

Rehabilitation, Intervention, and Parole for the Toronto 18: Dead Ends and Silver Linings

R E E M Z A I A *

“There was no correctional programming recommended in your case as traditional programming does not target the needs specific to offenders involved in terrorist related offences.” – Parole Board of Canada (Decision for Inmate #5)

* Reem Zaia is an associate lawyer practicing in the Advocacy Department of Gowling WLG's Ottawa office. Her litigation experience includes professional liability, constitutional, criminal, and administrative law matters. She also advises on privacy and government relations files and maintains an active academic and advisory practice in national security law. Prior to joining Gowling WLG, Reem practiced criminal and regulatory law at Henein Hutchison in Toronto, Ontario. Reem has served as counsel and co-counsel at all levels of court in Ontario, as well in matters before the Supreme Court of Canada.

Reem obtained her law degree from the University of Ottawa. During her studies, she clerked for judges of the Ontario Court of Justice and served as law clerk to the Honourable Justice Charles Vaillancourt in the matter of Senator Michael Duffy. She then completed her articles at the Ontario Crown Attorney's Office. Reem is also a graduate of the University of Toronto, where she received her LL.M. as the Nathan Strauss Q.C. Fellow in Constitutional Law and published a thesis on the information-sharing provisions of the *Anti-Terrorism Act, 2015*. While completing her Master's degree, she practiced constitutional and administrative law at the appellate level.

Reem is a part-time Professor at the University of Ottawa Faculty of Law. Her areas of speciality include criminal, national security, and constitutional law.

Before joining the legal profession, Reem worked on Parliament Hill for two Members of Parliament, including the former Deputy Speaker of the House of Commons.

ABSTRACT

This chapter assesses the spectrum of intervention measures (on a state and non-state level) available to offenders who plan to, or have, committed terrorism-related offences. The author does so with a view to determining whether intervention measures or rehabilitative efforts are sufficiently mitigating for the purpose of sentencing or parole. The author begins by surveying various intervention programs in Canada for persons at the “pre-charge” stage and highlights their practical shortcomings. Relying on this information, she emphasizes that evidence of rehabilitation efforts or work with intervention groups can prove insufficient for the purpose of mitigating a sentence of incarceration or granting parole. The author argues that this phenomenon results in a dead-end at every milestone of the criminal justice system for offenders convicted for terrorism-related offences. Even in cases where offenders have shown an ability to rehabilitate, the weight of their rehabilitative efforts is often questioned by courts and the National Parole Board by virtue of the crime they committed.

I. INTRODUCTION

What awaits those convicted and sentenced for terrorism-related offences at the sentencing and parole stages? A dead end. Indeed, this fate pervades the criminal justice system. Specifically, Canada’s existing framework for interventions, such as mentoring, coaching, social support, counselling, and programming¹ lacks cohesion and consistency. They are limited in terms of their jurisdictional reach, accessibility, and utility. Unlike the Partner-Assault Response Program, or Alcoholics Anonymous, which are designed to offer therapeutic and non-therapeutic intervention for offenders with addictions or predilections in the post-charge phase, there is no decades-old, systematized “go-to” for persons convicted of terrorism-related offences. Likewise, the Correctional Service of Canada (CSC) does not offer specialized programming for inmates convicted of terrorism-related

¹ Canada Centre for Community Engagement and Prevention of Violence, *National Strategy on Countering Radicalization to Violence*, Catalogue No. PS4-248/2018E-PDF (Ottawa: Canada Centre, 2018), 31, <https://www.publicsafety.gc.ca/cnt/rsrccs/pblctns/ntnl-strtg-cntrng-rdclztn-vlnc/ntnl-strtg-cntrng-rdclztn-vlnc-en.pdf>.

offences. Making matters worse, clinical risk assessments for inmates convicted of terrorism offences are frequently viewed with skepticism by courts and the National Parole Board of Canada (the “Board”). These cumulative tensions render it difficult to identify appropriate interventions and, more importantly, determine how a sentencing court or the Board would receive them.

Relying on the Toronto 18 cases and, more broadly, cases involving inmates convicted of terrorism offences since 2001, this chapter sheds light on the systemic resource deficit for interventions at the tail ends of the justice system (i.e., the pre-charge, pre-sentence, and custodial stages). This deficit is double-edged – it applies to inmates who lack the resources to rehabilitate and taxpayers who are burdened with the cost of keeping an inmate incarcerated without appropriate interventions and the risk of further radicalization. Worse, those who do not receive appropriate interventions are at a greater risk of harbouring the same grievances that initially led them into the criminal justice system and re-offending upon release.

Part II of this chapter provides an overview of existing interventions available to offenders in Canada at the governmental and non-governmental levels. It will also address some of the practical and strategic challenges offenders face as a result of this resource deficit. Part III highlights how evidence of rehabilitation or positive intervention has fared at the sentencing stage by drawing on pre-sentence and psychiatric reports from selected Toronto 18 cases. Part IV focuses on 15 cases from the Board involving inmates convicted of terrorism offences since 2001. Relying on these decisions, I identify cases where the Board’s decision to refuse release were partly attributable to the absence of structured, institutionalized programming or the reliability of clinical risk assessments. I also comment that in nearly half of those cases, the Board imposed a condition on the inmate to participate in religious counselling. I conclude by making recommendations for counsel who intend to introduce their clients to intervention programs at various stages of the criminal justice system to avoid the dead ends articulated, with a view to facilitating their clients’ eventual reintegration into the community.

II. A DEAD END FOR CONCERTED INTERVENTION AT THE PRE-CHARGE AND PRE-SENTENCE STAGES

Between 2001 and 2018, 55 individuals were charged with terrorism offences under the *Criminal Code*.² By the end of 2015, only 12 offenders were federally incarcerated for terrorism-related offences, with sentences ranging from six years to life – the majority of them being in maximum-security facilities.³ As some researchers later discovered, the average sentence for those in leadership roles was 21 years, as compared with 11 years for those in non-leadership roles.⁴ Moreover, of the 26 prosecutions that resulted in a guilty plea or conviction since 2001, 23% received life sentences, and the average sentence for terrorism offences to date is 13 years.⁵

Comparatively speaking, the total number of inmates convicted of terrorism offences when measured against crime statistics is low when viewed in light of all offenders in Canada. However, the potential harms caused by these offenders are significant as compared with those who commit more common crimes. At first blush, it would seem that the absence of specific programming during the pre-charge, pre-sentence, and custodial phases is a product of scarce resources. From a fiscal standpoint, one might question the rationale behind implementing inmate-specific programs of a highly specialized nature, particularly if the volume of inmates committing terrorism offences is low. By contrast, from a public policy perspective, one might argue that the rise of extremism in Canada and globally⁶ should raise the spectre of concern. Whether a far-right online subculture incites a mass

² Public Safety Canada, *2018 Public Report on the Terrorism Threat to Canada*, Catalogue No. PS1-16E-PDF (Ottawa: PSC, 2019), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/pblcrprt-trrrsm-thrt-cnd-2018/index-en.aspx#s32>.

³ Access to Information Request A-2016-0014, Email Correspondence between Departmental Staff in Preparation for Minister's U.K. Trip, 582 [A-2016-0014] [ATIP, Email Correspondence] (on file with author).

⁴ Michael Nesbitt, Robert Oxoby, and Meagan Potier, "Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases," *UBC Law Review* 52, no. 2 (2019).

⁵ Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions," 10–11.

⁶ See e.g., Gordon Corera, "Is There a Growing Far-right Threat Online?," *BBC News*, July 8, 2019, <https://www.bbc.com/news/world-europe-48830980>; Josee St-Onge, "Social Media Fuelling Rise of 'New Generation of Extremism' in Alberta, report says," *CBC News*, April 23, 2019, <https://www.cbc.ca/news/canada/edmonton/alberta-study-extremism-radicalism-online-hate-terrorism-1.5108262>; Alex Boutillier, "Rise of Right-wing Extremists Presents New Challenge for Canadian Law Enforcement Agencies," *Toronto Star*, October 7, 2018, <https://www.thestar.com/news/canada/2018/10/07/rise-of-right-wing-extremists-presents-new-challenge-for-canadian-law-enforcement-agencies.html>.

shooting, or a radicalized inmate is released without access to the appropriate intervention tools, society never stands to gain when individuals who need intervention do not receive it.

Relatedly, the importance of programming is also relevant when measured against the average age of inmates convicted of terrorism offences. As evidenced in Chapter 14 by Dr. Michael Nesbitt, many of the Toronto 18 inmates were relatively young compared to their cohort in custody. Regrettably, many of them are being released from custody still radicalized.⁷

Due to restrictions attributable to privacy laws, it is difficult to ascertain exactly how many and which offenders participated in intervention programming prior to their sentences and/or during their time in custody. More importantly, it would be helpful to know the proportion of offenders who were able to identify, match with intervention programs during the pre-charge phase, and successfully complete them prior to their sentence passing. A brief survey of existing interventions at the pre-charge and pre-sentencing phases may shed light on the difficulties that inmates have in locating appropriate interventions. As the information below demonstrates, existing intervention resources are limited in their availability and may not serve as appropriate templates in terms of meeting the grievances and needs of the offender.

A. State and Non-State Actors in the Intervention Forum

1. Federal State Actors

Few centres across Canada specialize in the delivery of intervention programs. At the federal level, there is no unified intervention program for persons who have been charged with a terrorism-related offence at the pre-trial stage. However, there are some centres and government-funded groups with mandates to work with various stakeholders across the country. These groups operate with a view to gathering and disseminating evidence-based research on the efficacy of intervention programs and supporting their implementation.

For example, in 2017, the federal government established the Canada Centre for Community Engagement and Prevention of Violence (the

⁷ Stewart Bell, “Canada’s Terrorism Offenders are Coming out of Prison Still Radicalized,” *Global News*, February 27, 2020, <https://globalnews.ca/news/6574722/terrorism-in-canada-deradicalization-programs-parole/>.

“Canada Centre”) to build a knowledge base in this capacity. The Canada Centre exists under the auspices of Public Safety Canada to research and advise on counter-radicalization measures as well as assist stakeholders across the country with the implementation of intervention mandates.

In 2017, long after the Toronto 18 trials were heard and after some inmates were paroled, the federal government allocated \$35 million in funding to establish the Canada Centre and support its work over five years, with an additional \$10 million each year following.⁸ Based in Ottawa, the Canada Centre provides leadership at the national level in areas such as policy guidance to the Minister of Public Safety and Emergency Preparedness. It also promotes coordination and collaboration with organizations to prevent radicalization, secure funds, and coordinates research relevant to deradicalization from violence, and targeted programming through the Canada Centre’s Community Resilience Fund to support initiatives that prevent radicalization to violence.⁹ The Canada Centre is comprised of professionals with expertise in countering radical violence in research, policy, and advocacy-based roles. It also represents Canada at the international level alongside other state and non-state actors, including the Five Eyes.¹⁰ The Canada Centre constitutes the backbone for various organizations that require funding support and community-based resources. As members of the Toronto 18 are slowly released on parole, this type of funding becomes less directly applicable to them, as it is not designed to facilitate contact with inmates.

While the Canada Centre does not work directly with accused persons, it works closely with community groups that deliver intervention programming. It is helpful to know that the Centre releases information about its work to the public from time to time. Counsel might also benefit from learning where the Canada Centre allocates its dollars to build intervention programs across the country when considering programming for clients.

Relatedly, CPN-Prev (Canadian Practitioners Network for Prevention of Radicalization and Extremist Violence) is a public, evidence-based organization funded by Public Safety’s Community Resilience Fund. The fund is administered through the Canada Centre. CPN-Prev was established to fill a gap by connecting practitioners to one another across the country

⁸ Canada Centre, *National Strategy on Countering Radicalization to Violence*, 5.

⁹ Canada Centre, *National Strategy on Countering Radicalization to Violence*, 5–6.

¹⁰ Canada Centre, *National Strategy on Countering Radicalization to Violence*, 6.

to assist radicalized individuals. Practitioners include, but are not limited to, social workers, psychologists, and psychiatrists. CPN-Prev supports interventions across Canada and trains practitioners by sharing tools for intervention. CPN-Prev produces systemic reviews and publishes its findings for public consumption on a range of issues including, but not limited to, extremist online content and factors that lead to radicalization. Presently, the organization is studying empirical evidence regarding intervention and counter-violent extremism programs to assess whether they actually work.¹¹ Importantly, CPN-Prev has a dedicated team of academics, practitioners, and policymakers who are able to locate practitioners in various communities for individuals who require intervention.

CPN-Prev is a valuable resource for defence lawyers who wish to custom-tailor an intervention program for their clients at any stage of a prosecution. A call to CPN-Prev will assist in bridging the connection with various practitioners in different communities. For example, CPN-Prev may connect counsel to a forensic psychiatrist, psychologist, or religious leader where appropriate. These types of contacts, if made early, are particularly helpful for offenders who wish to begin rehabilitating at an earlier stage in their involvement with the justice system. They provide the offender with an array of options in terms of who might be willing to assist and how that individual can be reached. Importantly, CPN-Prev's interventions are not limited to the pre-charge phase and can be helpful prior to sentencing or while an inmate is in custody.

2. Municipal State Actors

At the municipal level, some programs also focus on intervention during the pre-charge stage of a case. Each program has a unique mandate with a focus on particular outcomes and is exclusive to its respective jurisdiction. Many of them feature prominently in more urban, metropolitan areas such as Toronto, Ottawa, Edmonton, and Calgary.

For example, the Multiagency Early Risk Intervention Tables (MERIT) is a program led by the Ottawa Police Service with a broad mandate to “reduce risk and victimization and improve community resiliency and well-

¹¹ “Reviews #2 and #3: Programs That Aim to Prevent Violent Radicalization & Disengage Individuals Adhering to Violent Radical Ideas/Behaviors,” CPN-Prev, accessed August 1, 2019, <https://cpnprev.ca/systematic-review-3/>.

being.”¹² While broad in scope, the program also hosts the Preventing and Countering Violent Extremism (P/CVE) program, which is designed to increase responsiveness to radicalization. Funded by the Community Resilience Program at the Canada Centre, the program facilitates interventions with persons who are at risk of radicalizing prior to their entry into the criminal justice system.¹³ The program is collaborative and operates alongside multiple community agencies to assist persons in avoiding charges under the *Criminal Code*.

The Toronto Police Service (TPS) is responsible for a similar initiative to counter violent extremism. FOCUS is a multi-agency program under the auspices of the TPS, the City of Toronto, the United Way, and various local community organizations. The program focuses on risk intervention that is required due to the probability that risk will manifest as an emergency, social disorder, crime, or further victimization.¹⁴ The program relies on social workers, public health workers, counsellors, and community groups to identify and assist persons who are at an elevated risk of victimization or offending.¹⁵ Using “situation tables,” law enforcement and practitioners come together to review cases involving individuals who are at high risk of radicalization.¹⁶ In 2018, the federal government granted the organization approximately \$1 million in funding in addition to funding from the Community Resilience Fund for its coordinated efforts in this regard.¹⁷

In Edmonton, the Resiliency Project of the Edmonton Police Service (EPS) recently received funding to address sources of violent extremism

¹² “MERIT,” Ottawa Police Service, accessed August 1, 2019, <https://www.ottawapolice.ca/en/news-and-community/MERIT.aspx>.

¹³ Matthew Kupfer, “Ottawa Police get Almost \$1M to Prevent Violent Extremism,” *CBC News*, July 21, 2018, <https://www.cbc.ca/news/canada/ottawa/ottawa-police-radicalization-violent-extremism-prevention-1.4756178>.

¹⁴ “Focus Situation Tables,” Toronto Police Service, Presentation by Sgt. Brian Smith, accessed August 1, 2019, http://hsjcc.on.ca/wp-content/uploads/NY-HSJCC-Presentation-FOCUS_Human-Services-and-Justice-Co-ordinating-Committee-Jan-20182.pdf.

¹⁵ Chris Herhalt, “Feds offer \$1M to strengthen ‘Focus Toronto’ intervention program,” *CP 24*, September 6, 2018, <https://www.cp24.com/news/feds-offer-1m-to-strengthen-focus-toronto-intervention-program-1.4082874>.

¹⁶ Public Safety Canada, *Federal Funding for Toronto Police to Expand Counter Radicalization to Violence Initiative* (New Release) (Ottawa: PSC, 6 September 2018), <https://www.canada.ca/en/public-safety-canada/news/2018/09/community-resilience-fund-provides-to-ontopolicewith-1-million-to-expand-a-counterrad2violence-prevention-and-intervention-program.html>.

¹⁷ Public Safety Canada, *Federal Funding for Toronto Police*.

online and offline.¹⁸ The project operates in collaboration with the Organization for the Prevention of Violence (OPV), an organization that conducts psycho-social interventions and an evidence-driven approach to countering violent extremism.¹⁹ The OPV produces research and working relationships with organizations across Alberta, including the Royal Canadian Mounted Police and EPS, to create awareness and assist in developing evidence-based interventions. The OPV is also funded by the Community Resilience Fund to identify sources of extremism throughout Alberta and establish partnerships to address radicalization.²⁰

Similarly, since 2015, Calgary's local police force has delivered a pre-charge intervention program called ReDirect. ReDirect is designed to prevent Calgary youth and young adults from being radicalized to violence through education and social support.²¹ ReDirect has a dedicated case planning team that develops individualized support plans for young persons and helps find the right community agencies to implement the plan. The program accepts referrals from "concerned parents, teachers, community leaders or anyone else who knows them well enough to observe concerning behaviours."²² Those eligible for the program are considered against the backdrop of three criteria: engagement with a radical cause or ideology, intent to cause harm, and ability to cause harm. Those who successfully complete individualized programming receive follow-up assistance from the ReDirect team if required.²³

While police-based programming such as those discussed above can be helpful for young persons without a criminal record, radicalized adults may be hesitant to rely upon them, particularly if they are more entrenched in their ideology. For example, some offenders may be hesitant to expose their vulnerabilities and ideologies to a police agency despite assurances that

¹⁸ Lydia Neufeld, "Edmonton police, anti-violence organization receive \$3.5 million to target radicalization in Alberta," *CBC News*, January 19, 2018, <https://www.cbc.ca/news/canada/edmonton/terrorism-hate-radicalization-edmonton-1.4495506>.

¹⁹ Organization for the Prevention of Violence, accessed August 1, 2019, <https://preventviolence.ca>.

²⁰ "Political scientist receives federal grant to help prevent violent extremism in Alberta," University of Alberta, accessed August 1, 2019, <https://www.ualberta.ca/arts/faculty-news/2018/january/political-scientist-receives-federal-grant-to-help-prevent-violent-extremism-in-alberta>.

²¹ *ReDirect*, accessed August 1, 2019, <http://www.redirectprogram.ca>.

²² *ReDirect*.

²³ *ReDirect*.

information will remain confidential. For programs that offer assistance during the post-charge phase, such as MERIT, some counsel may also be hesitant to introduce their clients to the police during the pre-charge phase, especially if their arrest is imminent.

3. *Non-State Actors*

It would seem that Canada's complement of non-state actors is also scant. By non-state actors, I refer to entities that are not necessarily publicly affiliated with the state. In terms of non-state actors, one of the most prominent and well-known organizations is the Centre for the Prevention of Radicalization Leading to Violence (CPR) in Montreal, Quebec. While created by the City of Montreal with additional funding from the Government of Quebec, this non-profit organization is not a government-run program. The program is run by individuals who are not government employees. It provides inter-disciplinary support for those affected by radicalization (e.g., families), persons who are radicalized, and those who are on the path to radicalization. CPR's mandate focuses on hate crimes and radicalization. Its interdisciplinary team includes psychosocial counselling services and resources to assist individuals with reintegration into the community. Notably, CPR runs a 24/7 free hotline for confidential support and counselling to persons who are worried about someone who is radicalizing or has radicalized, persons who want to cease involvement in a radical group, those suspected of being radicalized, and professionals who identify or work with people who have demonstrated signs of radicalization.²⁴ In 2017, CPR fielded 349 requests for help and reports through its platform.²⁵ It also provided 158 training sessions to various stakeholders and organizations, training approximately 2,630 persons in intervention.²⁶

In terms of interventions, CPR focuses on Quebec. In that sense, the jurisdictional reach of the organization is more limited than one would hope. However, CPR shares best-practice models and research internationally. For example, individuals from CPR recently travelled to

²⁴ "Helpline," Centre for the Prevention of Radicalization Leading to Violence, accessed August 1, 2019, <https://info-radical.org/en/intervention-en/helpline/>.

²⁵ "Annual Report: Preventing Radicalization Leading to Violence: Spreading the Expertise from Montreal and Quebec Report 2017," Canada Centre for the Prevention of Radicalization Leading to Violence, 2018, 62, <https://indd.adobe.com/view/0fd55b6b-49d4-4306-9a06-9b5619063b35>.

²⁶ CPRLV, "Annual Report," 3.

Lebanon for a range of meetings to support methods of prevention against radicalization in prisons. CPR will now support the Lebanese Ministry of Justice and the United Nations Office on Drugs and Crime in the development of tools/support for radicalized individuals in prisons.²⁷ CPR also trains local police officers on the prevention of radicalization leading to violence.

While CPR's interdisciplinary model presents a comprehensive approach to intervention, the intervention services are not available to individuals outside the province. It would seem that if other provinces followed suit with a similar model of intervention, which includes an array of social, psychotherapeutic, and educational resources, they would be well-served.²⁸

B. Intervention at the Custodial Level

In addition to the pre-charge and pre-sentence phases, I have also examined interventions at the custodial stage, meaning interventions available for those who are incarcerated following convictions. In 2016, I submitted an access to information (ATIP) request to obtain information from CSC about federally available correctional programming particularly tailored for inmates convicted of terrorism offences. Specifically, I sought information about programming from 2001 onward to capture post-9/11 cases, including the Toronto 18. In response to the request, CSC issued hundreds of pages containing reports undertaken by Public Safety and CSC, and email correspondence between staff in relation to Ministerial talking points and media requests. Many of the documents were authored by Public Safety and already accessible to the public. The result of the ATIP revealed that while CSC has considered the merits of implementing programs for inmates convicted of terrorism offences in custody, a cost-benefit analysis suggested it was not worth implementing.²⁹

²⁷ "The Centre went for a mission abroad to Lebanon," Centre for the Prevention of Radicalization Leading to Violence, accessed August 1, 2019, <https://info-radical.org/en/mission-abroad-lebanon/>.

²⁸ At the time this chapter was drafted, the state and non-state actors identified herein were most prominent. Any omissions with respect to new entities or programs in this domain are attributable of the amount of time that has lapsed since this chapter was drafted.

²⁹ ATIP, Email Correspondence.

Research studies over a multi-year initiative suggest that CSC sought information about international partners when considering best practice models for offender management and intervention. In 2015, 81 respondent institutions from 15 countries completed an online questionnaire to address a range of issues including intake, assessment, intervention, programs, and reintegration.³⁰ The results of the study showed that a majority of the “respondents indicated that their jurisdiction utilizes the same intake and assessment procedures for their radicalized offenders as non-radicalized offenders, and that they do not have specialized interventions for radicalized offenders.”³¹

According to correspondence between officials at Public Safety Canada, the department collaboratively shares information and intelligence with its domestic and international partners to address violent extremism “including the issue of radicalized offenders in the federal correctional system.”³² The department acknowledges that extremists do not fit well within the traditional departmental framework for managing offenders, such as risk assessment, given the various factors that influence the offenders’ decision-making.³³ While it is not clear what kind of information is shared, it would seem that either through its own data-gathering process or information-sharing efforts, the department is well aware that there is a mismatch between programs and these types of offenders.

In 2014, CSC launched a three-year research initiative, *Mitigating the Threat Posed by Violent Extremist Offenders in Correctional Institutions and Communities*, to ascertain best practices for intervention and management of radicalized offenders.³⁴ The project was designed to bring leading experts to the table to discuss offender risk management. At the time, CSC utilized an individualized correctional plan to measure their progress towards their correctional goals, such “as commitments to participate in... jobs and

³⁰ Correctional Service of Canada, *International Consultation: Best Practices in the Management of Radicalized Offenders* (Research Report), by M. Axford, Y. Stys, and R. McEachran, No. R-361 (Ottawa: CSC, 2015), <https://www.csc-scc.gc.ca/research/005008-0361-eng.shtml>.

³¹ Axford, Stys, and McEachran, *International Consultation*.

³² ATIP, Email Correspondence, 595.

³³ ATIP, Email Correspondence, 595.

³⁴ ATIP, Email Correspondence; Correctional Service of Canada, *Best Practices in the Assessment, Intervention and Management of Radicalized Offenders: Proceedings from the International Roundtable and Mini-Symposium on Radicalized Offenders* (Ottawa: CSC, December 2014), 1-6.

programs.”³⁵ The ATIP suggests that the approach, which resorts to individualized correctional plans, has not changed. In that sense, inmates convicted for terrorism-related offences will be processed and considered for CSC programming that would be available to other inmates as a matter of normal course.

Having regard for the pre-charge/pre-sentence and custodial interventions above, it seems that radicalized persons are limited in terms of finding appropriate programming to meet their rehabilitative needs both in and out of custody. However, this does not mean that inmates cannot turn to interventions of their choice. For example, some offenders may consider whether religious counselling³⁶ or psychiatric intervention is necessary. Whether less traditional interventions are later accepted by a court at the sentencing stage as a mitigating factor, or at the Board level for release, is uncertain. In that sense, courts and Crown Attorneys are interested in programs deemed “reliable” intervention models. However, how do courts quantify or assign weight to intervention programs if there are insufficient evidence-based solutions to support their efficacy? Who is the arbiter of reliability? What are the hallmarks of reliability for intervention programs? These are just some of the questions that pervade the sentencing stage where the question of rehabilitation and intervention as a mitigating feature remains unclear.

III. A DEAD END FOR REHABILITATION AT THE SENTENCING STAGE

Canada’s sentencing regime is founded upon the principles of restorative justice and rehabilitation. Both philosophies aim to restore the offender’s position in society by finding ways to meaningfully re-engage them into the community. One of the fundamental purposes of sentencing is to assist in rehabilitating offenders.³⁷

³⁵ Correctional Service Canada, *The Correctional Plan* (Ottawa: CSC, last modified 11 March 2020), <https://www.csc-scc.gc.ca/002/001/002001-1001-eng.shtml>. See also CSC, *Radicalized Offenders*, 4.

³⁶ See e.g., Stewart Bell, “‘Fulfilling the wishes of God’: The inside story of a police investigation into a Toronto ISIS supporter,” *Global News*, February 28, 2019, <https://globalnews.ca/news/5008031/inside-story-investigation-toronto-isis/>.

³⁷ Criminal Code, R.S.C. 1985, c. C-46, s. 718(d).

As discussed by Nesbitt (Chapter 14), notwithstanding these sentencing objectives, pursuant to subparagraph 718.2(a)(v) of the *Criminal Code*, courts must rely on the mere fact of a terrorism offence as a statutorily aggravating factor for the purpose of increasing a sentence.³⁸ By enacting this direction, Parliament's intent was to lessen the degree of discretion held by judges at the sentencing stage, particularly as it pertains to aggravating and mitigating factors. This provision suggests that sentences are necessarily steeper for those convicted of terrorism offences, and there is little room left in the analysis for rehabilitation.³⁹ However, the Supreme Court of Canada in *R v. Khawaja*⁴⁰ suggests otherwise.

Mohammad Momin Khawaja was convicted of five offences under the terrorism provisions and sentenced to life imprisonment, a concurrent sentence of 24 years and a period of ten years without parole eligibility.⁴¹ Mr. Khawaja was engaged with terrorist cells in the United Kingdom and Pakistan and sought to bring a small arms training camp to Canada. He hand-crafted a remote arming device for explosives and collected a range of supplies for remote arming devices, which were ultimately seized upon his arrest. He also provided funds and supplies to others affiliated with al-Qaeda to support explosives operations and the like.

At the Supreme Court of Canada, Mr. Khawaja challenged the constitutionality of the provisions with which he was charged and argued that the Ontario Court of Appeal erred in its application of the principles of sentencing. At his initial trial, the absence of evidence pertaining to Mr. Khawaja's likelihood to re-offend could not assure the judge that he would not re-offend. However, the trial judge reasoned that the potential for rehabilitation could not be overlooked.⁴² The Court of Appeal reviewed the decision and concluded that the lack of information on the probability of re-offending was, in the face of evidence of compelling dangerousness, sufficient to justify a stiffer sentence.⁴³ At the time, Mr. Khawaja refused to submit to a pre-sentence report, which made it difficult to determine his grievances and future level of risk. In reasoning through this issue, the Supreme Court rejected the Court of Appeal's proposition that the "import

³⁸ Criminal Code, s. 718.2(a)(v).

³⁹ Nesbitt, Oxoby, and Potier, "Terrorism Sentencing Decisions."

⁴⁰ *R v. Khawaja*, 2012 SCC 69.

⁴¹ *Khawaja*, SCC at para 1.

⁴² *R v. Khawaja*, [2009] O.J. No. 4279 at para 26.

⁴³ *R v. Khawaja*, 2010 ONCA 862.

of rehabilitation as a mitigating circumstance is significantly reduced in [the] context [of terrorism] because of the unique nature of the crime, the grave and far-reaching threat it poses to the foundations of our democratic society.”⁴⁴

Notwithstanding the foregoing, evidence of rehabilitation infrequently carries the day at the sentencing stage.⁴⁵ In some of the Toronto 18 cases, defence counsel retained a psychiatrist to assess their clients and relied on that evidence at the sentencing stage with a view to mitigating their client’s sentence. The efforts proved futile in some respects when measured against the gravity of the offences.

This section provides an overview of four cases from the Toronto 18 group, each of whom was evaluated by a psychiatrist. In each case, the psychiatrist recommended some form of intervention after sentencing to address their ideologies and motivations. Despite the fact that each offender was at a “low risk” to re-offend, each received sentences between ten years to life imprisonment.

A. Case Study One – Shareef Abdelhaleem

Mr. Abdelhaleem was a database engineer involved in the plot to detonate truck bombs in Toronto. He was not alleged to have been involved in the training camp run by Mr. Amara. At the time of his arrest, he was 30 years old. He was assessed by a forensic psychiatrist who spent just under 21 hours with him while he was in custody for the purpose of rendering an evaluation to assist with sentencing. His psychiatric evaluation suggested that he was at a low risk of engaging in violence in the future and had no criminal record. He was nonetheless sentenced to life imprisonment for intent to cause an explosion of an explosive substance for the benefit of, at the direction of, or in association with a terrorist group.⁴⁶ He also received five years imprisonment concurrently for participating in the activity of a terrorist group.⁴⁷

Mr. Abdelhaleem’s psychiatric report suggested that he began to attend mosque as a way to clean up his life.⁴⁸ He became motivated to participate

⁴⁴ *Khawaja*, ONCA at para 201.

⁴⁵ See e.g., Chapter 14 in this book by Dr. Michael Nesbitt.

⁴⁶ Criminal Code, ss. 81(1)(a), 83.2.

⁴⁷ *R v. Abdelhaleem*, 2011 ONSC 1428.

⁴⁸ *R v. Abdelhaleem* (Evidence, Exhibit 1, Sentencing of Mr. Shareef Abdelhaleem), 16 [Abdelhaleem, Exhibit 1] (on file with author).

in a bombing plot to gain acceptance from his peers.⁴⁹ At the time of his involvement, he felt as though he lacked a sense of self and felt like a failure in his community, which led him to believe that he needed to correct the impression others had of him by aligning himself with an Islamic cause in a way that would influence his identity.⁵⁰ The clinician who completed the evaluation explained that it was impossible to conclude which of the multi-layered factors contributed to his circumstances, be it extremist sympathy, the potential for financial regard, acceptance and respect, pleasing his father, participating in an empowering act, or fantasizing of being recognized as a hero in the Islamic world.⁵¹ He lacked a sense of self and had a “paucity” of close friends, which also influenced his decision-making in this regard.⁵²

The clinician who evaluated Mr. Abdelhaleem relied on two tools: the Violence Extremist Risk Assessment (VERA) and the Historical Clinical Risk (HCR-20) tools. Importantly, the clinician cautioned the Court as follows at the outset of his report:

Assessing individuals charged with terrorism-related offences is a relatively novel area in the field of psychiatry. As of the date of his report, Dr. Bloom was not aware of any universally accepted risk assessment tool that could predict an individual's risk of recidivism for such offences.⁵³

The VERA is a structured professional judgment used to score risk levels as low, moderate, or high. The VERA studies a range of variables including, but not limited to:

- (1) Attitudes/mental perspectives such as an attachment to ideologies justifying violence and high levels of frustration and anger;
- (2) Contextual items such as the use of extremist websites, anger at political decisions, and actions of a country;
- (3) Historical items such as exposure to violence in the home and prior criminal violence;
- (4) Protective items such as a shift in ideology and the rejection of violence to obtain goals.⁵⁴

⁴⁹ Abdelhaleem, Exhibit 1, 46.

⁵⁰ Abdelhaleem, Exhibit 1, 60.

⁵¹ Abdelhaleem, Exhibit 1, 62.

⁵² Abdelhaleem, Exhibit 1, 26.

⁵³ *Abdelhaleem*, ONSC at para 48.

⁵⁴ Public Safety Canada, *Risk Assessment Decisions for Violent Political Extremism 2009-02*, by D. Elaine Pressman, Catalogue No. PS3-1/2009-2-1E-PDF (Ottawa: PSC, 2009), <https://>

The HCR-20 is a tool that requires clinicians to score individuals on a range of items used to predict dangerousness and risk. Variables that factor into the matrix include, but are not limited to, a lack of insight, previous violence, employment problems, drug/alcohol abuse, and mental disorders.⁵⁵

On both assessments, Mr. Abdelhaleem was considered at low risk to re-engage in violent behaviour in the future. He was open to the idea of obtaining assistance through psychological interventions to better understand his motivations and assist with his self-esteem. The clinician recommended that he receive psychosocial interventions.

While the sentencing judge was alive to the fact that there is a degree of variability in terrorism cases as it pertains to the degree of danger the offender presents to society, he concluded there was insufficient evidence to mitigate Mr. Abdelhaleem's sentence. While the sentencing judge accepted the clinician's position that a host of factors contributed to his motivations, he made no comments about psychosocial interventions. Instead, he focused on the gravity of the offence and Mr. Abdelhaleem's ideological disposition to impose a life sentence. In this respect, he wrote the following:

While the evidence does not demonstrate that Mr. Abdelhaleem represents an ongoing danger because he is ideologically committed to terrorism, he has committed serious terrorist offences and the combination of some uncertain degree of ideological motivation, together with his lack of insight and remorse leaves me unable to conclude that he does not continue to pose a substantial risk to the public.⁵⁶

Mr. Abdelhaleem appeared before the Parole Board of Canada in March of 2019 and told the Board that he would rather die than re-offend.⁵⁷ A board member acknowledged that his progress was stymied because CSC's programming does not cater or apply specifically to persons who are motivated by violent extremism. During the hearing, he sought relief to leave prison and attend a meeting with the Centre for the Prevention of

[/www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-02-rdv/index-en.aspx](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-02-rdv/index-en.aspx).

⁵⁵ Pressman, *Risk Assessment Decisions*.

⁵⁶ Abdelhaleem, ONSC.

⁵⁷ Note that while he received a life sentence, he would have been eligible for parole after ten years or half of his sentence, whichever was less, pursuant to s. 743.6(1.2) of the *Criminal Code*.

Radicalization in Montreal.⁵⁸ The status of the decision remained unclear at the time this chapter was drafted and was not public.

B. Case Study Two – Steven Chand

At the time of his offence, Steven Chand was 25 years old with no criminal record or mental health issues. He was one of several individuals involved with Mr. Ahmad in Scarborough, conducting a winter survival training camp to train for possible attacks in Canada. He played the role of a sniper shooting paintballs at other attendees and discussed simulations for an attack on a VIP motorcade.⁵⁹ Mr. Chand had some experience in the Canadian military. A jury convicted Mr. Chand of two terrorism offences – participating/contributing to the activities of a terrorist group for the purpose of enhancing the ability of a terrorist group to facilitate or carry out a terrorist activity and counselling to commit fraud in association with the same terrorist group.⁶⁰ He received a global sentence of ten years, seven for the former and three years consecutive on the latter.⁶¹

Mr. Chand met with a forensic psychiatrist for approximately four hours,⁶² with a view to generating an assessment prior to his sentencing hearing. He explained growing up with a difficult upbringing with a fractured family dynamic. He converted to Islam at the age of 21, notwithstanding that his parents were non-practicing Hindus.⁶³ He explained that Islam was a vessel for him to pray to God directly, as he could not identify with idolatry in Hinduism.⁶⁴ Not unlike Mr. Abdelhaleem, Mr. Chand felt that he found a sense of belonging with the community at the mosque and grew close to Mubin Shaikh, who later became a police

⁵⁸ Adrian Humphreys, “I would rather die than re-offend’: Jailed architect of Toronto 18 terror plots makes plea for taste of freedom,” *National Post*, March 29, 2019, <https://nationalpost.com/news/canada/i-would-rather-die-than-re-offend-jailed-architect-of-toronto-18-terror-plots-makes-plea-for-taste-of-freedom>.

⁵⁹ *R v. Chand*, 2010 ONSC 6538 at paras 39–40.

⁶⁰ Criminal Code, ss. 83.18(1), 83.2.

⁶¹ *Chand*, ONSC at para 93. This does not account for pre-sentence custody.

⁶² *Chand*, ONSC at para 65.

⁶³ *Chand*, ONSC at para 60.

⁶⁴ *R v. Chand*, (Evidence, Dr. Julian Gojer’s psychiatric evaluation of Mr. Chand), 9 [*Chand*, Gojer’s psychiatric evaluation] (on file with author).

informant.⁶⁵ He explained that he never held the view that he wished to cause harm to anyone or fight a holy war.⁶⁶

At the time of his assessments, his religious beliefs were not strong. The clinician concluded that he likely “had problems establishing an identity for himself and his involvement with Islam in his early twenties gave him a niche and a sense of belonging.”⁶⁷ He also highlighted that Mr. Chand was uncertain about himself, his spiritual affiliations, and his direction in life. Relying on the VERA, among a few other assessment tools, the clinician concluded that Mr. Chand was at low risk of engaging in any terrorist activity. He was also a good candidate for counselling and recommended therapy that would assist him with unpacking his identity and cognitive distortions that led him to seek a life of harmful association.⁶⁸ Overall, it was recommended that he participate in counselling to assist in exploring identity issues and to develop a stable education plan.

The same sentencing judge from Mr. Abdelhaleem’s case presided over Mr. Chand’s matter. He found that he was “unable to place much reliance” on the clinician’s opinion beyond accepting that as a forensic psychiatrist, he ruled out mental illness and personality disorder. He concluded that:

When it comes to predicting whether Mr. Chand is likely to continue to pursue extremist views, I am not prepared to give [Dr. X’s] evidence much weight. This is not a criticism of [Dr. X] but recognition of the fact that, at the moment, forensic psychiatry and psychology have little to offer in this area.⁶⁹

This conclusion is difficult to accept in light of the fact that forensic psychiatry is effectively the only available and reliable tool at the sentencing stage when assessing future risk. It is otherwise difficult to identify any other possible method of predicting risk. In the common parlance of run-of-the-mill sentencing hearings, the concept of risk figures prominently, and courts rely on forensic psychiatrists to assist in that assessment. Notwithstanding this reality, risk is not a formulaic or quantitative statement of fact of what will occur in the future.⁷⁰ As aptly observed by two prominent forensic psychiatrists:

⁶⁵ Chand, Gojer’s psychiatric evaluation, 13.

⁶⁶ Chand, Gojer’s psychiatric evaluation, 10.

⁶⁷ Chand, Gojer’s psychiatric evaluation, 15.

⁶⁸ Chand, Gojer’s psychiatric evaluation, 16.

⁶⁹ Chand, ONSC at para 71.

⁷⁰ Hy Bloom and Richard D. Schneider, *Mental Disorder and the Law: A Primer for Legal and Mental Health Professionals* (Toronto: Irwin Law, 2006), 189.

The declaration that an individual represents a risk for dangerous conduct in the community does not necessarily say anything about the precise nature of the risk, when it will manifest, the degree to which it will manifest, exactly who it will affect, and whether it will be isolated in its expression.⁷¹

At the conclusion of Mr. Chand's case, the risk to re-offend remained at the forefront of the Court's decision-making calculus. The Court felt that Mr. Chand's feeling of being victimized by the criminal justice system due to his religion lacked insight and did not bode well from a rehabilitation standpoint.⁷² In fact, the sentencing judge expressed that less emphasis on rehabilitation is placed in cases involving terrorist offences.⁷³ Mr. Chand received a sentence of ten years in custody.⁷⁴

C. Case Study Three – Zakaria Amara

Zakaria Amara was 20 years old when he was arrested. He had no criminal record. He was arrested for recruiting young men to conspire to bomb CSIS headquarters and the Toronto Stock Exchange in downtown Toronto. He was said to be the mastermind and primary organizer of the plot.⁷⁵ He pled guilty to (1) participating and contributing in the activities of a terrorist group and (2) conduct with the intent to cause an explosion of an explosive device that was likely to cause serious bodily harm or cause serious damage to property in association with, at the benefit of, or at the direction of a terrorist group.⁷⁶ He received a nine-year sentence for the first offence and life imprisonment for the second.

At the time of his psychiatric assessment, he was 24 years old and had been married for six years. He is the son of Catholic parents who asserted that he was "goaded" by his peers to convert to Islam at the age of ten. He sought conversation as a source of intimacy, consistency, and loyalty among his peer group.⁷⁷ At some point in his life, he intended to become an Islamic

⁷¹ Bloom and Schneider, *Mental Disorder and the Law*, 191.

⁷² Chand, ONSC at para 64.

⁷³ Chand, ONSC at para 77.

⁷⁴ Note that this does not account for pre-trial custody, as nine years, two months, and 20 days were credited for pre-trial custody.

⁷⁵ R v. Amara, 2010 ONCA 858 at para 7.

⁷⁶ Criminal Code, ss. 83.18(1), 81(1)(a), 83.2.

⁷⁷ R v. Amara, 2010 ONSC 441 (Evidence, psychiatric report regarding amenability to treatment for Zakaria Amara by Dr. Arif Syed), 2–3, Terrorismcases.ca [Amara, psychiatric report].

scholar. He married early in life and worked long hours to make ends meet, leaving him feeling isolated.⁷⁸

The clinician who assessed him concluded that his ideology stemmed from his emotional needs and replaced (or supplanted) his scholarly aspirations.⁷⁹ Upon reflection, Mr. Amara expressed how contrite he was and expressed that he felt he “wasted his life.”⁸⁰ He presented a strong willingness to change his attitude and hoped to speak to imams who could assist in his rehabilitation.

The clinician was “confident that systemic educational dialogue with a qualified religious authority figure and skilled counselling with a Muslim therapist would bear wholesome fruition” in Mr. Amara’s case.⁸¹ He warned that extreme isolation would risk the onset of relapse and that the quantity of time served in custody would give Mr. Amara time to reflect. He also recommended that he commit to community service in a non-Muslim community, write a letter of apology to the Muslim and Canadian community, and speak to youth to overcome extremism.⁸² Additionally, the clinician recommended that he enrol in higher studies and participate in a highly socialized Muslim inmate program.⁸³ Mr. Amara also wrote a letter to the judge at sentencing expressing that the struggle to discover truth and the reality of life gullibly led him to the path of extremism.⁸⁴

The sentencing judge considered the psychiatric assessment as a mitigating feature from the perspective that it expressed no impediment for the capacity to change.⁸⁵ He gave less weight to the evidence that removed concerns for the underlying causes of his extremism.⁸⁶ He noted that Mr. Amara expressed a willingness to rehabilitate and an air of sincerity in his comments. However, given the circumstances of the offence, he believed that the prospects of rehabilitation were “guarded” at the time.⁸⁷ By guarded, I take the Court to mean that the prospects of rehabilitation were

⁷⁸ Amara, psychiatric report, 7.

⁷⁹ Amara, psychiatric report, 7.

⁸⁰ Amara, psychiatric report, 10.

⁸¹ Amara, psychiatric report, 10.

⁸² Amara, psychiatric report, 11-12.

⁸³ Amara, psychiatric report, 12.

⁸⁴ R v. Amara, 2010 ONSC 441 at para 70.

⁸⁵ Amara, ONSC at para 124.

⁸⁶ Amara, ONSC at para 124.

⁸⁷ Amara, ONSC at para 125.

limited at best. This is evidenced by the fact that while the Court found Mr. Amara had the potential to rehabilitate through counselling, he was nonetheless sentenced to life in prison.⁸⁸ The Court of Appeal for Ontario upheld his sentence.⁸⁹

D. Case Study Four – Fahim Ahmad

At the age of 17, Mr. Ahmad was involved in devising the training base with Mr. Chand, as described above. He was considered one of the leaders of the group who organized the Scarborough group and recruited young persons to join the training base. Halfway during his trial in 2010, Mr. Ahmad entered a guilty plea to (1) participating and contributing to the activities of a terrorist group to facilitate a terrorist activity (sentenced to 5 years); (2) importing firearms into Canada (sentenced to two years); and (3) knowingly instructing six individuals to carry out an activity for the benefit of, at the direction of or in association with a terrorist group (sentenced to nine years).⁹⁰ His sentences were consecutive, resulting in a global sentence of imprisonment for 16 years, which does not account for pre-sentence credit. At his sentencing hearing, the Court considered a report from the same forensic psychiatrist that assessed Mr. Chand. Mr. Ahmad also submitted a letter to the sentencing judge as part of his sentencing brief.

Mr. Ahmad came from a non-practicing Muslim family. As a teenager, he was told that non-believers go to hell. In particular, he struggled to reconcile his identity from an early age when a classmate wrote “terrorist?” on his notebook after 9/11.⁹¹ In her letter to the sentencing judge, his wife explained that her husband was suffering from an identity crisis and sought a place to belong,⁹² which ultimately incited his radicalization. He eventually grew interested in participating in a mission overseas after the invasion of Iraq because he felt he had no choice but to support the Taliban’s resistance

⁸⁸ On count 1, a sentence of 21 months was given and on count 4, life. Parole ineligibility was set at ten years pursuant to s. 743.6(1.2) of the *Criminal Code*.

⁸⁹ *Amara*, ONCA.

⁹⁰ *R v. Ahmad*, 2010 ONSC 5874 at para 73.

⁹¹ *R v. Ahmad*, 2010 ONSC 5874 (Evidence, Dr. Julian Gojer’s psychiatric evaluation of Mr. Ahmad for sentencing), 10, Terrorismcases.ca [*Ahmad*, psychiatric evaluation].

⁹² *Ahmad*, psychiatric evaluation, 22.

to the American invasion.⁹³ In speaking with several imams during the course of his incarceration, he came to realize that anything can be taken from a religious text and misapplied to justify one's emotions, sentiments, political views, and actions.⁹⁴

In his psychiatric evaluation, he scored low on the VERA and the clinician concluded that he was at a low risk to engage in terrorist activity.⁹⁵ He also had the potential to complete his university education. The clinician concluded that he took responsibility for his conduct and recommended counselling to reinforce the gains he made.⁹⁶

These conclusions were echoed by Mr. Ahmad's letter to the sentencing judge, in which he expressed his remorse. In his letter, he explained that "after 9/11, everything changed," as he had a lot of questions about his background, "being from a country [he] hardly remembered and a religion [he] hardly practiced".⁹⁷ He cited attendance at mosque and integration into the Muslim community as a way to find like-minded persons who were similarly alienated from school and society.⁹⁸ He explained that at age 20, he became a father and experienced constraints unique from his peers.⁹⁹ He explained a comradery with other inmates in his pre-trial detention and the sense of respect they showed him, notwithstanding his faith. His letter exhibited a profound sense of realization of the power of humanity, as opposed to individual religion or background. Perhaps most striking was his concern that he "failed as a citizen of this country that has given me so much to be grateful for."¹⁰⁰

Notwithstanding his strong potential to reintegrate into society, his degree of remorse, guilty plea, and honesty with the Court, Mr. Ahmad was sentenced to 16 years in prison.

These cases suggest that the weight of clinical assessments is never guaranteed for the purpose of sentencing. It seems that there is some skepticism about the reliability of actuarial tools and their ability to predict

⁹³ Ahmad, psychiatric evaluation, 2–3.

⁹⁴ Ahmad, psychiatric evaluation, 4.

⁹⁵ Ahmad, psychiatric evaluation, 26.

⁹⁶ Ahmad, psychiatric evaluation, 26.

⁹⁷ R v. Ahmad, 2010 ONSC 5874 (Written Submissions of Fahim Ahmad, Exhibit 3), 3 [Ahmad, Written Submissions] (on file with author).

⁹⁸ Ahmad, Written Submissions, 4.

⁹⁹ Ahmad, Written Submissions, 5.

¹⁰⁰ Ahmad, Written Submissions, 7.

risk. While it is unclear whether this is a product of the evidence before the court or general skepticism as it generally relates to the prediction of risk, the sentencing stage also presents a dead end for inmates who are genuinely remorseful for their conduct and express a desire to reintegrate into their community.

IV: A DEAD END FOR REHABILITATION AND INTERVENTION WHILE IN CUSTODY

Once inmates enter the correctional system, CSC assumes the role of preparing them for their eventual release back into society. CSC has no official rehabilitation or re-entry program for inmates convicted of terrorism offences.¹⁰¹ During the incarceration period, CSC conducts an individualized needs assessment, which may result in mandatory participation in disengagement activities, psychological treatment, or religious counselling.¹⁰² However, those incarcerated for terrorism offences do not have access to programming while in custody. This leaves inmates with yet another dead end when it comes time for their release.

Parole is a bridge between one's period of incarceration and their return to the community. In effect, it is a conditional release to the community that allows persons to serve part of their sentence in their community under the supervision of a parole officer and in accordance with certain conditions.¹⁰³ The Parole Board of Canada, which is an administrative tribunal that reports to the Minister of Public Safety, has the authority to grant, deny, and revoke parole for offenders serving sentences of two years or more.¹⁰⁴ In Canada, parole for individuals convicted of terrorism offences is statutorily constrained. The *Corrections and Conditional Release Act* (CCRA) requires the Board to consider whether the offender will present an undue risk to society before the end of the sentence and whether the

¹⁰¹ Jesse Morton and Mitchell D. Silber, "When Terrorists Come Home: The Need for Rehabilitating and Reintegrating America's Convicted Jihadists," Counter Extremism Project, accessed August 1, 2019, 33, https://www.counterextremism.com/sites/default/files/CEP%20Report_When%20Terrorists%20Come%20Home_120618.pdf.

¹⁰² Morton and Silber, "When Terrorists Come Home," 37.

¹⁰³ "What is parole?," Government of Canada, accessed August 1, 2019, <https://www.canada.ca/en/parole-board/services/parole/what-is-parole.html>.

¹⁰⁴ Government of Canada, "What is parole?"

release of the offender will contribute to the protection of society by facilitating the offender's return to the community as a law-abiding citizen.¹⁰⁵

With respect to terrorism offences, most offenders' parole is constrained by an order of the court during the sentencing hearing, and pursuant to the *Criminal Code*. Subsection 743.6(1.2) of the *Criminal Code* provides that when an offender is convicted of a terrorism offence, the court must order that at least half the sentence, or ten years, whichever is less, must be served before the offender can be released on parole.¹⁰⁶ This is normally the case unless the court is satisfied that "the expression of society's denunciation of the offence and the objectives of specific and general deterrence would be adequately served" by the regular ineligibility periods under the CCRA.¹⁰⁷ Under the CCRA, normal full parole, which would allow an offender to serve part of their sentence in the community, follows the successful completion of day parole. Generally, all inmates are eligible for full parole at one-third of their sentence, or seven years, whichever is less.¹⁰⁸ For those serving a life sentence, parole eligibility must be set at the time of sentencing. If parole is not granted at one-third of one's sentence, inmates must be released by two-thirds of their sentence.¹⁰⁹ All evidence that is relevant and available to the Board can be used to assess the offender's risk of re-offending.¹¹⁰

In 2018, I requested a copy of all "parole decisions for inmates convicted of terrorism offences since 2001" from the Board. A common theme from the decisions is that the Board was well aware of the absence of institutional programming and its effect on release. I also observed that the Board is circumspect about the accuracy of psychiatric risk assessment tools despite the fact that 93% of offenders granted day and full parole by the Board have not committed a new offence while on parole, and 99% have

¹⁰⁵ Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 102.

¹⁰⁶ Criminal Code, s. 743.6(1.2).

¹⁰⁷ Criminal Code, s. 743.6(1.2).

¹⁰⁸ "Types of Conditional Release," Government of Canada, accessed August 1, 2019, <https://www.canada.ca/en/parole-board/parole/types-of-conditional-release.html>. See also Corrections and Conditional Release Act, s. 120.

¹⁰⁹ Government of Canada, "Types of Conditional Release." Note that some offences attract certain parole exceptions.

¹¹⁰ Corrections and Conditional Release Act, s. 101. See also Government of Canada, "What is parole?"

not committed a new violent offence.¹¹¹ In most of these cases, inmates were denied day parole or full release notwithstanding no criminal history and a low to moderate risk of recidivism.

The chart below summarizes the decisions released in response to my request on January 24, 2019.¹¹² Notably, the following conclusions can be made from the results:

- Approximately half of the decisions impose a mandatory condition on the inmate to participate in religious counselling as a form of “treatment plan” approved by a parole officer;
- The Board questions the reliability of clinical risk assessments; and
- The absence of in-custody programming for inmates convicted of these offences does not assist inmates in making the case for release.

Inmate	Request	Outcome	Absence of Correctional Programming Identified	Inadequate or Inconclusive Risk Assessments	Counselling for Deradicalization Imposed
1	Detention review	Detention ordered	~	~	~
2	Detention review	Detention ordered	~	~	~
3	Full parole – pre-release	Change to conditions	~	Yes	~
4	Detention Review	Detention ordered	Yes	Yes	~
5	Full parole – pre-release	Denied	Yes	~	~

¹¹¹ Government of Canada, “What is parole?”

¹¹² Note: The request did not have a file number.

6	Day parole - pre- release	Continued	~	~	Yes
7	Day parole - pre- release	Granted	~	~	Yes
8	Statutory Release - pre-release	Change condition	Yes	Yes	Yes
9	Full parole pre-release	Denied	Yes	Yes	Yes
10	Day parole - pre- release	Continued. Condition changed for statutory release	~	Yes	Yes
11	Day parole-post release	Change condition	~	~	Yes
12	Day parole - pre- release and full parole	Full parole denied - day parole granted	Yes	~	Yes
13	Day parole - pre- release	Denied	~	~	~
14	Detention review	Detention order confirmed	Yes	~	~
15	Detention review	Detention order confirmed	~	Yes	~

Note: The Board did not release these decisions as numbered above. I individually numbered each decision as the inmates' names and identifiers were redacted in accordance with the Privacy Act.

A. The Absence of Institutional Programming

Inmate 3 came from a moderately religious family and had pro-social views. Citing the absence of a validated, reliable, and standardized test for assessing risk of re-involvement in terrorist acts, the Board ultimately confirmed his detention order. By the time of his parole hearing, this inmate shared that he began turning his life around by reading the right materials and teachings and only listening to people who are qualified. He cited his exposure to several risk factors including, but not limited to, the media, the “wrong” people, and “teachers”.¹¹³ The Board was concerned that he had downplayed his role with the index offences.¹¹⁴

In Inmate 14’s decision, the Board concluded that his radical beliefs were not mitigated and thus confirmed his detention order. Recognizing the institutional gaps at play, the Board wrote, “there does not exist a community strategy that would offer enough structure to prevent you to engage in behaviour that could potentially result in serious harm or death.”¹¹⁵ The same concerns were expressed in another decision in which the Board denied full release:

There was no correctional programming recommended in your case as traditional programming does not target the needs specific to offenders involved in terrorist related offences. You attended one session of psychological counselling, however, the clinician felt that she did not have the necessary knowledge or training to address your criminal dynamics. Further, it is felt that the standardized risk assessments completed by Correctional Service of Canada (CSC) would not appropriately capture the true risk levels for the type of crimes you were involved in.¹¹⁶

Other cases echo the same concerns, citing the fact that there are “no programs” available to inmates that would “facilitate” statutory release.¹¹⁷ In one case, the inmate participated in spiritual counselling in search of a new attitude, and yet the Board remained skeptical due to the lack of programming within CSC.¹¹⁸ In addition to the fact that the inmate’s “changes in beliefs” were not yet “tested in the community,” the Board

¹¹³ Inmate 1, Parole Board Decision, 5.

¹¹⁴ Inmate 1, Parole Board Decision, 4.

¹¹⁵ Inmate 14, Parole Board Decision, 3.

¹¹⁶ Inmate 5, Parole Board Decision, 6.

¹¹⁷ Inmate 4, Parole Board Decision, 5; Inmate 8, Parole Board Decision, 4; Inmate 9, Parole Board Decision, 4.

¹¹⁸ Inmate 8, Parole Board Decision, 4.

concluded that a “structured and highly monitored environment” was necessary to manage the inmate’s risk to re-offend.¹¹⁹

B. Issues with Psychiatric Risk Assessments

In many cases, despite the fact that inmates did not present with mental health issues, the Board questioned the accuracy of actuarial risk assessments used by psychiatrists to predict the risk of recidivism. In others, notwithstanding a positive actuarial score or a low possibility of risk, offenders were denied parole.

Consider Inmate 4, whose detention was ordered. Inmate 4 received a psychiatric assessment and evaluation, which suggested that he was at a low risk of engaging in terrorist activity. To be clear, this conclusion apparently originated from the inmate’s score on the Violent Extremism Risk Assessment (VERA). By contrast, a psychological risk assessment suggested that there are no “available standardized tools for assessing risk for recidivism in terrorist acts.”¹²⁰ The Board concluded that there was no medical psychological or psychiatric evidence that this inmate was likely to commit an offence causing bodily harm or death if released. Parole was ultimately denied due to the absence of a “reliable release plan, lack of coping strategies and an inability to understand and identify risk factors.”¹²¹

Inmate 5 faced a similar issue. In denying his release, the Board cited several reasons including an unreliable risk assessment score. Specifically, the Board was concerned that the standardized risk assessments completed by CSC could not capture the “true” risk levels for the types of crimes committed by the inmate. The Board further reported that it placed no weight on a psychiatric assessment by the inmate’s psychiatrist from his sentencing. The Board did not provide a rationale to explain why the risk assessments did not capture true risk levels. It was unclear whether this conclusion related to the absence of literature in the Board’s impression of this inmate. Nevertheless, the risk assessment component was just one factor that led to the denial of his request for full parole.

While concerns about the reliability of actuarial measures were echoed in several other decisions released, in one case, a clinical assessment was relied upon as just one factor which resulted in the Board granting day

¹¹⁹ Inmate 8, Parole Board Decision, 4.

¹²⁰ Inmate 4, Parole Board Decision, 4.

¹²¹ Inmate 4, Parole Board Decision, 5.

parole for one inmate. In the case of Inmate 7, the Board accepted an assessment from the trial on the basis that there were no “significant changes” to the case.¹²² The clinician who assessed Inmate 7, who was considered an “expert” by the Board with respect to terrorism cases, concluded that the inmate was at low risk for re-offending and concluded that any lingering risk could be further mitigated through religious and psychological counselling.¹²³

Comparatively speaking, Inmate 7 was described as more contrite and willing to change. In other decisions, the desire to change, coupled with a low risk of re-offending, was insufficient. Some decisions reflect doubt in the degree of authenticity associated with the inmates’ desire to change. A global read of the decisions suggests that those who participate in traditional models of counselling, have a low risk of re-offending, participate in traditional CSC programming, and have been genuinely contrite before the Board were more likely to receive day parole. The underlying premise in these decisions suggests that participation in more conventional rehabilitative efforts such as counselling proved advantageous at the parole stage.

C. Counselling for Deradicalization

Counselling for deradicalization presents a point of inherent tension. On the one hand, a recommendation in favour of counselling suggests that the underlying grievance of the accused is religion and any misconceived notions or beliefs about the faith ought to be de-programmed. On the other hand, counselling is frequently utilized as a tool to rehabilitate the general offender population.

This tension was at issue in the case of Aaron Driver in Manitoba. Mr. Driver was the subject of a peace bond. In a constitutional challenge to the terrorism peace bond provisions, the Court also considered whether the condition to participate in religious counselling was considered “overbroad.” In concluding that the condition to be subject to such programming ran contrary to section 7 of the *Charter*, the Court explained that requiring treatment would constitute an unreasonable condition:

If terrorism is “a litmus test for the dearly held beliefs”, it follows that the concept of terrorism is an ideological construct. Accordingly, imposing ideological programming is to impose subjective belief systems upon the subject. Given that

¹²² Inmate 7, Parole Board Decision, 5.

¹²³ Inmate 7, Parole Board Decision, 5.

freedom of thought and expression are protected by section 2 of the Charter, it is inconsistent with Charter values to implicitly prohibit such thought, ideology and expression.

While the Crown argues that the procedural safeguard of allowing the court to have the option of not imposing such a condition saves the constitutionality of the provision, the condition itself must be reasonable. With respect, requiring deprogramming “treatment” does not amount to a reasonable condition. No other type of treatment has been offered that would be in any way rationally connected to section 810.011(6)(a).¹²⁴

While the case of Mr. Driver did not concern parole matters, it suggests that compelling treatment is dangerous because it compromises one’s right to think and be free. While framed as a *Charter* argument, the Court’s thinking is in line with existing literature about the efficacy of religious intervention for the purpose of deradicalization. For example, in a 2019 study commissioned by European scholars, a study of 111 publications was commissioned to understand the efficacy and types of intervention programming in the world. The literature identified a focus on interventions that prevent or counter the intention to commit extremism. They included preventing recruitment and creating opportunities to leave extremist groups through deradicalization.¹²⁵ Notably, while the author found that the results of many studies suggested that educational interventions were beneficial, he was unable to identify studies comparing the outcomes of various interventions.¹²⁶

Importantly, the above study concluded that there was a lack of evidence-based interventions that focus on countering/preventing violent extremism. The authors recommended that future researchers consider evaluating the comparative efficacy of interventions. These conclusions are relevant to decisions of the Board, which frequently impose religious counselling as a condition of release. Oddly, while the Board acknowledges that there is insufficient evidence that proves the efficacy of intervention such as therapy, the Board has not hesitated to impose a condition requiring the inmate to participate in religious counselling.

¹²⁴ Canada (Attorney General) v. Driver, 2016 MBPC 3 at para 52 [emphasis added].

¹²⁵ Isabella Pistone et al., “A Scoping Review of Interventions for Preventing and Countering Violent Extremism: Current Status and Implications for Future Research,” *Journal for Deradicalization* 19 (2019): 24–25.

¹²⁶ Pistone et al., “Preventing and Countering Violent Extremism,” 25.

Consider the case of Inmate 9, who was denied parole for a host of reasons. The inmate's psychiatrist recommended that he participate in cognitive behavioural therapy (CBT).¹²⁷ The inmate was willing to obtain this type of therapy. Despite the inmates' willingness, the Board wrote:

Terrorism related offences occur infrequently and there is a lack of empirical evidence about therapeutic treatment (including CBT) to address radicalized offenders. The Psychology department at the institution is unable to operate outside their area of competency, particularly when there is a lack of guiding information about standard treatment and assessment.¹²⁸

It is worth noting that the Board drew these conclusions without reference to the existing literature on the subject matter. It is unclear whether the Board received submissions on this point and whether those submissions accounted for literature in this area. Furthermore, it would be helpful to understand whether any literature studied discussed the differences between traditional risk assessment tools derived from general-offender populations as compared with tools that are not. More importantly, it would be worth understanding whether the Board consulted with the department of psychology at the correctional facility to better appreciate what is meant by a "lack of guiding information." There is no indication that the Board consulted with a psychiatric expert in this regard, or whether psychiatry formed part of its decision-making calculus.

Inmate 9 was also advised that they had "outstanding needs with respect to deradicalization."¹²⁹ This was observed despite the fact that the inmate was assessed at a low-moderate risk for general recidivism and low-moderate risk for violent recidivism.¹³⁰ The Board did not opine on the relationship between these two elements. It also did not comment on what type of intervention would be suitable for the purpose of counselling. Additionally, the Board did not engage in an analysis that would explain why counselling would be fruitful for this inmate or whether any religious leaders were consulted about its utility.

It remains to be seen how the Board will consider counselling in future decisions. However, it would seem that there is an inconsistent approach between courts and the Board in this regard. While courts seem hesitant to impose counselling as a condition of one's release, the Board takes no issue.

¹²⁷ Inmate 9, Parole Board Decision, 5.

¹²⁸ Inmate 9, Parole Board Decision, 5.

¹²⁹ Inmate 9, Parole Board Decision, 5.

¹³⁰ Inmate 9, Parole Board Decision, 5.

This disparity of approaches sets a double standard for inmates at the sentencing and parole stages. In many cases, the Board's decision presupposes that religion is the underlying issue associated with the inmate's grievances, and that re-engineering one's thoughts is required for successful integration into the community. Without evidence that this nexus is in fact possible, the imposition of religious counselling amounts to no more than a wild guess.

V. CONCLUSION – PAVING THE WAY FORWARD

The dead ends presented in this chapter do not preclude a silver lining. Various research centres and organizations work exclusively to deliver evidence-based research on the efficacy of intervention. There is no shortage of research on these issues in Canada – rather the question boils down to implementation. Organizations such as the John Howard Society and the Elizabeth Fry Society have the benefit of hindsight and institutional memory, which bolsters their reliability in the eyes of justice system participants. Radicalization remains an embryonic area in our criminal justice system. Only time can tell how intervention programs will be implemented across Canada.

At the very least, counsel seeking pre-charge or pre-sentence intervention programs should be aware of the various resources offered by organizations such as CPN-Prev and individual organizations in their respective communities assisting with interventions. Counsel may also wish to consider obtaining a clinical assessment of their client with a view to understanding their underlying grievances prior to identifying appropriate intervention programs. Without the requisite background information and a complete picture of what incited an individual to radicalize, it is difficult to pinpoint the appropriate intervention methodology with precision. This assessment can be done under the solicitor-client umbrella through, for example, a psychiatric assessment. Otherwise, advising one's client to consider a particular avenue of intervention would be of limited assistance. This recommendation is particularly salient as it pertains to religious counselling. Religious counselling is not always the answer.

In the meantime, where there are institutional deficits such as an absence of programming, inmates are left in a catch-22. This is germane to the bigger picture: if inmates remain incarcerated without appropriate

interventions, they risk further radicalization. If they are released without appropriate interventions, they risk re-offending.