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# ***R. v. Khawaja*: At the Limits of Fundamental Justice**

**Hamish Stewart\***

## I. INTRODUCTION

In 2012, the Supreme Court of Canada decided only one case concerning the content of the principles of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*<sup>1</sup>: In *R. v. Khawaja*,<sup>2</sup> the Court rejected the appellant Nadarajah's argument that the offence of participating in or contributing to the activities of a terrorist group (*Criminal Code*,<sup>3</sup> section 83.18) violated section 7 of the Charter. The Court's reasons for rejecting this argument illustrate two general trends of Charter jurisprudence in criminal law, particularly anti-terrorism law. First, rather than invalidating offence definitions or statutory changes to criminal procedure, the Court prefers to use statutory interpretation to control the scope of criminal liability and to ensure fair proceedings. Second, the Court is reluctant to recognize new principles

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\* Professor, Faculty of Law, University of Toronto. I am very grateful to Kent Roach, Jamie Cameron and an anonymous reviewer for comments on a draft of this paper, to Andrew Hotke for research assistance, and to Jamie Cameron and Benjamin Berger for the invitation to participate in the 2012 Constitutional Cases conference at Osgoode Hall Law School.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>2</sup> [2012] S.C.J. No. 69, [2012] 3 S.C.R. 555 (S.C.C.) [hereinafter "*Khawaja*"]; *United States of America v. Sriskandarajah*, [2012] S.C.J. No. 70, [2012] 3 S.C.R. 609 (S.C.C.). The arguments I consider in this paper were raised in *Sriskandarajah* by the appellant Nadarajah, but the Supreme Court of Canada's reasons for rejecting them were incorporated into its reasons in *Khawaja*. I will refer to them as "Nadarajah's arguments". In 2012, the Court did decide other cases concerning s. 7 of the Charter, but all of them involved the application of well-established principles of procedural fairness such as the right to a fair trial rather than proposed new principles of fundamental justice. See *R. v. Bellusci*, [2012] S.C.J. No. 44, [2012] 2 S.C.R. 509 (S.C.C.); *R. v. S. (N.)*, [2012] S.C.J. No. 72, [2012] 3 S.C.R. 726 (S.C.C.); *R. v. Yumnu*, [2012] S.C.J. No. 73, [2012] 3 S.C.R. 777 (S.C.C.); *R. v. Davey*, [2012] S.C.J. No. 75, [2012] 3 S.C.R. 828 (S.C.C.).

<sup>3</sup> R.S.C. 1985, c. C-46 [hereinafter "Code"].

of fundamental justice, particularly those relating to substantive criminal law. Since the earliest days of the Charter, the Supreme Court of Canada has made section 7 into a powerful guarantee of substantive justice and procedural fairness, particularly in criminal law;<sup>4</sup> but cases like *Khawaja* suggest that the development of the principles of fundamental justice may have reached its limit.<sup>5</sup>

## II. ELEMENTS OF THE “PARTICIPATING OR CONTRIBUTING” OFFENCE

Section 83.18 of the Code creates the following offence:

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 or a term not exceeding ten years.

Section 83.18(2) provides that the offence can be committed (a) whether or not a terrorist activity is actually facilitated or carried out, (b) “whether or not ... the participation or contribution of the accused actually enhance[d] the ability of a terrorist group to facilitate or carry out a terrorist activity” and whether or not the accused knew of “the specific nature of any terrorist activity”. Section 83.18(3) provides a non-exhaustive list of activities that amount to participation or contribution, and section 83.18(4) provides some aspects of the accused’s conduct that may be considered in deciding whether he or she participates or contributes. “Terrorist activity” is defined in section 83.01.<sup>6</sup>

Before considering the constitutionality of section 83.18, the Court interprets it. The purpose of the offence, the Court holds,

... is “to provide means by which terrorism may be prosecuted and prevented” ... — *not* to punish individuals for innocent, socially useful

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<sup>4</sup> See generally Hamish Stewart, *Fundamental Justice* (Toronto: Irwin Law, 2012) [hereinafter “Stewart”].

<sup>5</sup> Other relatively recent cases where the Court has refused to recognize new principles of fundamental justice include *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.) [hereinafter “*Canadian Foundation*”].

<sup>6</sup> This definition was held to be constitutionally valid in *Khawaja*, *supra*, note 2.

or casual acts which, absent any intent, indirectly contribute to a terrorist activity.<sup>7</sup>

In light of this purpose, the Court considers two elements of the offence that turn out to be critical both to its meaning and scope and therefore to its constitutionality. First, the Court notes that the Crown must prove a very high level of *mens rea*. Section 83.18(1) explicitly states not just that the accused must “knowingly” participate in or contribute to the activity of a terrorist group, but also that he or she must do so “for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity”.<sup>8</sup> Thus, in contrast to most offences where proof of intention in the sense of knowledge of the effects of one’s actions is sufficient *mens rea*,<sup>9</sup> here the Crown must prove not only that kind of knowledge but also a purpose. What exactly is the purpose element, in this context? The Court speaks of a “specific intent to enhance the abilities of a terrorist group”,<sup>10</sup> and of an “intent to enhance the abilities of a terrorist group”.<sup>11</sup> By way of contrast, the Court also notes that knowledge that one’s conduct will enable a group to pursue its activities coupled with “a valid reason” for interacting with the terrorist group would mean that a person was *not* guilty of the offence because the “valid reason” would negate the guilty purpose.<sup>12</sup> The

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<sup>7</sup> *Khawaja, supra*, note 2, at para. 44, original emphasis, quoting from *Re Application under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 39 (S.C.C.) [hereinafter “*Re Application under s. 83.28*”]. See also *Khawaja*, at para. 55.

<sup>8</sup> *Khawaja, id.*, at para. 45.

<sup>9</sup> See, for example, *R. v. Buzzanga*, [1979] O.J. No. 4345, 49 C.C.C. (2d) 369 (Ont. C.A.) (interpreting the requirement that the accused “wilfully” promote hatred to require proof that the accused knew that their actions would have the effect of promoting hatred, not that they desired to promote hatred); *R. v. Hibbert*, [1995] S.C.J. No. 63, [1995] 2 S.C.R. 973 (S.C.C.) (interpreting the word “purpose” in s. 21(1)(b) of the *Criminal Code* as requiring only proof of knowledge of consequences). See also the American federal “material support” offences: 18 U.S.C.A., §§2339A, 2339B. The offence in §2339A does require proof of knowledge that support is being provided and knowledge or intent that the support will be used “in preparation for, or in carrying out” terrorist acts. However, the offence in §2339B requires only proof of knowledge that the organization supported is in some way a terrorist group; there is no requirement that the prosecution prove any further purpose or ulterior intent. See, for example, *United States v. Stewart*, 590 F.3d 93 (2d Cir. 2009); *Holder v. Humanitarian Law Project*, 561 U.S., 130 S. Ct. 2705 (2010), slip opinion, at 10-12 [hereinafter “*Holder*”].

<sup>10</sup> *Khawaja, supra*, note 2, at para. 47; see also para. 57.

<sup>11</sup> *Id.*, at para. 53.

<sup>12</sup> *Id.*, at para. 47. In the same paragraph, the Court unhelpfully contrasts subjective mental states with lack of knowledge and negligence; while the Court is quite right to say that the mental elements of this offence are subjective and not objective, the real issue is what kind of subjective mental state is required.

Court's overall conclusion on this point tracks an argument made some years ago by Kent Roach, that the Crown must prove not only the accused's "guilty knowledge" of the effects of his or her conduct but also the "higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity".<sup>13</sup>

Second, the Court interprets the *actus reus* of the offence as requiring proof that the accused's conduct is "capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity", or, put another way, that the effect of the accused's conduct on the group's abilities "creates a risk of harm that rises beyond a *de minimis* threshold".<sup>14</sup> This aspect of the *actus reus* is to be assessed on a reasonable person standard: whether a reasonable person would view the conduct "as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity".<sup>15</sup>

Putting these two points together with some less contentious aspects of the offence, we may conclude that the section 83.18 offence, as interpreted in *Khawaja*, requires proof of the following elements:

- the accused participated in or contributed to any activity of a terrorist group;
- the accused's participation or contribution, viewed objectively, materially enhanced the abilities of the terrorist group to facilitate or carry out a terrorist activity;
- the accused was aware of the general nature of the activity that he or she participated in or contributed to;
- the accused knew that the group was a terrorist group;<sup>16</sup>

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<sup>13</sup> Kent Roach, "Terrorism Offences and the Charter: A Comment on R. v. Khawaja" (2007) Can. Crim. L. Rev. 271, at 285. The Court quotes some of this passage: *Khawaja, id.*, at para. 45.

<sup>14</sup> *Id.*, at para. 51 (emphasis in original).

<sup>15</sup> *Id.* (emphasis in original); see also para. 52. Contrast the U.S. offences mentioned in note 9 above. These offences are defined as providing "material support or resources", but the statute itself provides an extensive definition of that term (18 U.S.C., §2339A(b)(1)). As a result, there is little scope for an argument that an accused is not guilty because his conduct has only a *de minimis* effect on a terrorist group's capabilities.

<sup>16</sup> The Court in *Khawaja, supra*, note 2, does not discuss in detail the knowledge elements concerning the group and the nature of its activities, but at para. 41 the Court adopts the Ontario Court of Appeal's interpretation of these elements (see *United States of America v. Sriskandarajah*, [2010] O.J. No. 5474, 109 O.R. (3d) 680, at para. 28 (Ont. C.A.)).

- the accused had the purpose, or specific intent, that the participation or contribution have the “general effect” of enhancing the terrorist group’s ability to carry out a terrorist activity.

The Court’s interpretation of the *mens rea*, particularly of the purpose requirement, is entirely plausible and very much in accord with the interpretation offered by commentators around the time the anti-terrorism offences were enacted. The concern was that without significant *mens rea* requirements, the new anti-terrorism offences, including the definition of terrorism itself, would be vulnerable to constitutional challenge, particularly under the “stigma” doctrine that had resulted in the invalidation of the constructive murder provisions of the Code.<sup>17</sup> The Court’s interpretation of section 83.18 makes it clear that the prosecution must prove significant subjective fault elements, which are surely more than adequate to justify stigmatizing an offender as a “terrorist”.

Defining the *actus reus* of an offence with reference to the reasonable person is a common interpretive tool in Canadian criminal law. The Court has made the same move in deciding whether words spoken constitute a “threat” and whether an image of a child constitutes “child pornography”; for these offences, the question is whether the reasonable person would regard the words or the image as meeting the definition of the *actus reus*.<sup>18</sup> So the Court’s use of that method here is unsurprising. But what is surprising is the Court’s apparent disregard for section 83.18(2)(b):

An offence may be committed under subsection (1) whether or not ... the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity.

This paragraph is surely most plausibly read as stating that the effect of the accused’s conduct on the capabilities of the terrorist group is irrelevant, in other words that the accused’s contribution need *not* be “material”.<sup>19</sup> Furthermore, section 83.18(3) defines certain specific forms

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<sup>17</sup> Kent Roach, *The 9/11 Effect* (Cambridge: Cambridge University Press, 2011), at 379-82; Stanley Cohen, “Safeguards in and Justifications for Canada’s New Anti-Terrorism Act” (2002-2003) 14 N.J.C.L. 99. On the “stigma” doctrine, see Stewart, *supra*, note 4, at 166-85.

<sup>18</sup> *R. v. McCraw*, [1991] S.C.J. No. 69, [1991] 3 S.C.R. 72 (S.C.C.); *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2 (S.C.C.). The Crown must, of course, also prove the *mens rea*, which for each of these offences is subjective.

<sup>19</sup> The Court in *Khawaja*, *supra*, note 2, mentions these provisions of s. 83.18(2)(b) at para. 41, but does not discuss or interpret them. Another possible reading of s. 83.18(2)(b), suggested to me by Andrew Hotke, is as follows. Suppose the Court is right to interpret s. 83.18(1)

of contributing or participating that do not on their face seem to require anything beyond the *de minimis*. For example, section 83.18(3)(d) specifies that one kind of participation or contribution is “entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group”.<sup>20</sup> If the *de minimis* threshold applies to the conduct mentioned in section 83.18(3), then this provision must be read as requiring proof not only that the accused entered or remained, *etc.*, with the appropriate mental state, but also that his entering or remaining in any country materially enhanced the ability of a terrorist group to pursue its objectives. Finally, the wording of section 83.18(1) itself suggests that although the accused’s purpose must be to enhance a terrorist group’s abilities, materially enhancing them is not part of the *actus reus*; it would seem that all that is required is conduct, regardless of whether its effect is beyond *de minimis*, with the relevant knowledge and purpose.

Yet a statute that imposed criminal liability on the basis of conduct that was *de minimis*, that had essentially no effect on the world, would be close to imposing liability for thoughts (knowledge and motivation) alone and so might plausibly be characterized as overbroad.<sup>21</sup> The Court’s willingness to overlook this plausible reading of section 83.18(2) and (3) in interpreting section 83.18(1) suggests that it prefers to interpret statutes so that they are not overbroad than to find them overbroad and then strike them down. Kent Roach has argued that this interpretive strategy is “less transparent and less democratic” than striking down “legislation that may clearly and unreasonably violate the *Charter*”.<sup>22</sup> Striking down, he suggests, puts in motion a process of dialogue between the Court and the legislature in which the arguments for and against limiting or overriding Charter rights can be clearly stated and democratically

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as requiring proof of contribution or participation outside the *de minimis* range. Then a potential terrorist who contributes or participates to an imaginary group set up by the police as part of an undercover investigation might say that his contribution, no matter how large it seemed to be, was *de minimis* because there was no contribution to the effectiveness of any actual terrorist group. Section 83.18(2)(b) might then be read as blocking this argument, so as to facilitate undercover investigation of suspected terrorists. The same result could be achieved with the law of attempts (see *United States of America v. Dynar*, [1997] S.C.J. No. 64, [1997] 2 S.C.R. 462 (S.C.C.) [hereinafter “*Dynar*”]), but without s. 83.18(2)(b), a court might find it difficult to impose liability for an impossible attempt to commit an offence that is itself remote from the ultimate harm.

<sup>20</sup> Compare the concerns expressed about the draft version of s. 83.18 by Don Stuart, “The Dangers of Quick Fix Legislation in the Criminal Law” in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001) 205, at 209-11.

<sup>21</sup> Although one might say the same about legally impossible attempts, where the Court has imposed liability: see *Dynar*, *supra*, note 19.

<sup>22</sup> Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001), at 287-88.

debated. There is much to be said for Roach's view in cases of obvious Charter violations, such as reverse onuses.<sup>23</sup> But it is less obviously applicable to a statutory provision like section 83.18, which is open to being interpreted in a variety of ways; moreover, exercises in statutory interpretation can also give rise to dialogue between the Court and the legislature.<sup>24</sup> An interpretive stance implicitly assuming that the legislature has not set out to violate constitutional rights may do as much or more for the substance of Charter rights as striking down, by deflecting the tendency of legislatures to respond with enactments that are minimally compliant with the Charter.

### III. THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The principles of fundamental justice invoked by Nadarajah were the norm against overbreadth and the norm against gross disproportionality. These are both substantive principles that apply whenever legislation or other government action affects the interests protected by section 7 of the Charter.<sup>25</sup> The norm against overbreadth originated in *Heywood*.<sup>26</sup> It states that a law offends the principles of fundamental justice if “in pursuing a legitimate objective, [it] uses means which are broader than is necessary to accomplish that objective”.<sup>27</sup> The defect in an overbroad law is that the interests protected by section 7 — life, liberty and security of the person — are affected more than necessary for the purposes of the law. The norm against gross disproportionality seems to have originated in *Suresh*<sup>28</sup> and

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<sup>23</sup> The complex split decision in *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.), upholding reverse onuses in the context of regulatory offences, was in this sense a missed opportunity for dialogue about constitutional status of the pre-Charter concept of a “strict liability” offence, as defined in *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.).

<sup>24</sup> The new self-defence provisions in s. 34 of the *Criminal Code* might be read as a legislative response to the courts' repeated complaints about the confusing and overlapping structure of the former provisions: see, for instance, *R. v. McIntosh*, [1995] S.C.J. No. 16, [1995] 1 S.C.R. 686 (S.C.C.); *R. v. Pintar*, [1996] O.J. No. 3451, 110 C.C.C. (3d) 402 (Ont. C.A.). But the proper interpretation of the new provisions is far from obvious, so their ultimate impact on the law of self-defence will depend on how the courts interpret them.

<sup>25</sup> They are related to but distinct from the norm against vague laws and the norm against arbitrary state action. All four of these norms demand that state action respect certain minimal requirements of rationality. See Stewart, *supra*, note 4, at 127-55.

<sup>26</sup> *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.) [hereinafter “*Heywood*”].

<sup>27</sup> *Khawaja*, *supra*, note 2, at para. 37.

<sup>28</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3, at para. 47 (S.C.C.).



was more explicitly considered in *Malmo-Levine*.<sup>29</sup> It states that a law offends the principles of fundamental justice if its impact on the interests protected by section 7 of the Charter is excessive in light of the objectives of the legislation.<sup>30</sup> The defect in a grossly disproportionate law is that the damage to the interests protected by section 7 is so severe that it cannot be justified by the benefits to the legitimate objectives of the law.

It is unclear from the cases whether gross disproportionality is a way of describing the defect of an overbroad law or whether overbreadth and gross disproportionality are distinct constitutional defects such that a law could be overbroad but not disproportionate, or vice versa.<sup>31</sup> In *Khawaja*, the Crown urged the Court to adopt the former view. The Court, though declining to resolve the point explicitly, leans to the view that the two concepts are distinct:

Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are “so extreme as to be disproportionate to any legitimate government interest” ...<sup>32</sup>

On this reading, a penal law could be overbroad, but not disproportionate, if it prohibited more conduct than necessary to achieve its objective but was not so extreme in its effects on life, liberty and/or security of the person as to be *per se* disproportionate to the objective. On the other hand, a law could be disproportionate, but not overbroad, if the prohibition was necessary to its objective, but the impact of that prohibition on life, liberty and/or security of the person was nevertheless so severe that prohibiting the conduct was, from a constitutional point of view, worse than using policy measures that would not affect life, liberty and security to deal with the conduct.<sup>33</sup>

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<sup>29</sup> *Malmo-Levine*, *supra*, note 5.

<sup>30</sup> *Id.*, at para. 169.

<sup>31</sup> The former view is suggested by some of the language in *Heywood*, *supra*, note 26 and in *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735 (S.C.C.); the latter view is suggested by the structure of the reasoning in *PHS Community Services Society v. Canada (Attorney General)*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134 (S.C.C.) [hereinafter “*PHS*”], where the two norms are considered separately. See also *Khawaja*, *supra*, note 2, paras. 38-39; *Stewart*, *supra*, note 4, at 151-55.

<sup>32</sup> *Khawaja*, *id.*, at para. 40, quoting from *PHS*, *id.*, at para. 133.

<sup>33</sup> This was the essence of the applicant’s unsuccessful argument in *Malmo-Levine*, *supra*, note 5. The applicant did not claim that prohibiting marijuana was an overbroad response to the problems caused by the use of marijuana; he argued, rather, that the impact of prohibition on the s. 7 interests was out of proportion to any abatement of harm achieved by the prohibition.

The contrast between overbreadth and gross disproportionality is analogous to the difference between the second and third steps of the *Oakes*<sup>34</sup> proportionality test. A limit on a Charter right fails the “minimal impairment” test if it is broader than reasonably necessary to achieve its pressing and substantial objective. A limit on a Charter right might pass that test, yet fail the “salutary and deleterious effects” test if “the impact of the rights infringement is disproportionate to the likely benefits of the impugned law”.<sup>35</sup> As I have argued elsewhere, the view that overbreadth and gross disproportionality are distinct constitutional defects is preferable. A law that overreaches but might be more carefully tailored to achieve its legislative objective can be amended without compromising that objective, but if the effects of a law on the interests protected by section 7 are so Draconian that it is *per se* disproportionate, then the legislature must in amending the law be prepared to accept some compromise of its objective.<sup>36</sup>

## 1. Overbreadth

Nadarajah argued that the section 83.18 offence was overbroad. In light of its interpretation of section 83.18, the Court rejected that argument. The material contribution and purpose elements were critical to this conclusion. Consider the following reasonable hypotheticals that were said to make the offence overbroad:

- “a person ... marches in a non-violent rally held by the charitable arm of a terrorist group, with the specific intention of lending credibility to the group ...”<sup>37</sup>. The Court holds that this person would not be guilty under section 83.18(1) because his or her conduct would not materially enhance the group’s ability to facilitate or carry out a terrorist activity.<sup>38</sup>

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<sup>34</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter “*Oakes*”].

<sup>35</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] S.C.J. No. 37, [2009] 2 S.C.R. 567, at para. 76 (S.C.C.). Compare Arahon Barak, *Proportionality* (Cambridge: Cambridge University Press, 2012), at 344.

<sup>36</sup> Stewart, *supra*, note 4, 150-56.

<sup>37</sup> *Khawaja*, *supra*, note 2, para. 49. If the terrorist group in question was “foreign”, this conduct might well amount to “material support” under U.S.C.A., §2339B, because it would arguably be “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization”: *Holder*, *supra*, note 9, slip opinion, at 19.

<sup>38</sup> *Khawaja*, *id.*, at paras. 50-51.

- “a restaurant owner ... cooks a single meal for a known terrorist”.<sup>39</sup> The Court holds that the restaurant owner would not be guilty because his or her conduct “is not of a nature to materially enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity”.<sup>40</sup>
- A lawyer defends a known terrorist on a terrorism-related charge.<sup>41</sup> The Court holds that the lawyer is not guilty, even if he or she knows that a successful defence will have the effect of enabling the client to continue to pursue terrorism, as long as the lawyer’s purpose is merely to do his or her job as a lawyer, that is, to provide his client with “a full defence at law”.<sup>42</sup>

In each case, it is either the “beyond *de minimis*” element of the *actus reus* or the purpose element of the *mens rea* that saves the hypothetical accused from criminal liability, and therefore saves section 83.18 from overbreadth. The Court’s strict interpretation of the offence elements is critical to its finding that the offence is not overbroad.

## 2. Gross Disproportionality

Nadarajah’s gross disproportionality argument was potentially far more significant than his overbreadth argument. If accepted, it would have amounted to constitutionalizing a controversial principle of substantive criminal law: that conduct defined as an offence should not be too remote from the harm or wrong that the offence is intended to address. The Court’s reasons for rejecting it show its reluctance to accept the constitutional status of that principle, and perhaps more generally its reluctance to recognize substantive principles of fundamental justice in the criminal law beyond those it has already accepted.

The essence of Nadarajah’s gross disproportionality argument was that it was unconstitutional to criminalize conduct that falls short of recognized forms of inchoate liability. Attempting, conspiring, and counselling the commission of acts of terrorism can be readily prosecuted under

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<sup>39</sup> *Id.*, at para. 52; compare Kevin E. Davis, “Cutting Off the Flow of Funds to Terrorists: Whose Funds? Which Funds? Who Decides?” in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom* (Toronto: University of Toronto Press, 2001) 299, at 301-303 [hereinafter “Daniels, Macklem & Roach”].

<sup>40</sup> *Khawaja, id.*, at para. 52.

<sup>41</sup> Compare Kent Roach, “The New Terrorism Offences and the Criminal Law” in Daniels, Macklem & Roach, *supra*, note 39, at 161.

<sup>42</sup> *Khawaja, supra*, note 2, at para. 47.

the *Criminal Code*, with or without section 83.18.<sup>43</sup> But section 83.18 criminalizes conduct that is even more remote from the actual commission of a terrorist offence, so remote from the commission of a terrorist act that it probably could not be prosecuted as attempting, conspiring, or counselling.<sup>44</sup> It was, Nadarajah argued, “unnecessary and disproportionate to reach back further and criminalize activity that is preliminary or ancillary to those preparatory acts”.<sup>45</sup> Or, as he put it in his factum:

Parliament is entitled to broadly define the scope of conduct prohibited by its anti-terrorism legislation but only so far as it creates a risk of harm either because the conduct is inherently dangerous or is preliminary to other dangerous acts.<sup>46</sup>

He noted that in *Déry*, the Court had held that “attempting to conspire” to commit a substantive offence was an offence unknown to Canadian law.<sup>47</sup>

The Court rejected the disproportionality argument, for two reasons. First, *Déry* was not a constitutional case, and moreover was concerned with the remoteness of the accused’s conduct from a substantive offence (which in that case was theft). Under section 83.18, in contrast, “there is no problem of remoteness from a substantive offence because Parliament has defined the substantive offence ... as acting in ways that enhance the ability of a terrorist group to carry out a terrorist activity”.<sup>48</sup> Second, given the interpretation of section 83.18 as requiring proof of, among other elements, conduct “capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity” and a specific intent to that effect, section 83.18 is not disproportionate to the objective of preventing terrorism. Since a claim of disproportionality compares the impact of a law on the interests protected by section 7 with its impact on its objective, this holding might be spelled out as follows: the effect of the section in prohibiting conduct that was not previously criminal is not disproportionate to the benefits of preventing terrorism. As the Court put it:

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<sup>43</sup> And with or without the facilitating offence in s. 83.19 of the Code, *supra*, note 3, for that matter.

<sup>44</sup> Though it likely includes those forms of participation.

<sup>45</sup> *Khawaja*, *supra*, note 2, at para. 58.

<sup>46</sup> Nadarajah Factum, para. 45. For a similar argument, though not expressed in constitutional terms, see Peter Ramsay, “Preparation Offences, Security Interests, Political Freedom” in Antony Duff *et al.*, eds., *The Structures of Criminal Law* (Oxford: Oxford University Press, 2012) 203.

<sup>47</sup> *R. v. Déry*, [2006] S.C.J. No. 53, [2006] 2 S.C.R. 669 (S.C.C.); see also *R. v. Dungey*, [1979] O.J. No. 1146, 51 C.C.C. (2d) 86 (Ont. C.A.).

<sup>48</sup> *Khawaja*, *supra*, note 2, at para. 61.

It is true that s. 83.18 captures a wide range of conduct. However ... the scope of that conduct is reduced by the requirement of specific intent and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity. On the other side of the scale lies the objective of preventing the devastating harm that may result from terrorist activity.<sup>49</sup>

Once again, the Court's relatively narrow interpretation of the offence is critical to its holding that the offence is constitutionally valid.

The Court's observation that *Déry* and related cases were not constitutional cases may seem to beg the question: Nadarajah did not argue that they were constitutional, but that the principles they expressed ought to be recognized as constitutional. And that is typically how the principles of fundamental justice develop: the Court gives constitutional status to legal ideas that have previously been expressed as common law principles or as norms of statutory interpretation.<sup>50</sup> Moreover, the Court has previously recognized a number of substantive criminal law doctrines as principles of fundamental justice that serve to control the scope of criminal liability.<sup>51</sup> The Court's resistance to recognizing new principles of fundamental justice of this kind, such as the harm principle,<sup>52</sup> raises the disquieting possibility that a legislature can, with appropriate *mens rea*, make virtually any conduct into a substantive offence.

Nevertheless, the Court was wise to resist the particular argument that Nadarajah made. It would have effectively constitutionalized a principle of substantive criminal law concerning the proper scope of criminal liability; it would have created a new constitutional norm against criminalizing conduct that is in some sense too remote from the wrong or harm that the offence is intended to prevent. It would then have been necessary to define a conception of remoteness appropriate to this norm. That conception of remoteness would likely be defined on one end by the core wrongs and harms targeted by the criminal law, and on the other end by the traditional varieties of party and inchoate liability (most significantly, aiding and abetting, counselling, attempting and conspiring). If the conduct in question could not be characterized as wrongful or sufficiently harmful in its own right, or could not be

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<sup>49</sup> *Id.*, at para. 62.

<sup>50</sup> See Stewart, *supra*, note 4, c. 3.

<sup>51</sup> *Id.*, c. 4C and 4D.

<sup>52</sup> See *Malmo-Levine*, *supra*, note 5.

prosecuted under the existing provisions of the Code governing party liability and inchoate liability, it could not be criminalized. And this principle would have significantly restricted the ability of Canadian legislatures to create penal law and would cast into doubt the constitutional validity of many existing offences. It would, for example, put in question the constitutionality of much of Part III of the Code, which consists mostly of penal apparatus for the enforcement of the regulatory regime for firearms. This regulatory regime is directed generally at public safety. Parliament's belief was, no doubt, that an effective system of regulation would reduce the incidence of offences committed with firearms, ranging from murder and manslaughter to pointing a firearm without lawful excuse (section 87) to careless use of a firearm (section 86(1)). These are core wrongs and harms that are sufficiently dangerous to be justly criminalized under any view of the proper scope of criminal law. But consider offences such as contravening a firearms regulation (section 86(2)), unauthorized possession of a firearm (section 92), or possession of a firearm in an unauthorized place (section 93). None of the conduct prohibited by these offences creates any risk beyond whatever risk is already inherent in possessing a firearm (which is not an offence in itself). None of them is an attempt or a conspiracy to commit any other offence. None of them makes the accused a party to an offence committed by anyone else. So all of them would, according to Nadarajah's disproportionality argument, violate section 7 of the Charter. The same would likely be true of many provincial regulatory offences intended to enforce various regulatory schemes. It is hard to accept that a principle that would jeopardize so much of the apparatus of the modern regulatory state could qualify as one of the "basic tenets of our legal system"<sup>53</sup> or the "shared assumptions on which our system of justice is grounded".<sup>54</sup> And even without this version of gross disproportionality, the Court would in an appropriate case no doubt use the norms against overbreadth and gross disproportionality to invalidate an overly intrusive criminal law or other state action.<sup>55</sup>

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<sup>53</sup> *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at 503 (S.C.C.).

<sup>54</sup> *Canadian Foundation*, *supra*, note 5, at para. 8.

<sup>55</sup> As in *PHS*, *supra*, note 31.

#### IV. CONCLUSION

The Supreme Court of Canada has repeatedly held that statutory interpretation should precede and not be influenced by Charter considerations, except where the statute is ambiguous.<sup>56</sup> Despite this holding, the Court's approach to the anti-terrorism provisions of the Code has been to use statutory interpretation rather than invalidation to control the scope of criminal liability and to ensure a fair trial process. In *Re Application under s. 83.28 of the Criminal Code*, the Court read the provisions of the Code concerning investigative hearings as generously as possible in respect of the rights of the person summoned to answer questions;<sup>57</sup> similarly, in *Ahmad*, the Court interpreted certain provisions of the *Canada Evidence Act* in a non-obvious way so as to protect the accused's right to a fair trial.<sup>58</sup> *Khawaja* provides another example of this tendency. There is a good argument for interpreting the *actus reus* of section 83.18 of the *Criminal Code* quite broadly, but the Court reads the legislative purposes of the anti-terrorism provisions as already including a concern about over-criminalization;<sup>59</sup> this reading supports a narrow interpretation of both the *mens rea* and the *actus reus*, and so enables the Court to reject the claim that the offence is overbroad. The Court's rejection of the gross disproportionality claim illustrates a rather different theme: the Court's reluctance to recognize new principles of fundamental justice. Although the claim was put in terms of gross disproportionality, a principle of fundamental justice that has been recognized at least since *Malmo-Levine*, the claim in substance was that a legislature could not create an offence that was remoter from the harm it sought to control than traditional forms of inchoate and accessorial liability such as attempting, conspiring and aiding. While the Court was right to reject the claim that this was a constitutional principle, the larger message may be that the project of recognizing substantive norms of fundamental justice has reached its limit.

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<sup>56</sup> See, for example, *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, [2002] 2 S.C.R. 559, at para. 62 (S.C.C.); *Re Application under s. 83.28*, *supra*, note 7, at para. 35; *R. v. Tse*, [2012] S.C.J. No. 16, [2012] 1 S.C.R. 531, at para. 20 (S.C.C.); *R. v. Boudreault*, [2012] S.C.J. No. 56, [2012] 3 S.C.R. 157, at para. 66 (S.C.C.).

<sup>57</sup> See Hamish Stewart, "Investigative Hearings into Terrorist Offences: A Challenge to the Rule of Law" (2005) 50 *Crim. L.Q.* 376.

<sup>58</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5; *R. v. Ahmad*, [2011] S.C.J. No. 6, [2011] 1 S.C.R. 110 (S.C.C.).

<sup>59</sup> *Khawaja*, *supra*, note 2, para. 44.