 150 metres in a downtown urban setting." The seized hifidigimonster had a reduced range – about 200 metres in the open and 100 metres in a downtown area. According to Sergeant Fiset, the seized hifidigimonster was potentially capable of being used to trigger or arm an improvised explosive device ("IED"). However, Sergeant Fiset acknowledged that, because the power regulator in the seized device was only a 0.1 amp regulator, it would not trigger an IED, but would only trigger a light- emitting diode ("LED").

[49] Sergeant Fiset further testified that additional electronic components suitable for building more remote detonator devices were found in the appellant's residence, together with three illegal jamming devices found in Qasim's room. No blasting caps, other detonators or any explosives components were discovered in the home.

[50] Sergeant Fiset offered the opinion that the detonation of 600 kilograms of ammonium nitrate fertilizer "would provoke certainly structural damage … to infrastructure such as electrical conduits, gas pipelines located underground because of the seat of the explosions" and, if people were present, "would provoke death and serious injuries."

(6) Motion for Directed Verdicts

[51] After the close of the Crown's case, the appellant moved for directed verdicts of acquittal on all seven counts. He submitted that the Crown's case as originally conceived and developed at trial was premised on the assertion that his alleged "participation, facilitation and financing of one common design … namely, the *London* fertilizer bomb plot" (emphasis added), constituted the terrorist activity underlying all counts. The appellant argued that, because there was no direct or circumstantial evidence from which it could reasonably be inferred that he had any knowledge of this specific plot, the requisite *mens rea* to sustain convictions on counts 1 and 2 had not been established.

[52] With respect to the remaining counts, the appellant did not deny the conduct underlying them. However, he maintained that the evidence demonstrated that he committed the acts in question, including his role in creating the remote detonator devices for the Khyam group, for the purpose of participating in and supporting "armed conflict", namely, the Islamist insurgent fighting in Afghanistan. The appellant asserted that what the Crown had in fact proved at trial was not his knowledge of or participation in the

"*London* fertilizer bomb plot" but, rather, his "involvement in a different plan, namely, to be a frontline Jihadi soldier in Afghanistan".

[53] The appellant then argued that, at the conclusion of the trial, the Crown had impermissibly shifted the basis on which it sought to secure convictions by claiming that the "overall common design" in respect of all counts was "violent Jihad wheresoever it might ultimately be committed".

[54] The Crown acknowledged on the directed verdicts motion that the "*U.K.* fertilizer bomb plot" (emphasis added) was the focus of counts 1 and 2. However, as the evidence did not establish a selected target for that plot, the Crown contended that a conviction on the first two counts could be grounded on the evidence that the appellant was a party to a plan to bomb one or more of several possible targets in the United Kingdom. The Crown also emphasized that the remaining counts as framed in the indictment did not particularize specific terrorist activity.

[55] The trial judge dismissed the directed verdicts motion. He held that it would at least be open to a trier of fact on the Crown's evidence to draw the inference in relation to counts 1 and 2 that: "Khawaja was a knowing participant with Omar Khyam and others in the London area in a scheme to explode improvised explosive devices at a place or places in the United Kingdom." Further, as counts 3 to 7 were not focused on a London, or even a United Kingdom, fertilizer bomb plot, it would be open to a trier of fact to find

that the appellant acted "to facilitate or carry out, in whole or in part, terrorist activity and in association with or assisting or enhancing a terrorist group in so doing."

(7) Defence Calls No Evidence

[56] The appellant did not testify at trial. Nor did he call any evidence in his own defence. Thus, he offered no evidence about his knowledge of the Khyam group's objectives, his interactions with members of the Khyam group, his own intentions regarding the group's activities, or his understanding of the nature of the conflict in Afghanistan.

(8) Trial Judgment

[57] In his reasons for judgment, the trial judge held that, based on the position taken by Crown counsel in opening submissions, the primary offences charged in the first two counts against the appellant related to his knowledge of the U.K. fertilizer bomb plot. Although in his directed verdicts ruling, the trial judge had held that it would be open to a trier of fact to find that the appellant knew of this plot, he ultimately concluded that the Crown had failed to establish on the requisite criminal standard that the appellant knew of the existence of the U.K. fertilizer bomb plot, or that he intended by his activities to facilitate that plot (at para. 101):

> The evidence does not lead inescapably, or beyond a reasonable doubt, to the conclusion that Momin Khawaja was privy to the fertilizer bomb plot or its existence. On that basis, given the narrow focus cast by the prosecution on counts 1 and 2, the necessary *mens rea* or guilty knowledge of the fertilizer bomb plot has not been established to the

> requisite level of proof, and I am unable to find Momin Khawaja guilty as charged on those 2 counts.

[58] The trial judge observed that each of counts 1 and 2 also alleges the commission of indictable offences under s. 81(1) of the *Criminal Code*.[7] He pointed out that the appellant admitted through counsel that there was evidence on which a properly instructed jury could find him guilty beyond a reasonable doubt on the included offences of acting with intent to cause an explosion (count 1) and possession of an explosive (count 2). The trial judge found at para. 106 that the appellant knew he was building a device to trigger explosions that were intended to cause injury or death and serious property damage based on "the whole context of violent Jihad which brought Khawaja together with Khyam" and the other members of the Khyam group. He thus entered convictions on the included offences.

[59] In respect of counts 3 to 7, the trial judge noted at para. 108 that the prosecution did not restrict these counts to the U.K. fertilizer bomb plot. The Crown's position was that the preparation for and support of the insurgency against the coalition forces in Afghanistan constituted the enhancing or facilitating of a terrorist group and a terrorist activity.

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[7] Section 81(1) states in part:

> 81.(1) Every one commits an offence who
>
> (a) does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property;
>
> ....
>
> (d) makes or has in his possession or has under his care or control any explosive substance with intent thereby
>
> (i) to endanger life or to cause serious damage to property, or
>
> (ii) to enable another person to endanger life or to cause serious damage to property.

[60] The defence position was that the appellant's actions were directed solely to the furtherance of insurgent fighting in Afghanistan and that his actions fell outside the definition of terrorist activity because of the exclusionary clause in the definition for acts committed during an armed conflict in accordance with customary or conventional international law. We discuss this so-called "armed conflict exclusion" later in these reasons.

[61] The trial judge rejected both aspects of the defence position. He held at para. 129 that the appellant's actions did not come within the armed conflict exception to the statutory definition of terrorist activity. He also held at paras. 130-31 that the appellant knowingly acted to support the Khyam group's broader terrorist agenda beyond front line combat in Afghanistan. His findings at paras. 134-39 in relation to the individual counts may be summarized as follows:

Count 3 — By taking weapons training at the camp in northern Pakistan, the appellant had the object of enhancing the ability of a terrorist group to facilitate or carry out terrorist activity.

Count 4 — The appellant deceived a young woman into acting as a conduit to pass funds, including a bank card, to Khyam and his group. The funds were for the purpose of enhancing the ability of the group to facilitate or carry out terrorist activity.

Count 5 — The appellant made his parents' residence in Pakistan available for the use of Babar, Amin, Garcia, or any of the people Khyam needed housing for. Since the relationship between the appellant and Khyam involved the pursuit of their common objective of violent Jihad, the offer of the residence was to facilitate terrorist activity. It is immaterial that the residence was not actually used by members of the terrorist group.

Count 6 Everything the appellant did in relation to developing the remote detonator device, including his reports to Khyam and meeting with him in February 2004, amounted to participating in or contributing to the activity of a terrorist group for the purpose of enhancing the group's ability to carry out terrorist activity.

Count 7 The appellant's actions in transporting money, a medical kit, the SIM cards and invisible ink pens from Khyam to Babar and Amin; his offer to acquire equipment like night vision goggles; his suggestion that Khyam and S. Mahmood come to Canada for shooting practice; his offer to provide a course in electronics to Khyam; the suggestion that "Immy" be sent on a suicide mission to Israel; and his discussion with S. Amin about putting his computer skills to work to assist "the bros" were all things knowingly done by the appellant to assist the terrorist purposes of the group.

[62] Based on these findings, the trial judge entered convictions on the offences in counts 3 through 7.

I. Conviction Appeal

[63] There are five issues on the conviction appeal:

(1) Did the trial judge err by severing the "motive clause" in s. 83.01(1)(b)(i)(A) of the definition of terrorist activity and thereafter registering convictions for offences unknown to law?

(2) Did the trial judge err by convicting the appellant on a different case than that set out in the Crown's opening statement at trial?

(3) Did the trial judge err by holding that the "armed conflict exception" to the definition of terrorist activity, set out in s. 83.01(1)(b)(ii) of the *Criminal Code*, is inapplicable in this case?

(4) Did the trial judge err by taking judicial notice of the geo-political situation in Afghanistan and of international law?

(5) Are the convictions on counts 3 to 7 unreasonable?

(1) The Constitutionality of the Motive Clause

(i) The Ruling at Trial

[64] On a pre-trial motion, the appellant challenged the constitutionality of the offence-creating provisions in Part II.1 of the *Criminal Code*. He claimed that they were so vague and so broad as to violate s. 7 of the *Canadian Charter of Rights and Freedoms*. These arguments failed at trial and were not renewed on this appeal. The overbreadth argument, however, was raised in *United States of America v. Nadarajah and Sriskandarajah* (2009), 243 C.C.C. (3d) 281 (Ont. S.C.),[8] companion extradition appeals from the orders of Pattillo J. directing the committal of the appellants for surrender to the United States pursuant to s. 29 of the *Extradition Act*, S.C. 1999, c. 18. We will address the overbreadth argument in our reasons disposing of those appeals, released concurrently with these reasons.

[65] The appellant in this case also challenged the constitutionality of the definition of "terrorist activity", and in particular, s. 83.01(1)(b)(i)(A). That provision requires the Crown to prove that the relevant act or omission was committed "in whole or in part for a political, religious or ideological purpose, objective or cause". The appellant argued that this provision infringes s. 2(a) and s. 2(b) of the *Charter*. Section 2(a) protects freedom of religion and conscience and s. 2(b) protects freedom of thought, belief, opinion and expression. The trial judge referred to s. 83.01(1)(b)(i)(A) as the "motive clause". We

[8] These cases were heard together by Pattillo J. and are indexed as *U.S. v. Nadarajah*. The appeals proceeded separately, but were heard together, in this court.

will use that description to avoid continual reference to the complex letter and number designation of the section.

[66] In his ruling reported at (2006), 214 C.C.C. (3d) 399, the trial judge did not find that the conduct defined in "terrorist activity" was protected by any part of s. 2 of the *Charter*. Instead, he found a violation of s. 2, not as it applied to anyone who might engage in the conduct defined as "terrorist activity", but rather in respect of individuals who shared, or could be seen as sharing, some or all of the political, religious or ideological beliefs associated with those who actually engage in "terrorist activity". The trial judge took the view that persons who shared or were seen by others as sharing views akin to those associated with "terrorist activity" would refrain from, or at least be reluctant to, espouse those views, either because of the public perception connecting those views to terrorism, or because of the government's tendency to focus its investigative resources on persons associated with those views.

[67] The trial judge attributed this "chilling effect" on the rights in s. 2 to Parliament's inclusion of the motive clause in the definition of "terrorist activity". His reasoning is captured by the following passages at paras. 52 and 58 of his ruling:

> Even in cases, however, in which the politics, religion or ideology of foreign persons or groups must be proven, it would be likely that such focus would have some impact in Canada. *Canadians who might share the political, religious or ideological stripe of the foreign groups under scrutiny could not help but fall under some sort of shadow. It is exactly that sort of phenomenon that has given rise to concerns for racial or ethnic profiling and prejudice in the*

> *aftermath of the notorious terrorist actions* in a number of countries around the world in recent years.
>
> …
>
> It seems to me that the inevitable impact to flow from the inclusion of the "political, religious or ideological purpose" requirement in the definition of "terrorist activity" will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad. *Equally inevitable will be the chilling effect Webb* [an author cited by the trial judge] *predicts.* There will also be an indirect or re-bound effect of the sort Professor Stribopoulos [another author cited by the trial judge] described, as *individuals' and authorities' attitudes and conduct reflect the shadow of suspicion and anger falling over all who appear [to] belong to [or] have any connection with the religious, political or ideological grouping identified with specific terrorist acts. This in my view amounts to a prima facie infringement or limitation of the freedoms of conscience, religion, thought, belief, expression and association* such that would have to be justified with reference to s. 1 of the *Charter*. [Emphasis added.]

[68] The trial judge further found that the limitation placed on the rights under s. 2 of the *Charter* by the motive clause could not be justified under s. 1 of the *Charter*. At para. 80, he held that the Crown had offered "no compelling benefit or justification" for the clause.

[69] Having determined that the motive clause was unconstitutional, the trial judge declined to declare the entire definition of "terrorist activity" of no force and effect. Instead, he severed the offending clause from the rest of the definition of "terrorist activity", leaving the remainder of the definition to be applied to the various offences that

required proof of "terrorist activity". The remedy granted by the trial judge had the anomalous effect of easing the Crown's ultimate burden of proof by eliminating an essential element of the definition of "terrorist activity" as enacted by Parliament.

(ii) Arguments on Appeal

[70] The appellant accepts the trial judge's ruling that the motive clause is unconstitutional. He submits, however, that the remedy chosen by the trial judge was inappropriate. The appellant contends that, having found that a central component of the definition of terrorist activity was unconstitutional, the trial judge should have declared the entire definition of no force and effect and left it to Parliament to decide whether it wished to re-enact the definition without the offending clause. The appellant submits that, if the entire definition of "terrorist activity" is declared of no force and effect, then all the offences in Part II.1 incorporating that definition are rendered of no force and effect.

[71] The respondent Crown argues that the trial judge erred in holding that the motive clause offends s. 2 of the *Charter*. Crown counsel points out that, in contrast with the trial judge, three other courts that have considered the motive clause have all upheld its constitutionality: see *Nadarajah*, at paras. 29-43; *R. v. Ahmad* (2009), 257 C.C.C. (3d) 199 (Ont. S.C.), at paras. 88-141; *Reference re Marine Transportation Security Regulations*, 2009 FCA 234, at para. 35. Alternatively, the Crown argues that if the trial judge was correct in his constitutional analysis, he was also correct in the remedy he

chose and that severance of the motive clause from the rest of the definition of "terrorist activity" was the appropriate order.

[72] Counsel for the appellant, following the trial judge's analysis, does not argue that the definition of "terrorist activity" includes conduct that is protected by s. 2 of the *Charter*. Before this court, counsel limits his constitutional argument to the submission that the motive clause violates s. 2 through its "chilling effect" on those who would otherwise be inclined to express political, religious, or ideological beliefs that are, or might be seen by the public and the authorities as, similar to the views held by individuals associated with "terrorist activity". Although the constitutional challenge does not allege a personal violation of the appellant's constitutional rights, the Crown, quite properly, does not challenge the appellant's right to make this argument: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313; *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), at paras. 78-80.

[73] In contrast to this case, in *Nadarajah* and *Sriskandarajah* (the "extradition appeals"), the appellants do argue that some of the conduct captured by the definition of "terrorist activity" is protected by s. 2 of the *Charter*. On this argument, the terrorism offences in Part II.1, which incorporate "terrorist activity" as an element of the crimes created by those sections, are unconstitutional unless justified under s. 1 of the *Charter*. This claim was unsuccessfully advanced in the courts below and is renewed on appeal.

These appellants also rely on the "chilling effect" analysis of the trial judge in the present case as a second basis for a finding of unconstitutionality.

[74] We think it best to address both arguments based on s. 2 of the *Charter* at the same time. We will do so in these reasons.

(iii) Analysis

(a) The Statutory Framework

[75] The analysis of the s. 2 *Charter* arguments in this appeal and in the extradition appeals requires an understanding of the statutory framework of the anti-terrorism provisions in the *Criminal Code*. We therefore begin with a consideration of that framework.

[76] "Terrorist activity" is not a crime under Part II.1 of the *Criminal Code*. The phrase "terrorist activity" does not prohibit or criminalize any political, religious, ideological thought, belief or opinion. The phrase defines certain conduct. The definition includes the requirement that the defined conduct be performed for a political, religious or ideological reason. The distinction between the expression of a belief by means other than those caught by the definition of "terrorist activity" and the expression of a belief using "terrorist activity" is made explicit in s. 83.01(1.1):

> 83.01 (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 "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

[77] The phrase "terrorist activity" as defined in s. 83.01 is used as a component of several of the terrorism crimes created in Part II.1. To prove those crimes, the Crown must prove that someone, not necessarily the accused, engaged in conduct amounting to "terrorist activity". To appreciate the constitutional argument, it is helpful to examine more closely the language used in the definition of "terrorist activity" and in related provisions. We begin with the definition of "terrorist group" in s. 83.01:

> "terrorist group" means
>
> (a) an entity that has as one of its purposes or activities facilitating or *carrying out any terrorist activity*, or
>
> (b) a listed entity,
>
> and includes an association of such entities. [Emphasis added.]

[78] The word "entity" is broadly defined and includes a person or group. Subsection (b) refers to a list that is established under s. 83.05. It has no relevance in these proceedings.

[79] The definition in subsection (a) incorporates the phrase, "terrorist activity". "Terrorist activity" is defined in two different ways in s. 83.01. The definition in subsection (a) refers to acts or omissions that would constitute any of the offences enumerated in (i) through (x) of s. 83.01(1)(a). This arm of the definition of "terrorist activity" is not in issue in these proceedings.

[80] The operative definition of "terrorist activity" for present purposes is found in subsection (b) of s. 83.01(1). We have placed our descriptor beside each part of the definition to assist in following the analysis set out below:

> "terrorist activity" means ...
>
> (b) an act or omission, in or outside Canada, ← **The Act Requirement**
>
> (i) that is committed
>
> (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and ← **The Motive Requirement**
>
> (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 ← **The Ulterior Intention Requirement**
>
> (ii) that intentionally ← **The Intention Requirement**
>
> (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),

← The Consequences Requirement

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

← Expanded Meaning of Act or Omission

[81] The definition of "terrorist activity" is complex, having both a conduct and a mental component. The conduct component, subject to the "armed conflict exception" inserted in the final paragraph of the subsection, encompasses any act or omission, a conspiracy, attempt or threat to commit any act or omission, counselling an act or omission, and being an accessory after the fact to an act or omission, that causes one of the five consequences described in s. 83.01(1)(b)(ii)(A)-(E). For example, and assuming the armed conflict exception does not apply, s. 83.01(1)(b)(ii)(A) refers to an act or omission that "causes death or serious bodily harm". The conduct component of the definition of "terrorist activity" is established if the Crown proves an act or omission that had that consequence. The conduct component is also established if the Crown proves a conspiracy, attempt, threat to commit, or counselling of an act or omission that if carried out would cause death or serious bodily harm. Finally, the conduct component is satisfied if the Crown proves that the individual acted as an accessory after the fact to an act or omission that caused death or serious bodily harm.

[82] The mental component of the definition of "terrorist activity" has three parts. First, as is evident from the use of the word "intentionally" in s. 83.01(1)(b)(ii), the act or omission must be done with the intention of bringing about one of the consequences described in sub-paragraphs (A) through (E) of that section. In this case, it is not necessary to settle on the precise meaning of "intentionally" in that particular context.

[83] Second, the act or omission must be done with the further intention of bringing about one of the consequences described in s. 83.01(1)(b)(i)(B), namely:

- the intimidation of the public or a segment of the public with respect to its security or
- compelling a person, government or domestic or international organization to do or refrain from doing any act.

[84] The consequences described in s. 83.01(1)(b)(i)(B) need not actually occur, but must be intended by those engaged in the conduct. An intention to bring about a consequence that is not part of the conduct component is described as an ulterior intention: see E. Colvin & S. Anand, *Principles of Criminal Law*, 3rd ed. (Toronto: Thomson Carswell, 2007), at pp. 112, 193.

[85] Third, in addition to proving an intention to bring about one of the consequences that forms part of the conduct element of "terrorist activity", and proving the further intention of bringing about one of the additional consequences set out in s. 83.01(1)(b)(i)(B), the definition also requires that the act be done "for a political, religious or ideological purpose, objective or cause": s. 83.01(1)(b)(i)(A).

[86] Putting the triple-layered fault component of the definition into the language used to describe the *mens rea* component of criminal offences, the definition of "terrorist activity" requires an intention to bring about the consequence prohibited in the definition,

an ulterior intention with respect to a further consequence, and proof of a specified purpose or motive.

[87] The definition of "terrorist activity" is made clearer when removed from the dense and abstract language of the *Criminal Code* and placed in the context of the specific findings of fact made by the trial judge at paras. 89-90. He found that Khyam and others had agreed to cause explosions in the United Kingdom and elsewhere. This agreement constitutes an "act or omission" under the definition of "terrorist activity" in s. 83.01(1). The trial judge further found that, had the scheme been implemented as planned, there would have been explosions that were intended to and would have caused death and destruction of property. This finding satisfies both the consequence component of the definition and one element of the mental component, namely, the requirement that the act or conduct be done with the intention of bringing about that consequence. Further, the trial judge found that the objectives of the Khyam group included terrorizing segments of the public in the United Kingdom and elsewhere with regard to their security. This finding addresses the ulterior intention requirement in s. 83.01(1)(b)(i)(B). Finally, and although the trial judge struck the motive clause as unconstitutional, he was satisfied that the Khyam group had acted in part, at least, for a political, religious or ideological purpose, thus satisfying the requirements of s. 83.01(1)(b)(i)(A).

(b) The Relevance of Criminalizing Motive to the Constitutional Argument

[88] Motive refers to the reason, or at least one of the reasons, that a person chooses to engage in conduct intending to bring about a certain consequence. One's reason for choosing to bring about that consequence is one's "motive": *R. v. Lewis*, [1979] 2 S.C.R. 821, at pp. 831-32; D. Stuart, *Canadian Criminal Law: A Treatise,* 5th ed. (Toronto: Thomson Carswell, 2007), at p. 225. We agree with the trial judge that s. 83.01(1)(b)(i)(A) requires proof of motive, in that it requires proof that one of the reasons for engaging in the proscribed conduct was "a political, religious or ideological purpose, objective or cause". In fact, there are two motive clauses in the definition of "terrorist activity". Section 83.01(1)(b)(i)(B), which we have described as the ulterior intention clause, also requires proof of motive, in that it requires proof of a reason for which the person brought about the intended consequence: see K. Roach, "Terrorism Offences and the *Charter*: A Comment on *R. v. Khawaja*" (2007) 11 Can. Crim. L. R. 272, at p. 292.

[89] While we agree that s. 83.01(1)(b)(i)(A) is properly described as a motive clause, we attribute no significance in the constitutional argument to the fact that the section requires proof of motive. The mental processes that precede and generate conduct are multi-faceted and interrelated. They can be parsed and labeled in a variety of ways. Conduct may have one or many motives. The same state of mind may be described as motive, intention or purpose. None of the labels is intrinsically more accurate than the others. The distinction between motive and other mental states is often one of

terminology rather than substance: B. Fisse, *Howard's Criminal Law*, 5th ed. (Sydney: Law Book Co., 1990), at pp. 485-86.

[90] For example, the offence of break and enter with intent to steal can be described as requiring proof of the reason or motive that precipitated the break-in – an intention to steal. However, if one wishes to avoid using the word "motive" to describe an element of the *mens rea*, one can refer to the intention to steal as the burglar's ulterior intention and describe the burglar's motive as his or her desire for financial gain, a state of mind that is irrelevant to criminal culpability.

[91] The aphorism that "motive is no part of a crime" does not express a criminal law principle referable to the permitted scope of criminal liability, much less a principle of fundamental justice protected by s. 7 of the *Charter*. The aphorism refers to the interpretive rule that, ordinarily, when interpreting the *mens rea* required for criminal culpability, and absent statutory language to the contrary, the reason or reasons that cause an accused to engage in prohibited conduct or to choose to bring about a prohibited consequence are irrelevant to culpability: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at pp. 496-97. The aphorism is also a reflection of the nomenclature used to describe the fault component of crimes and, more specifically, to distinguish between states of mind that are relevant to culpability as described in the statute creating the offence (*e.g.*, intent, purpose), and states of mind that are not relevant to that definition

(*e.g.*, motive): Colvin & Anand, at pp. 192-93. Professor G. Williams in his *Textbook of Criminal Law*, 2nd ed. (London: Stevens & Sons, 1983) puts it this way, at p. 75:

> In ordinary speech, "intention" and "motive" are often convertible terms. For the lawyer, the word "motive" generally refers to some further intent which forms no part of the legal rule.

[92] Nor do we accept that treating motive as relevant to criminal culpability is foreign to Canadian criminal law. Motive plays a part in many aspects of the substantive criminal law, including the definition of the fault component of some crimes and the definition of exculpatory justifications and excuses: M. Plaxton, "Irruptions of Motive in the War on Terror" (2007) 11 Can. Crim. L. R. 233; Colvin & Anand, at pp. 192-93. For example, there are many *Criminal Code* offences that require that the prohibited conduct be done for a specified purpose that is ulterior to the conduct component of the crime (*e.g.*, s. 23(1) (accessory after the fact), s. 51 (intimidating Parliament or the legislature), s. 52 (sabotage), s. 53 (inciting to mutiny), s. 57(2) (false statement in relation to passport), s. 151 (sexual interference), s. 152 (invitation to sexual touching)). The requirement that the Crown prove "purpose" can refer to different states of mind, including the requirement of proof of the reason that precipitated the conduct that brought about the intended consequence. When purpose is used in this sense, it is effectively indistinguishable from the concept of motive: *R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 27; *R. v. Kerr*, [2004] 2 S.C.R. 371, at paras. 26-27.

[93] Parliament, in defining a crime, can require proof of the perpetrator's motive as an element of that crime: *Hibbert*, at para. 25. A statutory provision that requires proof of motive is not constitutionally suspect. The motive clause in the definition of "terrorist activity" signals that Parliament has determined that motivation for the conduct described in the definition is a central feature of that which distinguishes terrorism from other crimes. On this view, terrorism is only properly described and labeled for criminal law purposes by including certain motives as a component of that definition: see B. Saul, *Defining Terrorism in International Law* (London: Oxford University Press, 2008), at p. 39.

[94] Australia, Great Britain, New Zealand and South Africa have used motive as an element of the definition of "terrorist activity".[9] The United States has adopted a definition that makes no reference to motive.[10] It is irrelevant for the purpose of the constitutional analysis which of the two approaches is preferable from a policy standpoint. What is germane to the analysis is the undoubted power of Parliament to make motive part of a crime. The constitutional concerns generated by this particular motive clause arise because the nature of the motive identified by Parliament is so closely associated with the fundamental freedoms protected by s. 2 of the *Charter*.

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[9] Australia, *Criminal Code Act 1995* (Cth), s. 100.1; Britain, *Terrorism Act 2000* (U.K.), 2000, c. 11, s. 1(1)(c); New Zealand, *Terrorism Suppression Act 2002* (N.Z.), 2002/34, s. 5; South Africa, *Protection of Constitutional Democracy Against Terrorist and Related Activities Act*, No. 33 of 2004, s. 1(1)(xxv)(c).

[10] U.S.C. § 2331.

(c) Section 2 of the *Charter* and the Definition of "Terrorist Activity"

[95] Section 2 of the *Charter* guarantees certain fundamental freedoms:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

[96] The trial judge did not distinguish between the rights protected under s. 2(a) (conscience and religion) and s. 2(b) (thought, belief, opinion and expression). At their extradition hearings, counsel for Nadarajah and Sriskandarajah relied on ss. 2(b) and 2(d) (freedom of association) and the extradition judge in those cases likewise dealt with both claims together. The arguments in all three appeals is that the motive clause infringes the right to engage in activities that express religious beliefs and political opinions. In *Ahmad*, Dawson J. examined similar constitutional claims from the perspective of the right to freedom of expression guaranteed in s. 2(b). We propose to follow the same approach as in *Ahmad*. The s. 2(b) claim as framed is the broadest of the *Charter* infringement claims. If the s. 2(b) claim fails, then the claims based on the other rights protected by s. 2 of the *Charter* must also fail.

[97] The constitutional right to freedom of expression has been repeatedly interpreted in a broad and purposive manner. Activity that conveys or attempts to convey meaning

through a non-violent method is *prima facie* under the umbrella of s. 2(b). The content of the meaning expressed or intended, that is, the message intended or actually conveyed, cannot deprive an activity of its expressive quality: *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, at pp. 967-71; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 729; *R. v. Zundel*, [1992] 2 S.C.R. 731, at pp. 751-53; *Montreal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, at paras. 59-60.

[98] The broad reading of s. 2(b) reflects the fundamental importance of the values that animate the right to freedom of expression, both to the individual and to society as a whole. Chief Justice Dickson identified those values in *Keegstra*, at pp. 727-28:

> [T]he Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

[99] Conduct that falls within the definition of "terrorist activity" is, by definition, intended to convey a meaning. The requirement that the conduct be performed for a political, religious or ideological purpose means that the Crown must prove that the activity was done in part, at least, to convey a certain message or meaning: *Ahmad*, at paras. 100-101.

[100] Although the meaning conveyed by any given activity cannot exclude that activity from the protection of s. 2(b), expressive activity that takes the form of violence is not sheltered under s. 2(b): *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 588; *Irwin Toy*, at pp. 969-70; *Keegstra*, *per* Dickson C.J.C. for the majority, at pp. 731-32, and *per* McLachlin J. in dissent, at pp. 828-30; *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 S.C.R. 295, at para. 28.

[101] Violent activity, even though it conveys a meaning, is excluded from s. 2(b) because violence is destructive of the very values that underlie the right to freedom of expression and that make this right so central to both individual fulfillment and the functioning of a free and democratic society. Expression conveyed through violent means coerces and dissuades others from exercising their rights, including their right to freedom of expression. The use of violence to convey beliefs or opinions discourages others from testing the truth of those beliefs or opinions, discourages participation in social and political decision-making, and prevents others from achieving individual self-fulfillment through the expression of their own beliefs and opinions. To accord even *prima facie* protection under s. 2(b) to expression conveyed through violence is to undermine the very reason for the provision.

[102] The Supreme Court has not been called upon to set out the exact parameters of the violence exception to the broad meaning of expressive activity protected by s. 2(b). The exception clearly reaches conduct that causes physical harm to others. There is also

substantial *obiter dicta* in the early s. 2(b) jurisprudence indicating that the violence exception applied to threats of violence: see *Irwin Toy*, at p. 970; *Dolphin Delivery*, at p. 588; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, at p. 1182; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at p. 245. However, in *Keegstra*, at p. 732, the majority held that only "expression communicated directly through physical harm" would be placed beyond the potential protection of s. 2 (b). The dissent, at p. 830, would have excluded "actual or threatened physical interference with the activities of others."

[103] While the majority in *Keegstra* appeared to hold that threats of violence cannot be equated with violence for the purpose of the s. 2(b) analysis, in two cases since *Keegstra*, the majority of the Supreme Court has indicated in *obiter* comments that threats of violence or other threatening actions short of actual physical violence will not be treated as expressive conduct for the purpose of s. 2(b): see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at paras. 107-108; *Greater Vancouver Transportation Authority*, at para. 28.

[104] The case law from the Supreme Court has also not defined "violence" in the context of the right to freedom of expression. In dissent in *Keegstra*, at p. 830, McLachlin J. referred with approval to a dictionary definition of "violence" as meaning "[t]he exercise of physical force so as to inflict injury on or damage to persons or property." More recently in *R. v. C.D.*, [2005] 3 S.C.R. 668, at paras. 28-33, a case

which did not involve s. 2 of the *Charter*, the majority acknowledged that violence can have a wide variety of meanings and could extend to physical harm done to property in some contexts.

[105] The meaning of violence for the purpose of determining forms of expression that will not be *prima facie* protected by s. 2(b) is therefore an open question. In particular, we take it as undecided whether violence can refer to physical harm to property and whether violence includes conduct preliminary to the actual infliction of physical violence, such as threats of violence.

[106] In the extradition appeals, counsel for Nadarajah and Sriskandarajah acknowledge that an act or omission that causes any of the consequences described in s. 83.01(1)(b)(ii)(A)-(D) constitutes violent activity and is not constitutionally protected expression. They instead contend that the conduct described in subsection (E) does not necessarily address violent activity and is, therefore, potentially protected under s. 2(b). The extradition judge rejected that argument (paras. 33-34). The argument was accepted, however, in *Ahmad*, at paras. 104-107.

[107] Dawson J. in *Ahmad* also held at para. 106 that some of the conduct that falls within the extending meaning of act or omission in the definition of "terrorist activity" does not amount to violent activity and is, therefore, potentially protected under s. 2(b). Dawson J. observed at para. 108 that conspiracy, counselling and being an accessory after

the fact, all conduct captured within the meaning of act or omission, does not necessarily involve violent activity.

[108] Neither the argument that the conduct in subsection (E) is potentially protected by s. 2(b), nor the argument that conduct ancillary to actual acts of violence is protected by s. 2(b), need be addressed to resolve the constitutional issue in these appeals. First, subsection (E) is not engaged in these appeals. Subsection (E) is directed at conduct that causes a serious interference with or disruption of an essential service, facility or system. It was not the Crown's case either in this appeal or in the extradition appeals that the alleged terrorist activity involved the kind of conduct described in subsection (E). The prosecution relied on the definitions in subsections (A)-(D).

[109] Second, even if the ancillary conduct described in the definition, such as threats or conspiracies, is not excluded from s. 2(b) as violent conduct, the conduct is not protected by s. 2(b). As will be explained below, where, as here, it is the effect rather than the purpose of the legislation that limits expressive activity, the legislation will be found to violate s. 2(b) only if the affected expression promotes the values underlying the right to freedom of expression. The ancillary conduct in this case does not do so.

[110] As it is unnecessary to address the arguments based on the scope of the violence exception to decide this appeal or the extradition appeals, we think those issues should be left to a case where resolution is necessary to the outcome. In taking that view, we follow the *dicta* in *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R.

248, at paras. 30-31, where in the course of interpreting the anti-terrorism legislation, the Supreme Court cautioned against attempts to interpret legislative provisions that are not directly engaged on the facts before the court.

[111] Accordingly, we will not address the meaning of subsection (E). We will also assume that at least some of the conduct captured by the expanded meaning of act or omission in the definition of "terrorist activity" is not violent conduct. We move next to explain why even though the conduct is not violent activity, it is not protected by s. 2(b).

[112] A legislative provision may limit freedom of expression either through its purpose or by its effect. If the purpose is to restrict expression that is *prima facie* protected by s. 2(b), the limit must be justified under s. 1 of the *Charter*: *Keegstra*, at p. 733; *Zundel*, at p. 758. However, if the purpose is not to restrict expression, but the effect of the legislation is to restrict expression, the legislation limits the rights guaranteed under s. 2(b) only if the activity limited by the legislation promotes at least one of the values underlying the right to freedom of expression. These principles are the pursuit of truth, participation in the community and individual self-fulfillment: *Irwin Toy*, at pp. 976-77.

[113] Counsel do not submit that the purpose of the legislation in Part II.1 of the *Criminal Code* is to restrict freedom of expression or any other right guaranteed under s. 2. Counsel in the extradition appeals do, however, contend that the legislation has that effect.

[114] We agree that the purpose of the legislation is to protect the community from the physical harm that will flow from the conduct captured by the definition of "terrorist activity". Section 83.01(1.1) makes it clear that the purpose is not to limit expression. For convenience, we repeat that provision:

> 83.01(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 "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria in that paragraph.

[115] Turning to the effect of the legislation, we can do no better than refer to the analysis of Dawson J. in *Ahmad*, at paras. 128-29. We adopt his analysis, which states in part:

> [T]o the extent the "activity" in question falls outside the violence exception and remains within the scope of s. 2(b) protection, (for example because the mode of participation does not involve actual violence), it nonetheless involves actions taken in aid of a political, religious or ideological objective, by means intended to cause the harmful effects that clauses (A) to (E) of s. 83.01(1)(b)(ii) are aimed at, with the intention to intimidate or compel action as specified in s. 83.01(1)(b)(i)(B) of the definition. ...
>
> In my view, the expressive activity affected by the legislation tends to undermine rather than support the values upon which freedom of expression is based.

[116] We agree with Dawson J. that none of the conduct that falls within "terrorist activity" involves expressive activity that advances any of the values underlying s. 2(b). For example, counselling someone to engage in conduct that would cause death or serious bodily harm hardly encourages the pursuit of truth, participation in the

community or individual self-fulfillment. Consequently, even if the activity is not violent, it is not expressive conduct for the purpose of s. 2(b).

[117] In summary, none of the activity that falls within the definition of "terrorist activity" is protected under s. 2(b) for one of two reasons. First, some, if not all, of the conduct involves the use of violence to convey a meaning. Second, to the extent that the activity does not involve the conveying of meaning through violence, it does involve the conveying of meaning in a manner that is contrary to and destructive of the principles underlying the right to freedom of expression. As the purpose of the legislation is not to limit expression, the fact that it has that effect, but only with respect to a form of expression that is destructive of the principles underlying freedom of expression, does not constitute an infringement of s. 2(b).

(d) The "Chilling Effect" Argument

[118] One would think that the conclusion that the phrase "terrorist activity" does not capture conduct protected by s. 2 would end the argument that any part of the definition infringes the rights protected by s. 2. However, as outlined above, the trial judge in the present case found a violation of s. 2 of the *Charter* based on his conclusion that the motive clause would inhibit persons who wished to engage in conduct that is outside the definition of "terrorist activity" from expressing certain beliefs and opinions that might be shared by those who were engaged in terrorist activity. A finding of unconstitutionality based on a collateral effect on persons whose conduct is not within the terms of the statute is, to our knowledge, unique to this case. The impact of legislation on

persons who are not directly "caught" by the terms of the legislation is normally addressed in the context of the proportionality analysis required by s. 1 of the *Charter*: *e.g.*, see *Zundel*, at pp. 771-72; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 104. Section 1, and the proportionality analysis required by it, is of course engaged only after it is concluded that the legislation breaches a constitutionally protected right.

[119] Even assuming that an indirect effect of a statutory provision can render that provision unconstitutional, we reject the trial judge's conclusion that the motive clause is unconstitutional because it has a chilling effect on the rights protected by s. 2 of the *Charter*. The problem with the trial judge's view of the indirect effect of the impugned definition is that it is founded entirely on speculation, both as to the existence of the "chilling effect" and the cause or source of that "chilling effect", if indeed one exists. The trial judge simply declared that the "chilling effect" on the rights of certain segments of our society to freely express themselves was "the inevitable impact" of the inclusion of the motive clause in the definition of "terrorist activity". In doing so, he relied on similar declarations made by academic commentators: see paras. 55-58.

[120] The "chilling effect" relied on by the trial judge to declare the motive clause unconstitutional would presumably fall upon those in the community who shared some of the views associated with those who engaged in "terrorist activity", or who shared the cultural or religious background of those associated with "terrorist activity". Neither this appellant, nor the appellants in *Nadarajah* and *Sriskandarajah*, led any evidence to

support the contention that individuals within any part of the community felt constrained in the expression of their beliefs or opinions by any part of the terrorism-related provisions, much less specifically by the motive clause.

[121] The trial judge did not acknowledge the absence of any evidence to support his crucial finding on the constitutional question. He regarded the chill as self-evident and beyond question. The extradition judge in *Nadarajah*, at paras. 37-42, acknowledged the absence of any evidence to support the "chilling effect" argument, but determined that it was not fatal to that argument. In *Ahmad*, at paras. 130-35, Dawson J. declined to make any finding of a "chilling effect" in the absence of any evidence to support it.

[122] The appellant bears the onus of establishing the breach of s. 2. Usually, although not always, evidence is required to meet that onus. The anti-terrorism legislation has been in place in Canada for almost 10 years. Similar legislation operates in several other countries. If the motive clause has dampened freedom of expression in certain segments of the community, as assumed by the trial judge, one would have thought that the appellants would be able to produce, at the very least, some credible anecdotal evidence to that effect. One would also have thought that credible expert evidence would be available.

[123] The trial judge did not suggest that he was taking judicial notice of the "chilling effect" of the motive clause, although that is what he did. Accepting that the scope of judicial notice is broader in respect of non-adjudicative social facts, such as the potential

"chilling effect" of legislation, judicial notice still requires that the fact of which judicial notice is taken be one that is not open to reasonable dispute after due inquiry. In *R. v. Spence*, [2005] 3 S.C.R. 458, at para. 53, the Supreme Court reaffirmed the exacting legal principles regarding judicial notice as articulated by McLachlin C.J. in *R. v. Find*, [2001] 1 S.C.R. 863, at para. 48:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy....

[124] The contention that a segment of the community is reluctant to exercise its rights under s. 2 because of the motive clause in the anti-terrorism legislation comes nowhere near to meeting the standard required before judicial notice can be taken. The appellants had the obligation to demonstrate the "chilling effect" said to result in the infringement of s. 2 of the *Charter*. In our view, they could not do so without adducing some evidence to support that contention. The absence of evidence cannot be overcome by judicial speculation or academic commentary. The "chilling effect" argument fails for this reason alone.

[125] There is a second difficulty with the "chilling effect" analysis. Even if one could assume or take judicial notice of the fact that there is a segment of the community that is

reluctant to express its views because those views may be associated in the public mind with "terrorist activity", the motive clause would thereby be rendered unconstitutional only if the appellants demonstrated a connection between that reluctance and the motive clause. Dawson J. in *Ahmad* referred to this difficulty at para. 133:

> *The problem in the present case is that the cause and effect relationship the applicants rely upon is not obvious.* I have no trouble concluding on a common sense basis that some members of minority communities have experienced a chill when it comes to the expression of their political, religious or ideological views because they are concerned they may be seen as extremist and singled out for scrutiny. Where I have difficulty is in connecting such a chill to the motive requirement.… *It seems to me that any such chill could simply be the result of the general state of our society in the post "9/11" environment.* [Emphasis added.]

[126] We agree with Dawson J.'s remarks. There are many potential explanations for why people might feel a chilling effect when it comes to expressing extremist Islamic views. Perhaps, most obviously, there is the reality of the world we live in. Terrorism and the fear and uncertainty terrorism creates are facts of life. Fear can generate many things, including suspicion based on ignorance and stereotyping. Many, but by no means all, of the major terrorist attacks in the last 10 years have been perpetrated by radical Islamic groups fueled by a potent mix of religious and political fanaticism. It is hardly surprising that, in the public mind, terrorism is associated with the religious and political views of radical Islamists. Nor is it surprising that some members of the public extend that association to all who fit within a very broad racial and cultural stereotype of a radical Islamist.

[127] In making these observations, we do not intend to condone profiling or stereotyping. We do, however, mean to say that the most obvious cause of any "chilling effect" among those whose beliefs would be associated in the public mind with the beliefs of terrorist groups is the temper of the times, and not a legislative provision that in all probability is unknown to the vast majority of persons who are said to be "chilled" by its existence: see *Reference re Marine Transportation Security Regulations*, at para. 35.

[128] Section 83.01(1.1) also stands in the way of any finding that the motive clause has generated a "chilling effect" on freedom of expression in certain segments of the community. To reason that the motive clause causes an individual to be reluctant to express an opinion or belief, one must assume that that person is aware of the motive clause. If one makes that assumption, one must, it seems to us, also assume that the individual is aware of s. 83.01(1.1). That provision clearly declares that one need not fear expressing any political, religious or ideological belief as long as one does not engage in conduct that falls within the meaning of "terrorist activity". If assumptions are to be made about the effect of legislation, those assumptions must be based on the entirety of the relevant provision.[11]

[129] The respondent Crown makes the valid point that the motive clause has virtually no effect on the manner in which potential terrorist activities are investigated and

[11] We also note that the logic of the trial judge's finding would suggest that the entirety of Part II.1 of the *Criminal Code* should be struck down. Commonsense would tell us that, if indeed there is a "chilling effect" as described by the trial judge, it is a product of the entire package of legislation, particularly the extensive investigative powers given to the authorities in respect of terrorism offences. This would appear to be the view of Professor Webb, one of the authors relied on by the trial judge: M. Webb, "Essential Liberty or a Little Temporary Safety? The Review of the Canadian Anti-terrorism Act" (2006) 51 Crim. L. Q. 53.

prosecuted. The vast majority of terrorist acts are borne of political, religious and ideological motivations. Consequently, motive will play a crucial role in the detection and prosecution of terrorist activities. The investigative focus will fall on persons or groups whose beliefs are known or believed to promote or condone terrorist conduct. Where those investigations lead to prosecutions, the motive of the accused will no doubt be a central feature of the prosecution's case.

[130] The facts of this case present a good example. The appellant's motive was the subject of considerable evidence. To the extent that the "chilling effect" on freedom of expression is the product of the targeting and prosecution of individuals who have certain motives, that chill would exist regardless of whether the motive clause was part of the definition of "terrorist activity". In other words, it is the nature of the activity and the nature of the state response that may generate the "chilling effect", not the content of the legislation.

[131] The irrelevance of the exact terms of the anti-terrorism legislation to any potential "chilling effect" is also supported by the absence of any evidence suggesting that there is a distinction to be drawn between the countries where motive is an element of the definition of "terrorist activity" and countries where motive is not an element of that definition. For example, there was no evidence adduced in this case that the "chilling effect" said to exist in Canada does not exist, or exists in any different way, in the United States where the anti-terrorism legislation does not require proof of motive.

[132] The trial judge was concerned that the investigative authorities, in the course of efforts to prevent and uncover terrorist activities, would overstep their powers and in the course of doing so, sweep within their investigative net persons who had done nothing more than bear a religious, cultural or racial resemblance to persons stereotyped by authorities as terrorists. This was certainly an important and proper concern.

[133] It is equally important, however, to distinguish between proper and improper police conduct. If the police have grounds to believe that someone is engaged in or associated with "terrorist activity", they are not only entitled, they are obliged, to investigate that person. Individuals who associate themselves through their conduct or statements with the goals or activities of terrorist groups can expect to be investigated by the police even though it may turn out that those persons have not engaged in any "terrorist activity". As long as the police conduct their investigation in a lawful manner, any "chilling effect" on those targeted by the investigation is no basis upon which to find a *Charter* infringement.

[134] Improper police conduct, such as profiling based exclusively on ethnicity or religious belief, is an entirely different matter. This kind of state conduct is not only unacceptable, it is unconstitutional. There is, however, no evidence of any connection between these abuses and the motive clause. Nor can improper conduct by the state actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a

constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, at paras. 133-35.

[135] For these reasons, we are satisfied that the appellant in this case and the appellants in the extradition appeals have failed to show that the motive clause has caused any "chilling effect" on the rights of those who do not engage in "terrorist activity". We make one final point. It seems to us, although we could perhaps be accused of the same speculation we have attributed to the trial judge, that persons who are inclined to express views that support some of the beliefs or goals (but not the methods) of terrorist groups, might well be dissuaded from openly expressing those views because of the terrorist activities of those who hold similar views. A person who would never engage in "terrorist activity" may refrain from expressing a particular point of view for fear of being identified with true terrorists who happen to share the same belief. On this analysis, it is the actions of the terrorists and not the legislation targeting their activities that creates the "chill".

(iv) Conclusion on the Constitutional Arguments

[136] We agree with the Crown that the trial judge erred in holding that the motive clause was unconstitutional and of no force and effect. The constitutional remedy granted by the trial judge was to sever the motive requirement in s. 83.01(1)(b)(i)(A) of the definition of "terrorist activity". As a result, the Crown was not required to satisfy this element of the definition in seeking to obtain convictions on counts 1 to 7.

[137] In view of our conclusion that the motive requirement is not unconstitutional, the trial judge erred in granting the remedy he did. However, that error is of no moment because, as the trial judge observed at para. 89, even if the motive requirement was an essential ingredient of these offences, the Crown would have proved it was established based on the evidence adduced against the appellant:

> I say that because there is such an abundance of evidence that what was being done by Khawaja, Babar, Khyam, and his associates was clearly motivated "in whole or in part for a political, religious or ideological purpose, objective or cause."

[138] Thus, we would not give effect to the s. 2 constitutional challenges to the definition of "terrorist activity" raised by this appellant and by the appellants in *Nadarahaj* and *Sriskandarajah*. We now consider the remaining grounds of the conviction appeal in the present case.

(2) Alleged Shift in the Crown's Case

[139] In his opening address at trial, Crown counsel described the nature of the Crown's case in these terms:

> In late 2003 and early 2004, a terrorist group was plotting to build and then detonate within the United Kingdom one or more improvised explosive devices based on 600 kilograms of ammonium nitrate-based fertilizer.
>
> If an improvised explosive device based on 600 kilograms of ammonium nitrate-based fertilizer were to be detonated in a populated area, the result would be massive destruction and loss of life. If parceled into separate bombs, the explosions would cause similar destruction and loss of life distributed over a wider area.

> Possible targets discussed by members of the group included a shopping mall in Kent, a nightclub in central London and the high voltage electricity and high pressure gas supply networks in England and Wales. The aim was to cause death, injury and damage for religious and political purposes.

[140] Further, Crown counsel described the offence charged in count 7 – the knowing facilitation of a terrorist activity – as: "knowingly facilitating a terrorist activity, namely the fertilizer bomb plot undertaken by ... a terrorist group in the United Kingdom."

[141] The appellant claims that, based on this early articulation of the Crown's case, the thrust of the defence advanced at trial was to attempt to show that he knew nothing about the U.K. fertilizer bomb plot and that his activities were designed merely to further his desired participation in the insurgency in Afghanistan.

[142] The appellant submits that, in response to this defence strategy, the Crown improperly expanded the nature of its case at the end of trial by alleging in closing submissions that the terrorist activity underlying the offences charged "resided within a greater common criminal design: violent Jihad wherever it might opportunistically be committed." The appellant contends that this constituted a material shift in the Crown's case at a late stage of the trial, thereby compromising trial fairness and occasioning a miscarriage of justice.

[143] We did not find it necessary to call on the Crown to address this argument. Simply put, the appellant's contention that the Crown impermissibly recast its case against him ignores the basic distinction between formal particulars and the prosecution's

chosen theory of an accused's criminal liability. As this court stated at p. 286 in *R. v. Groot* (1998), 41 O.R. (3d) 280 (C.A.), aff'd [1999] 3 S.C.R. 664:

> It is important to distinguish between particulars under s. 587 of the *Code* and particulars of the theory of the Crown. While the Crown is bound to prove formal particulars, subject to the surplusage rule, particulars are distinguished from the Crown's theory which it is not bound to prove.

See also *R. v. Ranger* (2003), 67 O.R. (3d) 1 (C.A.), at para. 134.

[144] More recently, a majority of the Supreme Court in *R. v. Pickton*, 2010 SCC 32, reiterated that the Crown has the right to modify its theory or strategy as the trial progresses. Citing Binnie J. (dissenting, but not on this point) in *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 27, the majority in *Pickton* noted at para. 19:

> The notion that it is sufficient for the accused to respond to the "Crown theory of the case" also suffers from the practical difficulty that the Crown's theory of the case is a moving target that has to adjust to meet new or changing circumstances during the trial, including what the Crown hears in the defence closing address.

[145] Thus, in the absence of formal particulars regarding the terrorist activity alleged, it would have been unobjectionable for the Crown to adjust the theory of its case in response to the evidence at trial as it evolved.

[146] In this case, Crown counsel's opening depiction of the appellant's criminal conduct was not confined to his alleged involvement in a fertilizer bomb plot, in London or elsewhere. Early in his opening address, Crown counsel stated:

> Throughout the years 2002, 2003 and until his arrest in 2004, Khawaja participated in and contributed to the London fertilizer bomb plot and *other activities of the Omar Khyam group* by numerous e-mail exchanges and meetings, both in London and Pakistan, with various associates of the terrorist group. [Emphasis added.]

[147] It was therefore clear from the outset of trial that the Crown's theory of liability was not centred exclusively on a fertilizer bomb plot.

[148] Moreover, on the facts of this case, the defence cannot be said to have been taken by surprise by the Crown's contention that the appellant knowingly worked in concert with terrorists to achieve commonly-held terrorist aims. The record confirms the Crown's assertion before this court that evidence of the Khyam group's aims and of the appellant's desire "to advance Jihad on all fronts", formed part of the Crown's case at trial. There is no suggestion that the Crown's disclosure of this evidence was inadequate or deficient.

[149] The appellant elected not to testify or lead any evidence in answer to the Crown's case. Nor did he seek from the Crown formal particulars of any of the offences charged. Of course, had he done so, the Crown would have been bound to prove any particulars provided. While the appellant was entitled to make these tactical decisions, he cannot now complain that he was denied the opportunity to know, and to attempt to meet, the Crown's case as established by the evidence actually led at trial.

[150] Finally, the authorities relied on by the appellant in support of the proposition that the Crown cannot seek and obtain a conviction on a different basis than is presented in its case to the court – *R. v. Wynnychuk* (1962), 132 C.C.C. 227 (Alta. C.A.), *R. v. Pendleton*

(1982), 1 C.C.C. (3d) 228 (Ont. C.A.) and *R. v. Motto*, [2005] O.J. No. 268 (S.C.J.) – do not assist him as they have been overtaken by subsequent cases: see *R. v. Drolet*, [1989] R.J.Q. 295 (C.A.), aff'd [1990] 2 S.C.R. 1107 and *R. v. Pincemin*, [2005] 11 W.W.R. 55 (Sask. C.A.), at para. 35. Additionally, the cases he relied on are distinguishable on the facts. They involved trials in which the accused testified in his own defence and admitted to committing the same or a related offence, but on a different occasion than that in regard to which the Crown called evidence in its case in chief: see *Motto*, at para. 5; *Wynnychuk*, at pp. 228-229; *Pendleton*, at p. 230. That is not this case.

[151] This ground of appeal therefore fails.

(3) Armed Conflict Exception

[152] As we have said, at the close of the Crown's case, the defence moved for directed verdicts of acquittal on all counts. The defence sought to rely on the "armed conflict exception" to the definition of terrorist activity set out in s. 83.01(1)(b)(ii) of the *Criminal Code* as a complete answer to all the offences charged. This exception excludes from the definition of terrorist activity:

> an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict …

[153] The defence position was that the appellant's activities were designed solely to further his desired participation in and support of "armed conflict" in Afghanistan. The defence maintained that the Crown bore the evidential onus of establishing that the armed

conflict exception was inapplicable because the appellant's actions did not comply with customary or conventional international law applicable to the war in Afghanistan. As the Crown failed to discharge this onus, the exception was engaged.

[154] The trial judge disagreed. He ruled that the armed conflict exception was inapplicable and irrelevant in this case, reasoning that the appellant was not part of an armed force or involved in any armed conflict. He was of the view that the exception found in s. 83.01(1)(b)(ii) of the definition:

> applies to those actually engaged in armed combat. In my view, the term 'during' has the meaning of 'in the course of' and does not just mean 'contemporaneously with,' or 'at the same time as.' The exception shields those who do acts while engaged in an armed conflict that would otherwise fit the definition of terrorist activity from prosecution as terrorists as long as the acts are within the internationally recognized principles governing warfare. Momin Khawaja was not so engaged. His actions in Canada, in the U. K. and in Pakistan cannot, in my view, be regarded as falling outside the definition of 'terrorist activity' by reference to the 'armed conflict' exception.[12]

[155] The trial judge also rejected the defence assertion that the Crown was obliged to establish that the exception was inapplicable based on evidence that the appellant's acts did not accord with international law. He held at para. 127: "There is no burden on the prosecution to negative or establish that the exception is inapplicable. It simply is inapplicable to the facts of this case."

[12] See para. 127 of the trial judge's reasons for judgment, quoting from his ruling on the directed verdicts motion.

[156] In closing submissions at trial, the defence urged the trial judge to revisit his earlier ruling that the armed conflict exception did not apply. The trial judge acceded to this request and again concluded that the exception was inapplicable. In his reasons for judgment, he held that: (1) the appellant, Babar and members of the Khyam group were not engaged in "armed conflict" within the meaning of that term under the exception, and the exception did not extend to the appellant's and the Khyam group's "non-combatant" activities; (2) there was no armed conflict in Canada, the United Kingdom or Pakistan where the appellant's relevant acts were carried out; and (3) in any event, through his various activities, the appellant knowingly participated in and supported a terrorist group, namely, the Khyam group (at paras. 128-32).

[157] Before this court, the appellant renews his argument that the armed conflict exception applies to exempt his actions from the ambit of "terrorist activity" as defined under the *Criminal Code*. He submits that the exception was engaged at trial because the Crown conceded on the directed verdicts motion that the war in Afghanistan was a form of "armed conflict" and that the insurgent fighting in that country constituted "terrorist activity". Given these concessions, the appellant says it was incumbent on the Crown to establish that the exception was inapplicable based on evidence that his impugned acts did not comply with international law governing the conflict in Afghanistan.

[158] We reject this argument.

[159] We begin with the purpose of the armed conflict exception. The exception is concerned with armed conflict in the context of the rules of war established by international law. It is designed to exclude activities sanctioned by international law from the reach of terrorist activity as defined in the *Criminal Code*. We agree with Sproat J.'s observation in *R. v. N.Y.*, 2008 CanLII 24543 (ON S.C.), at para. 12, that, "[t]he armed conflict exception reflects the well recognized principle … that combatants in an armed conflict, who act in accordance with international law, do not commit any offence."

[160] The parties accept that, where shown to apply, the exception operates much like a traditional defence. An accused is entitled to have all defences put to a jury that are realistically available on the evidence. As the Supreme Court of Canada held in *R. v. Cinous*, [2002] 2 S.C.R. 3, at para. 50, *per* McLachlin C.J. and Bastarache J.: "[A] defence should be put to a jury if and only if there is an evidential foundation for it". The inquiry into whether there is an evidential foundation for a defence is referred to as the "air of reality test": *Cinous*, at para. 50; see also *R. v. Gunning*, [2005] 1 S.C.R. 627, at para. 29, *per* Charron J. The air of reality test applies to all defences and all requisite elements of a defence. Consequently, if evidential support for a necessary element of a defence is lacking, the air of reality test is not met: *Cinous*, at paras. 57, 82; *R. v. Ribic* (2008), 238 C.C.C. (3d) 225 (Ont. C.A.), at para. 38.

[161] During oral argument before this court, the appellant did not dispute that the air of reality test applies to the armed conflict exception. Rather, he argued that the test was satisfied by virtue of the Crown's concessions on the directed verdicts motion, above-described.

[162] We disagree. The Crown did not concede on the directed verdicts motion that the exception was implicated, but rather maintained that there was no air of reality to the armed conflict exception in this case. Indeed, the second "concession" by the Crown, that the insurgent fighting in Afghanistan constituted terrorist activity, dooms the appellant's argument that the exception operated in this case.

[163] The relevant inquiry in respect of the exception was whether there was anything in the evidence to suggest that the appellant's activities: (1) were undertaken while an armed conflict was in progress, and (2) were in accordance with the rules of war established by international law applicable to that armed conflict. This is not a question of evidential onus. It is a question of whether there was some evidential support for the invocation of the armed conflict exception based on the nature of the appellant's activities.

[164] On the directed verdicts motion, Crown counsel argued that, in order for the exception to apply, the evidence must establish that the appellant actually participated in the theatre of war where the relevant armed conflict was underway. The trial judge appears to have accepted this submission, observing at para. 128 of his reasons: "There

was no … armed conflict in Canada, the United Kingdom or in Pakistan where the acts with which Khawaja is charged, were carried out."

[165] On appeal, the Crown conceded that this narrow construction of the exception is inappropriate. We agree. The availability of the exception does not require proof of an accused's physical presence in an area of armed conflict. Nor does it contemplate that an accused's impugned acts or omissions must be carried out within the territorial limits of an area of armed conflict. As we have already said, all that is required to trigger the exception is some evidence that: (1) an accused's acts or omissions were committed "during" an armed conflict; and (2) those acts or omissions, at the time and at the place of their commission, accorded with international law applicable to the armed conflict at issue.

[166] This interpretive error, however, is of no moment. There was simply no evidence in this case that the appellant acted in accordance with international law, or that the hostilities by the insurgents in Afghanistan were undertaken in compliance with international law. As the Crown succinctly argued in its factum:

> [T]here is not one iota of evidence in this case which suggests that the Appellant has any inclination that laws of war and [international humanitarian law] exist and what they are, much less that he has the slightest desire or intention to obey or observe these principles. Equally, as the Appellant's counsel acknowledged, there was no evidence that the 'side' of the armed conflict he claimed to be supporting behaved in any way consistently with international law.

[167] We agree with the Crown's submission that the appellant's own emails belie any suggestion that he viewed the violent Jihad that he espoused as lawful. Contrary to the central tenets of international humanitarian law, he made no distinction between civilians and soldiers or lawful combatants. Indeed, his emails reveal that he supported the indiscriminate and random murder of civilians, for instance, by means of a suicide attack in a crowded public venue in Israel or by terrorist attacks similar to those in the United States on September 11, 2001.

[168] Moreover, the appellant's claim that his actions were directed solely at supporting the insurgency in Afghanistan is contradicted by the trial judge's unchallenged factual findings. The trial judge expressly held at paras. 130-31 that the appellant knew of and supported the Khyam group's terrorist objectives, which extended beyond Jihad-related activities in Afghanistan:

> Momin Khawaja... knew that the group he was training with [and] supporting... was far more than just a support mechanism for front line armed combat in accordance with the international rules of war. His knowledge extended to the broader terrorist activity that the group had, in whole or in part, as its purpose. Babar testified that they all shared an appetite for violent Jihad. Khawaja … shared [the group's] broad vision of economic terror throughout the western world. … He shared its appetite for suicide bombing in countries including Israel. … He was willing to help in other ways, offering to do so on several occasions and telling Khyam he was '*... starting to work on a few other much more sophisticated projects that can be of great benefit to the J ...*' and would speak to Khyam about them when they met.
>
> In my view, there is ample evidence apart from the support and preparation for violent Jihad with the Mujahideen in

> Afghanistan or elsewhere, establishing that Momin Khawaja knew he was dealing with a group whose objects and purposes included activity that meets the *Code* definition of terrorist activity. [Emphasis in original.]

[169] Thus, on the trial judge's findings, the armed conflict exception was simply unavailable to the appellant.

(4) Judicial Notice Complaint

[170] The appellant complains that the trial judge erred in determining whether the ulterior intention requirement in the definition of "terrorist activity" set out in s. 83.01(1)(b)(i)(B) of the *Criminal Code* had been satisfied by improperly taking judicial notice of the geo-political situation in Afghanistan and of international law. To repeat, under s. 83.01(1)(b)(i)(B), an act or omission is a "terrorist activity" if it is committed:

> 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 refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada.

[171] With respect to this issue, the trial judge stated at para. 113 that he was "entitled to take judicial notice of at least some aspects of the situation [in Afghanistan] by having resort to certain notorious facts and to certain other facts available from official United Nations documentation available to all on the United Nations website [http://www.un.org/documents/]; facts which I think are beyond dispute among reasonable people."

[172] The trial judge proceeded to take judicial notice of several facts at paras. 124-25, which may be summarized as follows:

> - the internationally recognized government of Afghanistan is backed by a coalition of western nations, including Canada, pursuant to various United Nations Security Council Resolutions;
>
> - insurgents in Afghanistan are conducting armed warfare against the coalition forces, the local government and that part of the local population that supports them;
>
> - Canadian forces have sustained fatal casualties as a result of insurgent fighting in Afghanistan; and
>
> - the purpose of the armed insurgent attacks is to intimidate those assisting in or supporting the peaceful reconstruction of Afghanistan and to compel those persons to desist from those efforts.

[173] The trial judge did not err in concluding that these skeletal and obvious facts about the basic nature of the conflict in Afghanistan meet the test for judicial notice. Contrary to the appellant's submission, they are notorious and beyond dispute among reasonable persons. They are recited in numerous United Nations Security Council Resolutions, some of which were referenced both by the Crown and the appellant's own counsel at trial, the factual accuracy of which is not challenged on appeal.

[174] The trial judge's reasons reveal that he appropriately employed a conservative approach to judicial notice. He expressly refused to accede to the Crown's request that he take judicial notice "of the unconventional and unprincipled nature of the conduct of hostilities by the insurgent fighters in Afghanistan" based on daily news reports of the

deaths of civilians and military personnel in Afghanistan (at para. 112). He also declined to take judicial notice of facts regarding the conduct of hostilities in Afghanistan from certain "specialist publications" concerning the war in Afghanistan filed at trial by the Crown (at para. 111).

[175] Beyond the notorious facts of which the trial judge properly took judicial notice, there was also evidence in the form of the appellant's own words that supported the trial judge's finding that the ulterior intention requirement was satisfied. In his emails, the appellant bluntly declared his intention to "[bring] down the Kuffar enemy dealing blow after blow, by whatever means available or necessary" in order to "[force the Kuffar] to withdraw their troops, so they cannot afford to wage war …. that they dare not worry about attacking us or supporting others in attacking us." For the appellant, the object of Jihad was to adopt: "[a] war-like mentality … against the Kuffar (governments, armies, supporters) because they 'are' at war with us." These goals fit squarely within the ulterior intention requirement of the statutory definition of terrorist activity.

[176] Accordingly, we would not give effect to this ground of appeal.

(5) Reasonableness of the Verdicts on Counts 3 to 7

[177] The appellant contends that the verdicts entered on counts 3 to 7 are unreasonable for three reasons:

> (1) the Crown premised its case on proof of the appellant's knowledge of and involvement in the U.K. fertilizer bomb plot, yet failed to establish that he knew of that plot;

(2) in the alternative, there is no evidence that the appellant knew that the Khyam group was a "terrorist group" within the meaning of that term under the *Criminal Code*; and

(3) in the further alternative, assuming that the activities in Afghanistan facilitated by the appellant do not constitute terrorist activity, the Crown failed to prove necessary particulars in each of the individual counts.

[178] These arguments may be dealt with summarily. First, for the reasons already set out, the Crown's case at trial did not rest solely on proof of the appellant's knowledge of and involvement in the U.K. fertilizer bomb plot. Moreover, nothing in counts 3 to 7 or in the Crown's submissions at trial confined the offences underlying those counts to activities in relation to a fertilizer bomb plot.

[179] Second, the trial judge expressly found that the Khyam group was a "terrorist group". The phrase "terrorist group" is defined under s. 83.01(1) of the *Criminal Code*, in part, as: "(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity". This finding was amply supported by the record.

[180] Critically, as we have already indicated, the trial judge also found that the appellant was aware of the Khyam group's terrorist objectives, that those objectives extended beyond Jihad-related activities in Afghanistan, and that the appellant knowingly acted in support of those objectives.

[181] There was compelling and overwhelming evidential support for these findings and for the trial judge's ultimate holding that the appellant knowingly participated in and

supported a terrorist group consisting of Babar, Khyam, Garcia, Amin, himself, and others. That participation and support included receiving training, providing money and supplies, furnishing the use of a home in Pakistan, constructing a remote detonator device with the intent that it be used to trigger an explosion in London or elsewhere, proposing to thereafter build 30 such devices, and offering to provide other assistance as needed by the terrorist group. We have no hesitation in affirming the trial judge's conclusion that these actions constituted terrorist activity.

[182] The verdicts on counts 3 to 7 are reasonable. There was ample evidence at trial on which a properly instructed jury, acting judicially, could reasonably have convicted on these counts. The well-established test for a reasonable verdict is therefore satisfied: see *R. v. Biniaris*, [2000] 1 S.C.R. 381; *R. v. Beaudry*, [2007] 1 S.C.R. 190.

(6) Conclusion on Conviction Appeal

[183] For the reasons given, the conviction appeal is dismissed.

II. The Sentence Appeals

(1) Introduction

[184] As already explained, the appellant was tried on an indictment containing 7 counts. He was found guilty as charged on counts 3 to 7 and guilty of included offences on counts 1 and 2. At the sentencing hearing, the trial judge stayed count 2 in accordance with *R. v. Kienapple*, [1975] 1 S.C.R. 729. He entered convictions on the remaining 6 counts. Those counts are identified in the chart below, along with the maximum punishment available for each and the sentence imposed by the trial judge:

Count	Offence	Maximum Punishment	Sentence Imposed
Count 1	Developing a device to activate a detonator, with intent to cause an explosion of an explosive substance likely to cause serious bodily harm or death to persons or serious damage to property, contrary to s. 81(1)(a) of the *Criminal Code*.	Life Imprisonment	4 years
Count 3	Knowingly participating in or contributing to the activity of a terrorist group by receiving training for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*.	10 years	2 years consecutive
Count 4	Knowingly instructing a person to carry out financial activity for the benefit of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, contrary to s. 83.21(1) of the *Criminal Code.*	Life imprisonment	2 years consecutive
Count 5	Providing and making available property and financial services to persons, intending or knowing that they would be used, in whole or in part, for the purpose of facilitating or carrying out terrorist activity, contrary to s. 83.03(a) of the *Criminal Code*.	10 years	2 years consecutive
Count 6	Knowingly participating in or contributing to an activity of a terrorist group... by participating in dialogue, meetings or exchanges of information relating to the development of an explosive device intended to endanger life or cause serious damage to property, contrary to s. 83.18 of the *Criminal Code*.	10 years	3 months consecutive

Count 7	Knowingly facilitating a terrorist activity, contrary to s. 83.19 of the *Criminal Code*.	14 years	3 months consecutive

[185] Totalling the various sentences, the appellant was sentenced to 10 ½ years in the penitentiary. This sentence was in addition to the almost 5 years of pre-trial custody that the appellant had served by the time of sentencing. At the sentencing hearing, the defence had argued that the appellant should receive credit for pre-trial custody on a 2:1 basis. The trial judge refused to give effect to this request, noting at para. 45 of his reasons for sentence that a 10-year block of credit for 5 years of pre-trial custody would not adequately denounce, repudiate and punish the appellant's conduct. In the end, the trial judge refused to specify a precise arithmetic formula for assigning a value to the credit for time served. Rather, he simply noted at para. 47 that he took this period of pre-trial custody into account in determining the sentences in this case.

[186] The appellant seeks leave to appeal against sentence and requests that his sentence be reduced to time served. The Crown also seeks leave to appeal against sentence by way of cross-appeal and asks that the sentence be increased to life imprisonment.

[187] For reasons that follow, we would grant leave to the Crown, allow the cross-appeal and increase the sentence on count 1 to life imprisonment. On that count, pursuant to s. 743.6(1) of the *Criminal Code*, we would order that the appellant serve 10 years before he may be released on full parole. With respect to the remaining counts, we would impose consecutive terms of imprisonment totalling 24 years, to be served concurrently

with the life sentence imposed on count 1. The ancillary orders made by the trial judge shall remain the same.

[188] In view of our disposition of the Crown's cross-appeal, we would accordingly dismiss the appellant's application for leave to appeal.

(2) Overview of the Sentence Appeals

[189] The trial judge provided clear and comprehensive reasons for sentencing: (2009), 248 C.C.C. (3d) 233. His task was not an easy one. Although he was presented with sentencing precedents from around the world, this was, as he observed, "the first sentencing under Canada's Part II.1 Terrorism provisions", which contain several sentencing provisions that apply specifically to terrorist activity: see Appendix A to these reasons.

[190] The trial judge approached his task in an orderly and coherent fashion. He applied traditional principles of sentencing where appropriate and modified them as necessary to give effect to the new terrorist sentencing provisions as he understood them.

[191] Our reasons for interfering with the sentences he imposed can be organized into two categories of concern. First, the trial judge made three specific errors in his reasons for sentence that warrant appellate intervention: (1) the trial judge erred in assessing the appellant's level of determination; (2) the trial judge erred in failing to treat the absence of any evidence of the appellant's rehabilitative prospects as a critical factor in sentencing; and (3) the trial judge erred in interpreting s. 83.26 of the *Criminal Code*.

[192] Second, the trial judge erred in his overall approach to sentencing the appellant. As we will explain, the sentencing of terrorists requires particular regard to three critical factors: (1) the unique nature of 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 to would-be terrorists that Canada is not a safe haven from which to pursue their subversive and violent ambitions. In failing to properly apply these considerations, the trial judge imposed a sentence that was manifestly unfit.

(3) Three Errors in the Reasons for Sentence

(i) The Trial Judge Erred in Assessing the Appellant's Level of Determination

[193] The Crown at trial submitted that the appellant should receive a life sentence, just as Khyam and his associates had received in England for their roles in the U.K. fertilizer bomb plot: see *Khyam*, at para. 2. The trial judge refused to give effect to the Crown's submission, stating at para. 37 of his reasons for sentence:

> I am not persuaded that Momin Khawaja should be characterized as a similar offender in similar circumstances as those [Khyam's] men. He was a willing helper and supporter, but Khyam [and his associates] *were away out in front of Momin Khawaja in terms of their determination to bring death, destruction and terror to innocent people*. In my view, Momin Khawaja's offences, the circumstances in which they were committed and his personal circumstances do not warrant his being sentenced to life imprisonment. [Emphasis added.]

[194] Leaving the appellant's personal circumstances aside for the moment, we are respectfully of the view that the trial judge's finding that Khyam and his associates "were away out in front" of the appellant "in terms of their determination to bring death, destruction and terror to innocent people" is not borne out by the record. On the contrary, the record attests not only to the depth of the appellant's commitment to violent Jihad, but also, as his emails show, his willingness to do anything and go anywhere to promote violent Jihad. He was eager to get on with the job and displeased that things were not moving as quickly as he would have liked. He was obsessed with the cause, fanatic in his determination to establish Islamic dominance, seemingly at any cost, and eager to assist in bringing about the destruction of western culture and civilization.

[195] The trial judge was not unaware of these features of the evidence. At paras. 130-31 of his reasons for convicting the appellant, he summarized the nature and extent of the appellant's involvement with Khyam and his supporters. The trial judge's salient findings about the appellant's aspirations in providing the Khyam group with financial and other support, including his efforts to build remote detonator devices to enable the group to detonate IEDs, are as follows:

> - the appellant knew that the group he was training with, supporting, helping to finance, providing a residence in Rawalpindi to, transporting supplies for, offering to train in electronics, offering to buy equipment for, offering to help with other projects, and building triggering devices to enable to remotely detonate IEDs for, shared an appetite for violent Jihad;

- the appellant was aware that the group's activity included guerrilla and sniper training and sending its members to different parts of the world to engage in violent Jihadist activities;

- the appellant shared the group's broad vision of economic terror throughout the western world and he shared its appetite for suicide bombing in countries including Israel;

- the appellant told Khyam he was '*startin to work on a few other much more sophisticated projects that can be of great benefit to the J...*'; and

- the appellant's most tangible and visible facilitation of the group's terrorist activity was his work in developing the hifidigimonster, which was intended to serve as the remote trigger for an IED; he agreed to build about 30 of them.

[196] In light of those findings, we fail to see on what basis the trial judge was able to differentiate the appellant's level of determination to bring about death and destruction from that of Khyam and his terrorist followers. In fairness to the trial judge, perhaps he was merely saying that Khyam and his followers were further along in terms of realizing their violent plans. But if that is what he meant, we do not consider the distinction to be significant. The fact that the appellant may have lagged behind his co-conspirators in this regard does not speak to his level of determination, nor does it attenuate the degree of his moral blameworthiness.

(ii) The Trial Judge Erred in Not Treating the Absence of Evidence of the Appellant's Rehabilitative Prospects as a Critical Factor

[197] The trial judge recognized at para. 25 that, in cases involving terrorist activity, "denunciation, deterrence, both personal and general, and protection of society must

weigh heavily in the sentencing process." At the same time, he observed at para. 26 that "the potential for rehabilitation and promotion of a sense of responsibility on the part of the offender cannot be overlooked."

[198] The question of reformation presented a problem in the appellant's case because, as the trial judge remarked at para. 27:

> [T]he Court knows virtually nothing about his potential for reformation, of any sense of responsibility or of any remorse he may feel for his criminal conduct, or of the likelihood of his re-offending. The only words heard from him throughout these proceedings were his pleas of 'not guilty' when arraigned and his answer 'no' when asked if he wished to say anything before I determined what sentences to impose. The purpose of a pre-sentence report is to provide information about an offender, including as to his "maturity, character, behavior, attitude, and willingness to make amends." This would assist the court in imposing sentence. Neither Momin Khawaja nor his parents were willing to be interviewed in the course of the preparation of the court-ordered pre-sentence report, and so it was of limited value.

[199] After observing that he was at a loss to know what to make of the dearth of information about the appellant's prospects for rehabilitation, the trial judge effectively treated this absence of information as a neutral factor in the sentencing process, stating at para. 29:

> While I cannot regard this silence, this dearth of information as an aggravating factor, it can lead to only one inference, and that is that there is nothing that can be said on behalf of Momin to lend weight to the mitigating factors relating to his rehabilitation, including his taking responsibility for his actions, making amends, feeling remorse or determination not to re-offend.

[200] With respect, by treating this lack of evidence at the sentencing hearing in this manner, the trial judge fell into serious error. Far from being a neutral factor, the absence of any evidence of the appellant's remorse or of his prospects for reformation should have been treated as a significant indicator of his present and future dangerousness. Absent convincing evidence that he no longer subscribed to violent Jihad at the time of sentencing (evidence the appellant could have led without compromising his conviction appeal), the trial judge ought to have found that the appellant continues to pose a serious threat to society and is likely to do so for the indefinite future. In the absence of any evidence of rehabilitation, there was no reason to conclude that the appellant would not engage in terrorist activity again if given the opportunity to do so. The trial judge should have viewed him in that light and sentenced him accordingly.

[201] We add this observation. Consideration of an offender's prospects for rehabilitation is a relevant factor on sentencing even in terrorism cases. That said, 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 our reasons in *R. v. Khalid,* released concurrently with these reasons.

[202] The important point in this case is that there is simply no evidence at all of any rehabilitative potential on the part of the appellant. On the contrary, the evidence established that this is a man who had written that he "wish[ed] to be with the

Mujahideen in the front-lines of Jihad"; who described 9/11 as "the most accurate, effective, and honorable way of conducting economic [Jihad]" and who wrote "imagine if there were 10 Sept 11's, wouldn't that accurately bring America down, never to rise again? Yes, I understand that innocent human beings died, but there is absolutely no other way of achieving the same objective with the same effect."

[203] In cases like this, where an offender has shown a willingness to participate in the indiscriminate killing of innocent civilians and there are good grounds for believing that he or she is likely to remain a serious danger for an indeterminate time, the need to segregate such offenders from society for society's protection must be the predominate purpose of any sentence. And it is in that sense that the trial judge failed to accord appropriate weight in the sentencing process to the absence of any evidence of the appellant's prospects for rehabilitation.

(iii) The Trial Judge Erred in Interpreting s. 83.26 of the *Criminal Code*

[204] Section 83.26 of the *Criminal Code* is one of the new provisions that Parliament enacted for offences involving terrorist activity. It reads in part as follows:

> 83.26 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;

[205] That provision clearly applied in this case. The appellant was being sentenced for six offences arising out of the same series of events, five of which came within the purview of s. 83.26.

[206] While the trial judge recognized that s. 83.26 applied in the appellant's case, his reasons show that he had difficulty harmonizing it with s. 718.2(c) of the *Criminal Code*, which reads as follows:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> ….
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[207] The trial judge addressed the potential conundrum created by the two provisions at para. 39: "Accordingly, the sentences I impose must be consecutive terms. At the same time, however, in light of s. 718.2(c) I must ensure that in their totality, they are not *unduly long or harsh*" (emphasis in original).

[208] The trial judge indicated that he felt constrained by the totality principle described by Lamer C.J. in *R. v. C.A.M.*, [1996] 1 S.C.R. 500, at para. 42, which "requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender." As noted by Lamer C.J. at para. 43: "Whether under the rubric of the 'totality principle' or a more generalized principle of proportionality,

Canadian courts have been reluctant to impose single and consecutive fixed-term sentences beyond 20 years."

[209] Faced with this seeming dilemma, the trial judge imposed modest sentences on counts 1, 3, 4 and 5 and token sentences on counts 6 and 7. He did so presumably in the belief that s. 83.26 speaks to the form the sentences are to take rather than their overall length, which is to remain within the customary upper range.

[210] With respect, we have difficulty with the trial judge's interpretation of s. 83.26. That interpretation effectively neutralizes the provision and instead endorses a "business as usual" approach to the sentencing of terrorists. In our view, s. 83.26 reflects Parliament's intention that the general principle of totality must be moderated or altered in the case of terrorism-related crimes. This provision signals that, when offenders are convicted of a number of such crimes, total sentences will be higher than they otherwise would be, and the customary upper range for consecutive fixed-term sentences will not be applicable.

[211] In this regard, we note that in the realm of conventional offences, a practice has developed in this country whereby sentences in the range of 15 to 20 years have become the default position where it is felt that a life sentence is unwarranted. That, however, is a matter of custom, not principle. Indeed, the custom was soundly rejected as a matter of principle in *C.A.M.*, the very case that the trial judge cited in support of treating s. 83.26 as essentially cosmetic in nature.

[212] In *C.A.M.*, at para. 53, Lamer C.J. defined the core issue in the appeal before him as follows:

> The core issue in this appeal concerns whether or not Parliament intended fixed-term sentences under the *Code* to generally be limited to 20 years' imprisonment, whether as a sentence for a single offence where life imprisonment is available but unwarranted, or as a sentence for multiple offences involving consecutive terms of imprisonment.

[213] At para. 54, the Chief Justice set out the principal argument advanced by the proponents of a 20-year ceiling:

> The central argument advanced by the proponents of such a ceiling is that Parliament, by fixing the default parole ineligibility period for any numerical sentence beyond 20 years (absent an order under s. 741.2) at seven years, implicitly intended to cap numerical sentences at 20 years. Given the fact that an offender sentenced to 30 or 40 years is still eligible for full parole at seven years, the suggestion is that Parliament saw little utility in such lengthy terms of imprisonment.

[214] At para. 56, Lamer C.J. responded to that argument as follows:

> With the greatest respect, *I find no evidence in either the Code or the Corrections Act that Parliament intended to constrain a trial judge's traditionally broad sentencing discretion through the imposition of a qualified legal ceiling on numerical sentences pegged at 20 years' imprisonment. Rather, in my reading of both statutes,* beyond setting statutory maximum and minimum sentences which reflect the relative severity of different offences, *Parliament intended to vest trial judges with a wide ambit of authority to impose a sentence which is "just and appropriate" under the circumstances and which adequately advances the core sentencing objectives of deterrence, denunciation, rehabilitation and the protection of society*. Accordingly, in

> my view, whether or not life imprisonment is available as a maximum sentence in the particular case, *there is no pre-set ceiling on fixed-term sentences under the Code*. [Emphasis added.]

[215] In the course of his analysis, Lamer C.J. reviewed the origins of our modern-day parole system and observed that the granting of parole does not reduce an offender's sentence, but merely changes the location where it is to be served. At para. 62, he stated:

> The offender remains under the strict control of the parole system, and the offender's liberty remains significantly curtailed for the full duration of the offender's numerical or life sentence. The deterrent and denunciatory purposes which animated the original sentence remain in force, notwithstanding the fact that the conditions of sentence have been modified. *The goal of specific deterrence is still advanced, since the offender remains supervised to the extent and degree necessary to prevent possible crime, and since the offender remains under the shadow of reincarceration if he or she commits another crime. As well, the goal of denunciation continues to operate, as the offender still carries the societal stigma of being a convicted offender who is serving a criminal sentence.* [Emphasis added.]

[216] With respect to minimum periods of parole ineligibility such as those established in s. 120(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the lesser of 1/3 of the sentence or 7 years), the Chief Justice observed at para. 64 that in fixing such periods, "Parliament seems to have concluded that a minimum period of physical confinement was necessary to advance the cause of general deterrence and denunciation *even if the offender was completely rehabilitated and posed absolutely no threat to society at the time of sentence*" (emphasis added). While recognizing that the 7-year default period under s. 120(1) of the *Corrections and Conditional Release Act* constituted

the period of physical confinement that Parliament considered necessary to vindicate the principles of deterrence and denunciation, Lamer C.J. emphasized at para. 65 that:

> *[T]here is no indication that the default parole ineligibility rules exhaust a court's ability to advance the goals of deterrence, denunciation, rehabilitation and the protection of society through the imposition of a numerical sentence beyond 20 years*. Even though the conditions of the offender's term of imprisonment may be subject to change after seven years, the interaction of well-accepted sentencing principles could still require that the offender remain under the supervisory aegis of the parole system (if not under imprisonment) for well beyond 20 years. [Emphasis in original.]

[217] In the end, at para. 72, Lamer C.J. "decline[d] to delineate any pre-fixed outer boundary to the sentencing discretion of a trial judge" and he saw "no reason why numerical sentences in Canada ought to be *de facto* limited at 20 years as a matter of judicial habit or convention." He recognized at para. 73 that, for "many of the lesser crimes presently before our courts" sentences beyond 20 years would be "grossly excessive, and probably cruel and unusual." However, he also noted that "in other circumstances, such a *stern sentence would be both fitting and appropriate*" (emphasis added).

[218] We have reviewed *C.A.M.* at some length because in our view, it helps shed light on Parliament's purpose in enacting s. 83.26. In short, we believe that in enacting that provision, Parliament intended to send a message that terrorism is a crime that warrants special consideration and it is to be treated differently for sentencing purposes. Parliament could have evidenced this intention in a variety of ways as, for example, by

legislating minimum sentences for terrorist activity. By enacting s. 83.26, it chose to signal its intention by mandating the imposition of consecutive sentences for terrorism offences that are not punished by a life sentence.[13] If giving effect to this intention means imposing sentences of more than 20 years in some instances where a life sentence is either unavailable or unwarranted, trial judges should not feel constrained from doing so by reason of a 20-year fixed ceiling custom that has no foundation in sentencing principles or policy.

[219] This view of s. 83.26 fits with the approach we believe should be taken in the sentencing of terrorists. Specifically, where the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the indiscriminate killing of innocent human beings, trial judges should consider very stiff sentences, including life imprisonment. And in those cases where a life sentence is found to be inappropriate, trial judges should determine the appropriate length of sentence having regard to the special sentencing provisions in the *Criminal Code* applicable to terrorism offences, the unique nature of terrorism-related crimes, and the enormity of the offence or offences at hand. This process will often result in sentences that are beyond the 15 to 20-year range that the courts have traditionally imposed in respect of serious crimes where a life sentence is not warranted.

[13] Section 467.14 of the *Criminal Code* also mandates the imposition of consecutive sentences for committing offences under the organized crime provisions in ss. 467.11, 467.12 and 467.13.

[220] In advocating this sentencing approach to terrorist-related activity that, to the offender's knowledge, is designed to or is likely to result in the indiscriminate killing of innocent human beings, we are not suggesting that there will never be cases of that nature for which the appropriate sentence will be within or below the 15 to 20-year customary range. For example, full and meaningful cooperation by the offender with law enforcement authorities in the detection of terrorists and terrorist activity may well alleviate against the imposition of longer than customary sentences. Such cooperation is always significant for sentencing purposes and particularly so in the case of terrorist-related crimes. By their nature, such crimes tend to be shrouded in secrecy and usually involve numerous people acting at different times, different places and in different ways. The heads of such conspiracies will generally be difficult to detect. Some may reside in foreign jurisdictions. Information from those lower down in the chain may prove invaluable to the authorities and lead to the capture of such individuals before they can perpetrate atrocities.

[221] Cooperation is but one example of the type of mitigating conduct that may alleviate against the imposition of longer than customary sentences in terrorism cases. We use it to emphasize the fundamental principle that sentencing remains a highly individual process and that the punishment imposed must be proportional to the overall culpability of the offender: see *C.A.M.*, at para. 73. For this reason, trial judges retain discretion, even in terrorism cases, to impose lighter sentences in appropriate circumstances. That said, it will be the rare case where lighter sentences are imposed on

offenders who knowingly engage in terrorist activity that is designed to or is likely to result in the indiscriminate killing of innocent human beings. As indicated, in those cases, life sentences or sentences exceeding 20 years will generally be appropriate.

[222] As we shall explain, there are many reasons why long fixed-term sentences exceeding 20 years may be warranted in terrorism cases. These include the horrific nature of the crime and the need to let would-be terrorists know that they will pay a heavy price if they choose to pursue their deadly activities in Canada. Beyond those factors, there is much to be said for keeping those who have shown a willingness to engage in the indiscriminate killing of innocent civilians under the aegis of the parole system, if not in prison, for well beyond 20 years.

[223] The trial judge did not follow this approach, either in his interpretation of s. 83.26 or in fashioning the global sentence. These errors contributed to the imposition of a sentence which we believe was manifestly unfit.

[224] Having identified three specific errors in the reasons for sentence, we now propose to turn to the larger picture and explain why the sentence imposed by the trial judge was manifestly unfit.

[225] Before doing so, however, we feel obliged to comment briefly on one further aspect of the trial judge's reasons for sentence that requires clarification.

(4) The Trial Judge's "amateurish efforts" Comment

[226] The trial judge referred to the appellant's efforts to perfect the hifidigimonster as "amateurish". At para. 33 of his reasons for sentence, he said:

> As well, it was apparent that Momin and his brother Qasim lacked expertise in their effort to perfect the hifidigimonster. Sgt. Fiset said it was an amateurish effort. The device, as seized, would not do the job, although it would take only minor modifications to change that. There were several cases referred to by counsel in which, fortunately, amateurish efforts by seriously intended terrorists, resulted in explosive devices failing or in one or more instances blowing up prematurely such that the lives of innocent victims were spared. That Momin Khawaja's efforts may have been amateurish and terminated before they were completed is hardly mitigation of the seriousness of his criminal intent.

[227] Although the trial judge stated that he did not regard the "amateurish" nature of the appellant's efforts as mitigating the seriousness of his intent, there has been some suggestion that the trial judge treated the appellant's lack of expertise as a mitigating factor: see, for example, *R. v. Khalid*, (September 3, 2009), Brampton, (2025/07) (Ont. S.C.), at para. 119., and *R. v. Namouh* (2010), 74 C.R. (6th) 376 (C.Q. (Crim. & Pen. Div.)), at paras. 50 and 57. Hence, the need to provide clarification. (For a case in which the sentence was mitigated where the plot in question was "amateurish", in the sense that the expected result "would never have occurred in practice", see *R. v. Barot*, [2007] EWCA Crim. 1119, at para. 29. We express no opinion on the principle applied by the court or the sentence imposed in that case.)

[228] In this case, the RCMP seized the hifidigimonster device and a photograph showing a detonator device from the appellant's home. According to Sergeant Fiset of the RCMP, the Crown's expert on explosive devices, the seized device was non-functional as a triggering device for an IED due to a design flaw; however, with modifications, it could be made to function effectively. Sergeant Fiset also testified that the hifidigimonster as photographed was capable of detonating an explosion in the field.

[229] The fact that the detonator as seized may have required some minor modifications to become functional is in our view irrelevant on sentencing. Terrorists who are caught in the preparatory stage may often appear to be amateurish; in those cases where the same plans have been carried out, they appear to be anything but amateurish. The characterization "amateurish" does not lessen the threat.

(5) The Trial Judge Erred in his Overall Approach to Sentencing and Imposed a Sentence that is Manifestly Unfit

(i) The Sentence does not Reflect the Unique Nature of Terrorism-Related Offences

[230] The appellant was an active member of a terrorist group whose singular goal was to eradicate western culture and civilization and establish Islamic dominance wherever possible. He was prepared to go anywhere and do anything for the violent Jihadist cause. At the time of his arrest, he was in possession of a prototype remote detonator device and had promised to build 30 more such devices for the Khyam group. As found by the trial judge at para. 32, this device was "intended to unleash fireworks at other as yet unspecified places in aid of the jihad." The appellant was a willing participant in activity

that he knew was likely to result in the indiscriminate killing of innocent human beings on a potentially massive scale. It is hard to imagine a more odious inchoate crime.

[231] To be sure, terrorism is a crime unto itself. It has no equal. It does not stop at, nor is it limited to, the senseless destruction of people and property. It is far more insidious in that it attacks our very way of life and seeks to destroy the fundamental values to which we ascribe – values that form the essence of our constitutional democracy.

[232] Much has been written about the features of terrorism that distinguish it from other crimes and place it in a category of its own. In *R. v. Elomar*, [2010] NSWSC 10 – an Australian case bearing many similarities to the present case – Whealy J. made the following observations about terrorism at para. 63:

> The mindset evinced by all this [extremist] material may be summarised as follows: First, a hatred of the "KUFR", that is those Muslims and non-Muslims who did not share their extremist views. Secondly, an intolerance towards the democratic Australian Government and its policies. Thirdly, a conviction that Muslims are obligated by their religion to pursue violent jihad for the purposes of overthrowing liberal democratic societies and to replace them with Islamic rule and Sharia law. *This criminal enterprise was not in any sense motivated, as criminal activities so often are, by a need for financial gain or simply private revenge. Rather, an intolerant and inflexible fundamentalist religious conviction was the principle motivation for the commission of the offence. This is the most startling and intransigent feature of the crime. It sets it apart from other criminal enterprises motivated by financial gain, by passion, anger or revenge*. [Emphasis added.]

[233] In *Khalid*, Durno J. referred to terrorist offences in these terms at para. 108:

> *Terrorist offences are a most vile form of criminal conduct... They attack the very fabric of Canada's democratic ideals*. Those involved live by a philosophy that rejects the democratic process. Their motivation is unique and fundamentally at odds with the rule of law. It is an offence that has an enormous impact on the public. *Their object being to strike fear and terror into the citizens in a way not seen in other criminal offences.* [Emphasis added.]

[234] In *R. v. Amara*, 2010 ONSC 441 (CanLII), Durno J. described at paras. 102 and 104 the catastrophic consequences that would have followed had the terrorists in that case succeeded in their plot to blow up the two buildings they had targeted in downtown Toronto:

> [T]here is no dispute that what would have occurred was multiple death and injuries. On the timetable indicated in the facts with detonation occurring at 9 a.m., the impact would have been magnified as workers arrived for work. With one ton bombs at each location, the results would have been catastrophic. What this case revealed was spine-chilling. I agree with Mr. Lacy that the potential for loss of life existed on a scale never before seen in Canada. It was almost unthinkable without the suggestion that metal chips would be put in the bombs. *Had the plan been implemented it would have changed the lives of many, if not all Canadians forever*.
>
> ...
>
> *This was not an offence that would just impact on those who were injured or killed and their families and friends. This type of offence, even when it is stopped before the plans are implemented, impacts throughout Canada*. [Emphasis added.]

[235] As already noted, the terrorism provisions contained in Part II.1 of the *Criminal Code* were introduced as part of the *Anti-terrorism Act* found in Bill C-36. Before the Special Senate Committee considering Bill C-36 (Senate of Canada, Proceedings of the

Special Senate Committee on the Subject Matter of Bill C-36, 1st Sess., 37th Parl., No. 1 (22 October 2001), at p. 1:25), the Minister of Justice made the following observations about terrorism and terrorism-related crimes:

> Before I speak specifically about the different elements of the bill, I would like to discuss with you the justification for a bill like this. As many honourable senators know, currently in the *Criminal Code* we have hijacking, sabotage and murder offences. While those remain available to us, *terrorism is a special threat to our way of life*, and it is with this in mind that Bill C-36 focuses on acts of terrorism. As the Prime Minister stated in the House: *It has become clear that the scope of the threat that terror poses to our way of life has no parallel*. [Emphasis added.]

[236] And finally, in the recent report on the Air India tragedy (see *Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, Air India Flight 182: A Canadian Tragedy*, Vol. 1 (Ottawa: Public Works and Government Services Canada, 2010), at p. 159), the Honourable John Major summed up succinctly the characteristics of terrorism that distinguish it from other crimes: "Terrorism is an existential threat to Canadian society in a way that murder, assault, robbery and other crimes are not. Terrorists reject and challenge the very foundations of Canadian society."

[237] The trial judge in the instant case recognized that the appellant's crimes were very serious. He accepted at para. 25 that denunciation, deterrence and protection of society "must weigh heavily in the sentencing process." He also noted that "sentencing in cases of terrorist activity must strongly repudiate activity that undermines our core values."

[238] We agree with those sentiments. Respectfully, however, we think that the sentence imposed on the appellant fails to reflect the enormity of his crimes and the horrific nature of the crime of terrorism itself. Terrorism, in our view, is in a special category of crime and must be treated as such. When the terrorist activity, to the knowledge of the offender, is designed to or is likely to result in the indiscriminate injury and killing of innocent human beings, sentences exceeding 20 years, up to and including life imprisonment, should not be viewed as exceptional. That may not be the traditional approach to sentencing, but it is the approach we believe must be taken to repudiate and deter terrorism and denounce it for the insidious crime it is.

(ii) The Sentence Fails to Adequately Reflect the Continuing Danger that this Offender Presents to Society

[239] We have already explained why, in our view, the appellant remains a continuing danger to society and will continue to be so for the indefinite future. The record reflects a complete absence of contrition or remorse. As such, the appellant remains a serious threat to the security of the state. The trial judge failed to take this into account. Had he done so, we believe he would have imposed a life sentence.

[240] In *Khyam*, at para. 145, Sir Igor Judge considered and rejected a submission advanced by several of the defendants that an indeterminate or discretionary life sentence was inappropriate and wrong in principle:

> These submissions are unrealistic. *Each of the Applicants was a highly dangerous man willing to participate in the infliction of wholesale death and destruction*. But for the intervention of the security services, their common objectives would have

> been achieved. *They represent a continuing danger, and will continue to do so for the indefinite future. In each case a discretionary life sentence was inevitable and rightly imposed*. [Emphasis added.]

[241] The thoughts expressed by Whealy J. in *Elomar*, at para. 93, about the accused's lack of remorse and the continuing danger he presents to society are also applicable to the appellant:

> Despite these moderating features, I have to say that Elomar has not acknowledged any responsibility for his actions, nor has he exhibited any contrition or remorse in relation to the serious crime for which he has been convicted. Of course, like the others, he continues to assert his innocence. From my perspective as the sentencing Judge, it is important to note, however, that there is no contrition and no acceptance of responsibility whatsoever. *Importantly, I see little prospect of rehabilitation. There is no present indication that Elomar will ever renounce the extremist views that fuelled his participation in this very serious conspiracy. Unfortunately, Elomar has all the hallmarks of an offender whose motivation is not that of financial or other material gain, but who is driven to act from an extremist religious conviction. The significance of this for sentencing purposes is the acknowledgement that the community needs protection from his criminality. The sentence must provide an appropriate level of incapacitation so that the commensurate degree of protection will be afforded to the community.* [Emphasis added.]

[242] As Whealy J. observed, where an offender is driven by extremist views to participate in a plot that is designed to or is likely to result in the indiscriminate killing and injury of innocent people, the sentencing judge must impose a sentence that provides for "an appropriate level of incapacitation so that the commensurate degree of protection will be afforded to the community."

[243] Elomar received a sentence of 28 years with no chance of parole for 21 years. The plot he engaged in was intended to cause serious damage to property. Had it been designed to or likely to result in the loss of innocent lives, as is the case with the appellant, there can be little doubt that Elomar would have received a life sentence.

[244] In assessing the danger the appellant poses to society in this case, we have not ignored his submission that his goal was to kill western soldiers in Afghanistan and local troops that support them, not innocent civilians, and that his punishment should be mitigated accordingly.

[245] We see no merit in that submission. His own writings belie it and the trial judge concluded that he cared not who his victims might be. The appellant advocated the death of innocent human beings as the only way of achieving his goal of violent Jihad. Beyond that, we reject outright the notion that the lives of soldiers serving in Afghanistan should be somehow treated as "less worthy" of protection when fashioning appropriate sentences for terrorism-related offences under Part II.1 the *Criminal Code*.

(iii) The Sentence Does not Adequately Deter Would-be Terrorists

[246] We have already explained why terrorism is a crime like no other. Once detected, it must be dealt with in the severest of terms. When terrorists acting on Canadian soil are apprehended and brought to justice, the responsibility lies with the courts to send a clear and unmistakable message that terrorism is reprehensible and those who choose to engage in it here will pay a very heavy price.

[247] Our justice system is committed to the values of a democratic society, in which openness, governmental accountability, individual freedoms and the rule of law are accepted as the cornerstones of a fair and just system of criminal justice. Our sentencing and correctional philosophy also places a premium on the notion of individual dignity and it accepts redemption and rehabilitation as desired and achievable goals. Regrettably, the hallmarks that define our justice system may be seen by those who reject democracy and individual freedom as signs of weakness. Terrorists, in particular, may view Canada as an attractive place from which to pursue their heinous activities. And it is up to the courts to shut the door on that way of thinking, swiftly and surely.

[248] In *R. v. Lodhi*, [2006] NSWSC 691, aff'd [2007] NSWCA 360, leave to appeal refused, [2008] HCATrans 225, Whealy J. addressed this very concern at para. 91:

> *The need for substantial sentences to reflect the principles of general deterrence are obvious in relation to crimes of this kind.* Such crimes are hard to detect; they are likely to be committed by members of our own community and often by persons of prior good character and favourable background. One has only to consider the tragedy of the London bombings in 2005 to recognise this observation as a sad truism. *Moreover, terrorism is an increasing evil in our world and a country like Australia, with its very openness and trusting nature, is likely to fall easy prey to the horrors of terrorist activities.* [Emphasis added.]

[249] In *R. v. Sakr* (1987), 31 A. Crim. R. 444, at p. 451, Crockett J., speaking for the Court of Criminal Appeal of Victoria, expressed similar thoughts on the need to stamp out terrorism quickly and decisively:

> [Terrorism] is an offence that is callous in its conception, wanton in its perpetration and, if the intent is given effect to, ruthlessly destructive in its aftermath. It is a crime that is relatively novel in this country, as I have already indicated, and yet it is plain that there is a community recognition that it is regarded with a particular repugnance because its commission represents a profound assault upon a stable society and the law and order that is necessary for that society's survival. Those responsible for such reprehensible conduct must expect to suffer condign punishment.
>
> If ever there were a case in which the nature of the offence and the circumstances of its commission, called for a deterrent penalty, then this is that case. The court is justified in believing that the community would expect that the punishment to be imposed should mark its intention, so far as it might be within the power of the court to do so, to arrest the incipient growth of terrorist-style criminal activity in this community.

[250] We agree with the sentiments expressed by Justices Whealy and Crockett. Terrorism must not be allowed to take root in Canada. When it is detected, it must be dealt with in the severest of terms.

[251] With respect, the trial judge in the instant case did not give sufficient weight to this concern. Nor, as we have observed, did he adequately consider the unique nature of terrorism-related offences, the gravity of the appellant's crimes, or the continuing risk that he poses to society now, and for the indefinite future. In the result, he imposed a sentence that was manifestly unfit. The appellant should have been sentenced to life imprisonment, with an order under s. 743.6(1) of the *Criminal Code* requiring that he serve at least 10 years before being eligible for release on full parole.

[252] The appellant is now 31 years old. He is still a young man. If he truly reforms and renounces his commitment to violent Jihad by presenting clear evidence of his reformation to the satisfaction of the parole board, he will have the opportunity to live out a full and productive life in the community, albeit under the scrutiny of the parole system. If he does not reform, society will at least have the peace of mind of knowing that he will never again be in a position to pursue his deadly activities.

(6) Conclusion on Sentence Appeals

[253] We would grant the Crown's application for leave to cross-appeal and increase the appellant's sentence on count 1 to life imprisonment. Although the trial judge entered the conviction on count 1 on the included offence of "doing anything with intent to cause an explosion of an explosive substance" contrary to s. 81(1) of the *Criminal Code* – a non-terrorism-related offence – that offence also attracts a possible life sentence. As we have explained, the trial judge acquitted the appellant of the terrorism-related offences underlying counts 1 and 2 on a very narrow basis, namely, that he was not satisfied beyond a reasonable doubt that the appellant knew he was assisting in the U.K. fertilizer bomb plot of the Khyam group, as alleged by the prosecution in connection with these counts. The Crown did not appeal the acquittal on the terrorism-related offences in counts 1 and 2. With that in mind, we are prepared to assume that the trial judge's decision on this issue was correct.

[254] Nonetheless, we are satisfied that the basis for the conviction on the underlying offence in count 1 was clearly connected to terrorist activity and thus properly triggers

the sentencing principles we have articulated. As noted by the trial judge at para. 4 of his reasons for sentence, the appellant's activity in developing and possessing an explosive device "was directed at assisting his terrorist associates in a way that could only result in serious injury, death and destruction to people and property somewhere." Accordingly, even though the appellant was acquitted of the terrorism-related offence in count 1, on the trial judge's findings, it is accurate to describe the underlying offence as a terrorist-related crime. Pursuant to s. 743.6(1) of the *Criminal Code*, an order will go on count 1 requiring that the appellant serve 10 years before he may be released on full parole.

[255] In light of the life sentence imposed on count 1, the sentences to be imposed on the remaining counts take on somewhat less significance. However, we would have regard to the following five factors in fashioning the sentence for the remaining counts: (1) the seriousness of the conduct underlying the counts as a whole; (2) the nature of the individual terrorism offences proved by the Crown; (3) the absence of evidence of the appellant's rehabilitative prospects; (4) Parliament's intent, reflected in s. 83.26 of the *Criminal Code*, that the cumulative sentence for multiple terrorism-related crimes will be beyond the upper range imposed for other crimes; and (5) the overriding principle of proportionality. Taking these factors into account, we would impose the following consecutive sentences on each remaining count, to be served concurrently with the life sentence imposed on count 1:

Count	Offence	Sentence Imposed
Count 3	Knowingly participating in or contributing to activity of a terrorist group by receiving training for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity, contrary to s. 83.18(1) of the *Criminal Code*.	4 years consecutive
Count 4	Knowingly instructing a person to carry out financial activity for the benefit of a terrorist group for the purpose of enhancing the ability of the terrorist group to facilitate or carry out terrorist activity, contrary to s. 83.21(1) of the *Criminal Code.*	7 years consecutive
Count 5	Providing and making available property and financial services to persons, intending or knowing that they would be used, in whole or in part, for the purpose of facilitating or carrying out terrorist activity, contrary to s. 83.03(a) of the *Criminal Code*.	2 years consecutive
Count 6	Knowingly participating in or contributing to an activity of a terrorist group... by participating in dialogue, meetings or exchanges of information relating to the development of an explosive device intended to endanger life or cause serious damage to property, contrary to s. 83.18 of the *Criminal Code*.	8 years consecutive
Count 7	Knowingly facilitating a terrorist activity, contrary to s. 83.19 of the *Criminal Code*.	3 years consecutive
		Total 24 years

[256] The ancillary orders made by the trial judge shall remain the same. The appellant's application for leave to appeal against sentence is dismissed.

Signed: "Doherty J.A."
"M.J. Moldaver J.A."
"E. A. Cronk J.A."

RELEASED: "DD" DECEMBER 17, 2010

APPENDIX A

Relevant Provisions of the *Criminal Code*, R.S.C. 1985, c. C-46

PART II.1 TERRORISM

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

"terrorist activity" means

...

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

(i) that is committed

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

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

endangers a person's life,

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

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

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

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

...

"terrorist group" means

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity, and includes an association of such entities.

...

(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 of "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

83.03 Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

> (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity,...

83.2 Every one who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of or in association with a terrorist group is guilty of an indictable offence and liable to imprisonment for life.

83.18 (1) Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

83.19 (1) Every one who knowingly facilitates a terrorist activity is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

83.21 (1) Every person who knowingly instructs, directly or indirectly, any person to carry out any activity for the benefit of, at the direction of or in association with a terrorist group, for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity, is guilty of an indictable offence and liable to imprisonment for life.

83.26 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.

PART XXIII SENTENCING

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

....

(v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances;

....

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

743.6(1) Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

(1.1) Notwithstanding section 120 of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for a criminal

organization offence other than an offence under section 467.11, 467.12 or 467.13, the court may order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

(1.2) Notwithstanding section 120 of the *Corrections and Conditional Release Act*, where an offender receives a sentence of imprisonment of two years or more, including a sentence of imprisonment for life, on conviction for a terrorism offence or an offence under section 467.11, 467.12 or 467.13, the court shall order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less, unless the court is satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served by a period of parole ineligibility determined in accordance with the *Corrections and Conditional Release Act.*

(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.