COURT OF APPEAL FOR ONTARIO

CITATION: R. v. N.Y., 2012 ONCA 745
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Goudge, Feldman, and Blair JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

N.Y.

Appellant

Brian Greenspan, Mitchell Chernovsky, and Faisal Mirza, for the appellant

John North, Amber Pashuk, and Maria Gaspar, for the respondent.

Heard: March 28, 2012

On appeal from the judgment of Justice John R. Sproat of the Superior Court of Justice, sitting in Youth Justice Court, dated September 25, 2008, with reasons reported at 2008 CanLII 51935 (ON SC).

R. A. Blair J.A.:

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BACKGROUND

[1] The appellant, N.Y., was convicted of knowingly participating in or contributing to the activities of a terrorist group contrary to s. 83.18 of the *Criminal Code.* Along with three other young persons and fourteen adults, he was charged following a police investigation that uncovered a plot to commit very public acts of terrorism, including bombing attacks on power grids and against various targets such as the Canadian Security Intelligence Service, the Royal Canadian Mounted Police, the Parliament buildings, the Toronto Exchange Tower, and an unspecified military target.

[2] The charge arose out of N.Y.'s participation in what the trial judge found to be two terrorist training camps held in rural Ontario – the first between December 18 and 31, 2005, at Washago, and the second between May 20 and 22, 2006, at Rockwood – and certain other activities related to the terrorist plans being fostered at those camps. In particular, the trial judge found that N.Y. participated in and aided the terrorist group by attending the Rockwood training camp, shoplifting camping supplies and walkie-talkies for the group, and removing a law enforcement surveillance camera found in the apartment complex of one of the leaders of the terrorist group.

[3] N.Y. was two months shy of his 18th birthday when he attended the Washago camp and was therefore a young person as defined in the *Youth*

Criminal Justice Act, S.C. 2002, c. 1, s. 2 at that time. He was an adult by the time he attended the Rockwood camp, however.

[4] The Crown's case consisted of agreed facts, videos recovered from seized computers depicting activities at the training camps, tapes of intercepted communications between members of the alleged terrorist group, and the evidence of a confidential police informant, Mubinoddin Shaikh, who participated in the camps and gave evidence about the activities of members of the group.

[5] N.Y. did not testify, nor did he call any evidence in his own defence at trial. His defence, essentially, was that he was a young, immature, easily-influenced, recent convert to Islam, who came under the persuasive spell of Shaikh and one of the lead conspirators, Fahim Ahmad. He claims he did not know that the camps and activities were designed to further terrorist plans; rather, he thought they were camps to promote Islamic principles.

[6] In very careful and thorough reasons, Sproat J. generally accepted Shaikh's evidence and concluded that most of the Crown's other evidence was incontrovertible. In the end, he did not accept N.Y.'s defence and after a 39-day trial, including several pre-trial motions, found N.Y. guilty of the offence as charged.

[7] On appeal, N.Y. submits that the trial judge erred by,

- misapprehending the evidence and making findings based on speculation and inferences not founded on the evidence;

- admitting into evidence the appellant's post-arrest statement despite having found that the police had breached his rights under ss. 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms*;

- relying on hearsay evidence of comments made by Ahmad, and the interpretation of those comments, led through the witness, Shaikh; and

- failing to enter a stay of proceedings at the end of trial on abuse of process grounds, in particular, in failing to find that Shaikh was a state agent rather than a confidential informant, and in failing to give sufficient weight to what were alleged to be overbearing and illegal acts on Shaikh's part.

[8] I would not give effect to any of these submissions, and for the following reasons would dismiss the appeal.

FACTS

[9] The facts are exhaustively laid out in the trial judge's reasons for judgment. I reiterate here only those necessary to explain the issues and my reasons for dismissing the appeal. As the trial judge noted, most of the Crown's case was uncontradicted in terms of what, in fact, occurred. However, there were, as he said, "competing interpretations and arguments regarding the significance of the evidence."

[10] The terrorist group was comprised of two sub-groups – one from Scarborough, the other from Mississauga. Ahmad led the Scarborough group. Another man, Zakaria Amara, led the Mississauga group.

1. The Lead-Up to the Camps

[11] During the Fall of 2005, CSIS was investigating these groups of young men for what it believed to be an emerging terrorist plot. In August 2005, two men had been arrested carrying weapons across the border from the United States into Canada. These two men were ultimately charged along with the appellant. One of them, Ali Mohammed Dirie, was Ahmad's brother-in-law and it turned out that Ahmad had paid for the rental vehicle that the two men had used to cross the border. In November 2005, CSIS received information about a meeting at the Taj Banquet Hall in Toronto and directed Shaikh to attend it in order to further the investigation by developing an association with Ahmad, Amara, and others.

[12] At that time, Shaikh was a confidential informant of CSIS. He went to the Taj Banquet Hall on November 27, 2005, where he identified Ahmad, Amara, and others, including the appellant, in attendance. He initiated a conversation with Ahmad, during which they engaged in various jihad-oriented exchanges concerning terrorist activities. Shaikh impressed Ahmad with his knowledge of, and ability to acquire, weapons and with his potential as a terrorist trainer.

Ahmad provided Shaikh with various publications concerning jihad and the justification for killing, assaulting, defaming, and stealing from non-believers.

[13] Later, on November 29, Ahmad told Shaikh that he had planned a training camp, that he needed a trainer, and that there were plans to attack targets including the RCMP, CSIS, the Parliament buildings, and power grids. Ahmad asked whether Shaikh could “train guys to do this stuff” and Shaikh assured Ahmad that he could. On December 5, 2005, Shaikh helped Amara purchase a rifle and 1,000 rounds of ammunition, using Shaikh’s licence to purchase firearms.

2. The Washago Camp

[14] The Washago Camp followed shortly thereafter – from December 18 to 31, 2005. The appellant and other young participants were told that the camp was to be an Islamic religious retreat with outdoor physical activities linked to its religious purpose. Although designed to appear as such a retreat, however, the program incorporated various activities involving combat-like manoeuvres including firing paintball weapons at a target while negotiating an obstacle course and training in the firing of real handguns. In his various interventions throughout the camp, Ahmad made combat-related references and suggested they were living under conditions similar to the *mujahideen* in Chechnya. Shaikh

participated as a trainer, which involved giving instruction in the use and firing of handguns. The appellant participated in all of these various activities.

[15] During the camp there were three formal "*halaqahs,*" or gatherings. At the first, the participants listened to an audio presentation entitled *The Constants on the Path of Jihad*. This presentation advised that fighting was a religious obligation. The second *halaqah* consisted of a forceful speech by Ahmad, outlined more fully below, one view of which is certainly that he encouraged those attending the camp to engage in the fight for Islamic dominance. The third *halaqah* was led by Shaikh, during which he posed questions to the group and discussed the oppression of Muslims abroad. The *halaqahs*, as well as many of the physical activities described above, were videotaped.

[16] A measure of the nature of Ahmad's exhortation at the second *halaqah* can be taken from the following passages, excerpted from the video (which the trial judge, and we, have had the opportunity to view):

> Well we're here to kick it off man. We're here to get the rewards of everybody that's gonna come after us *God willing* if we don't a victory *God willing* our kids will get it. If not them, their kids will get it […] if not them the five generations down somebody will get it *God willing*. This is the promise of Allah. *God help and victory is near*. It's coming. When it's gonna come doesn't matter man, this is our path we stick to it no matter what the trials are.
>
> …

But you know what your minds gotta be on this place. Your minds and your hearts have to be here. You go back, you're living with society and you have to put on that face, you know what, we're a bunch of peace lovers you know what I love all these *non-believers* yup I love your wealth… I love your women. (laughing) I love everything about you.

…

Our mission is here. This is where we come back at the end of the day. We all got our missions, which we gotta fulfill. We all know what we gotta do when we go back whether it's like enrol in school and be patient and this and that but at the end of the day, but especially the young guys… I don't know, how involved we'll be able to get you guys again and again and how often but this is the hearts. This is where the hearts are okay…

…

So although our bodies will be with the *non-believers* roaming around, going to work, trying to get money, sucking up to your boss and this and that, you know the typical idea of nice uh, do *favours* with the parents this and that… Our hearts are with the people of *heaven*, our hearts are with this group right here and everybody else that's given the Covenant for us to be part of this, who are not here but *God willing* they are here with their hearts, alright. So you go back *God willing* remember, doesn't matter what trials you face… it doesn't matter what comes your way. Our mission's greater, whether we get arrested, whether we killed, we get tortured, our mission's greater than just individuals. It's not about you or I or this Amir or that Amir, it's not about that. It's about the fact that this has to get done. Rome has to be defeated. And we have to be the ones that do it, no holding back, whether it's one man that survives, you have to do it. This is what the Covenant's all about, you have to do it. And *God willing* we will do it. *God willing* we will get the victory.

…

What… who's gonna say anything about it. We destroyed your armies, you got nothing. We broke your knees. Rome, Rome, you guys realize who you're messing with. This is Rome. This is the one empire that's never been defeated. […] It's like a friggin' monster man. You cut off one hand, another grows here, cut that off, another one grows here, cut that off, another one, another one, another one. Finally, you had to leave the entire Europe because the Muslims are too close to their shores. And here they came to North America and they got their fortress, they got their walls, they got their um, patriot missiles or whatever the heck they call them trying to you know defend their airspace and this and that, but you know what… here we are we entered your lands, we already started striking cause you know what this training is striking at them.

…

And it puts fright in their hearts, man, it freaks them out. Imagine we're walking the streets of downtown or even Washington or you're in front of the White House and you raise the banner of *There is no God except God*. Is anybody ever gonna think of facing us. *There is no God except God* in the White House. *God is Great* in the streets of downtown. You know what, this is what the changes are all about. Nobody counts on you and you prove 'em wrong. And w… I know like all you guys don't get involved from the first step and you guys haven't been involved for whatever reason but for the ones that have been, man we've seen the help of Allah. Small or big, we've seen the help of Allah.

[…]

And we've seen the help and it will come in bigger and from different forms. It's just, we just gotta stick with it man. If it takes long so be it. We just gotta stick with it because this is our mission.

[Words within asterisks were translated from Arabic]

[17] The trial judge concluded that the appellant may not have appreciated the nature of the camp, or the purpose of the group's activities and plans, when he agreed to attend and arrived at the Washago Camp. The appellant was young and naive and as a recent convert to Islam was anxious to learn more about that religion. The trial judge found that by the conclusion of the camp, however, the appellant understood the nature of the group and the terrorist intentions of Ahmad, and also understood that Ahmad considered him to be a member of the terrorist group. There was ample evidence to support these findings.

3. The Appellant's Acts of Participation in the Terrorist Group

[18] The appellant left the Washago Camp with Amara on December 30, 2005, and continued to associate with Ahmad closely until his arrest on June 3, 2006. It was during this period that the activities the trial judge concluded gave rise to the appellant's guilt took place. They were threefold.

a. Removal of the Surveillance Camera

[19] First, in January 2006, Ahmad discovered a surveillance camera hidden in an exit sign in the hallway of his apartment building. The appellant was found to have removed the surveillance camera at Ahmad's request.

b. Shoplifting

[20] Secondly, the appellant engaged in a number of shoplifting exploits for the purpose of acquiring equipment for the group. At sometime around January 2006, he shoplifted a number of walkie-talkies that, according to Ahmad, were to be used for the group's activities. Further, on February 2, 2006, he was arrested for shoplifting camping utensils, an LED clip light, an axe, and an 18-inch machete from a Canadian Tire store. In his post-arrest statement, the appellant admitted to shoplifting the items, but denied stealing for the purposes of the group; instead, he said he shoplifted the items for "the fun of it" and possibly to sell to friends. The trial judge did not accept this explanation.

c. The Rockwood Camp

[21] Finally, the appellant attended a second training camp held at Rockwood between May 20 and May 22, 2006. While some of the activities at the Rockwood Camp appear somewhat more benign than those at the Washago Camp – hiking and boating, for example – a number of them bore the mark of a resistance group conducting covert operations. The participants wore military fatigues and marched around holding 18-inch knives. They sat around a fire talking about their grievances against the United States – particularly with respect to the attacks by that country against Iraqi civilians – and expressing their beliefs that it is the obligation of Muslims to help Muslims abroad and that the

wrath of God would come down on people who committed injustices. Ahmad demonstrated tucks and rolls and taunted those who could not perform them. The video depicts images of young men sitting cross-legged with their faces masked. They had a document in front of them with large knives laid out at the top and the bottom of the document and a walkie-talkie positioned nearby.

[22] One witness, Sahl Syed, who attended the Rockwood Camp, testified that Ahmad had the video made to resemble videos released on the internet by resistance groups, and seen as well on CNN and CBC. Notably, the video also depicted one of the leaders crossing a creek, carrying Ahmad on his shoulders, and exhorting the participants: “[M]ost of the rivers and stuff is all from North America that go into the States and... and that like... almost the easiest access to get in through. So, that’s most likely going to be... lot of our missions going to be with water.” As the trial judge noted, the appellant and Mr. Syed were seen on the video in the area just before this demonstration; following the statement, they crossed the creek.

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[23] To provide context, I observe that this terrorist conspiracy – however it may have been portrayed in some quarters as the hapless fantasies of a group of naive, unsophisticated, young men who did not know what they were doing – was nonetheless a conspiracy of considerable reach.

[24] Eighteen suspects were initially arrested by the police, including the appellant and three other young persons. Seven were released or the charges against them ultimately withdrawn or stayed. Amara pleaded guilty to leading the bomb plot and was sentenced to life imprisonment. Ahmad pleaded guilty to leading the terrorist group and was sentenced to imprisonment for 16 years. Five other participants pleaded guilty to being involved in various aspects of the conspiracy and were sentenced to periods of imprisonment ranging from 7 to 20 years. Three of the adults were found guilty after trial and sentenced to periods of imprisonment ranging from 6 and one-half years to life.[1]

[25] N.Y. was the only young person convicted. The charges against the other three young persons were withdrawn or stayed following a preliminary hearing. N.Y. was sentenced to 30 months in prison, the equivalent of time served. He does not appeal the sentence.

[26] I turn now to a consideration of the errors said to have been committed by the trial judge.

ANALYSIS

[27] The relevant provisions of the *Criminal Code* provide as follows:

---

[1] The convictions, pleas, and sentences were widely reported in the media. See also *R. v. Amara*, 2010 ONCA 858, 275 O.A.C. 155; *R. v. Gaya*, 2010 ONCA 860, 272 O.A.C. 242; *R. v. Khalid*, 2010 ONCA 861, 272 O.A.C. 228; and *R. v. Abdelhaleem*, [2010] O.J. No. 5693 (S.C.).

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

(2) An offence may be committed under subsection (1) whether or not

(a) a terrorist group actually facilitates or carries out a terrorist activity;

(b) the participation or contribution of the accused actually enhances the ability of a terrorist group to facilitate or carry out a terrorist activity; or

(c) the accused knows the specific nature of any terrorist activity that may be facilitated or carried out by a terrorist group.

(3) Participating in or contributing to an activity of a terrorist group includes

(a) providing, receiving or recruiting a person to receive training;

(b) providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;

(c) recruiting a person in order to facilitate or commit

(i) a terrorism offence, or

(ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence;

(d) entering or remaining in any country for the benefit of, at the direction of or in association with a terrorist group; and

(e) making oneself, in response to instructions from any of the persons who constitute a terrorist group, available to facilitate or commit

(i) a terrorism offence, or

> (ii) an act or omission outside Canada that, if committed in Canada, would be a terrorism offence.
>
> (4) In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused
>
> (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group;
>
> (b) frequently associates with any of the persons who constitute the terrorist group;
>
> (c) receives any benefit from the terrorist group; or
>
> (d) repeatedly engages in activities at the instruction of any of the persons who constitute the terrorist group.

1. Misapprehension of the Evidence

[28] The appellant contends the trial judge erred in holding that the only reasonable inference to be drawn from the circumstantial evidence was that the appellant intended by his acts to enhance the ability of the group to carry out its terrorist activities. In this respect, he says that the trial judge failed to comply with the principle that where the Crown relies upon circumstantial evidence to prove intent, the inferences drawn must be the *only* reasonable inferences capable of being drawn from the facts: see *R. v. Rhee,* 2001 SCC 71, [2001] 3 S.C.R. 364, at para. 35.

[29] Specifically, the appellant argues that the trial judge's rejection of viable alternative explanations of innocence, was the result of a misapprehension of the

evidence, and the making of inconsistent findings or unwarranted inferences concerning a number of issues, including:

a) the appellant's reasons for shoplifting;

b) the removal of the surveillance camera;

c) the trial judge's *Vetrovec* analysis;

d) the appellant's interest in resistance efforts overseas;

e) the impact of Ahmad's speech during the second *halaqah* at the Washago Camp and of the presence of the firearm at that camp; and

f) the appellant's understanding of the terrorist nature of the Rockwood Camp.

[30] There is a fine line between an argument based upon misapprehension of the evidence, inconsistent findings and unwarranted inferences, on the one hand, and an argument which is, in substance, an attempt to persuade an appellate court to re-try the case and substitute its own – or, more particularly, the appellant's – take on the evidence for that of the trial judge. The appellant's argument falls into the latter category, in my view. Rather than list here the numerous errors alleged by the appellant, I have attached an Appendix containing a chart that details the factual findings challenged by the appellant and the evidence available to support them. As this chart – based on a similar chart contained in the Crown's factum – makes clear, there was ample evidence to support the trial judge's findings and the inferences he drew from those

findings. I am not persuaded that he made any significant findings that were inconsistent with the evidence.

[31] Nor am I persuaded that the trial judge ran afoul of the *Rhee* principle by concluding, on the basis of the evidence properly admissible and accepted by him, that the appellant, by his actions, intended to enhance the terrorist goals of the conspiracy. In this regard, I find the observations of McEachern C.J.B.C. in *R. v. To*, 1992 CanLII 913 (B.C.C.A.), at para. 41, concerning the assessment of competing inferences, apt:

> It must be remembered that we are not expected to treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty.

[32] I would not give effect to this ground of appeal.

2. Admission of the Appellant's Post-Arrest Statement

[33] At the conclusion of a blended *voir dire* attacking the admissibility of the appellant's post-arrest statement, the trial judge concluded (a) that the statement was voluntary, (b) that the appellant's s. 10(a) and s. 10(b) rights under the *Charter* had been violated, but (c) that, nonetheless, the statement should be admitted into evidence pursuant to s. 24 of the *Charter*. The appellant accepts the ruling that his statement was voluntary and that his *Charter* rights were

breached, but seeks to have the statement excluded on the basis that the trial judge erred in his analysis under s. 24(2) of the *Charter*.

[34] Sections 10(a), 10(b) and 24 of the *Charter* provide as follows:

> 10. Everyone has the right on arrest or detention
>
> (a) to be informed promptly of the reasons therefor;
>
> (b) to retain and instruct counsel without delay and to be informed of that right.
>
> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[35] As the trial judge noted, the *Charter* issue arises in this case because of a police error in explaining to the appellant the reason for his arrest and detention.

[36] The appellant was advised by the arresting officer that he was being detained because of his participation in a terrorist group. When he asked for clarification, the arresting officer told him “it was because he attended the terrorist training camp at Washago in December.”

[37] Sergeant Tost, the interviewing officer, did not speak to the arresting officer because of time constraints and therefore did not know exactly what the appellant had been told about the charges he faced. Sergeant Tost advised the appellant that one of the charges he was facing occurred in December, before the appellant turned 18, and had to do with a camp. He told the appellant that the charges were serious, the Crown had a right to seek an adult sentence, and that the appellant should speak to a lawyer.

[38] The appellant did speak to duty counsel. He was then taken for a videotaped interview, at which time Sergeant Tost made it clear that the appellant was facing two separate charges, which were read to the appellant as follows:

> - Between March 1, 2005, and June 1, 2006, he knowingly participated in the activities of a terrorist group for the purpose of enhancing the ability of a terrorist group; and
>
> - Between November 27 and December 21, 2005, he knowingly participated in the activities of a terrorist group by receiving training.

[39] Sergeant Tost explained that the latter charge concerned the Washago Camp. However, the charges relating to the period extending to June 1, 2006, included within their ambit the surveillance camera incident, the shoplifting of the camping equipment and the walkie-talkies, and the appellant's further attendance at the Rockwood Camp – some of which, at least, occurred after the appellant

attained the age of 18 and was no longer a young person within the meaning of the *Youth Criminal Justice Act*.

[40] The appellant was never given an opportunity to speak to counsel with the knowledge that he was being charged with matters relating to any activity other than his participation at the Washago Camp. In particular, he did not have an opportunity to speak with counsel with the understanding that his activities regarding Rockwood were under scrutiny. Then, during the interview, the appellant lied. He told Sergeant Tost that the last time he had been on a camping trip with Ahmad was in December 2005, when he had actually been to the Rockwood Camp a few weeks earlier. The lie proved to have some significance at trial because the trial judge ultimately considered it as a factor in determining the credibility of the appellant's statement and of his defence generally.

[41] In his ruling on the admissibility of the statement, the trial judge did not accept the Crown's submission that Sergeant Tost's subsequent explanation of the two charges cured any initial misstatements suggesting that the appellant's jeopardy related only to allegations of terrorist activity during the Washago Camp (when the appellant was still a young person). The trial judge concluded that there had been no breach of the appellant's s. 10(a) and s. 10(b) rights with respect to the allegations arising out of the Washago Camp, but that there had

been a breach of those rights insofar as the appellant's statement related to the remaining allegations.

[42] The appellant does not contest these conclusions on the appeal. The issue is whether the trial judge erred in then refusing to exclude the contents of the statement under s. 24(2) of the *Charter*.

[43] In arriving at his decision not to exclude the appellant's statement, the trial judge did not have the benefit of the Supreme Court of Canada's decision in *R. v. Grant,* 2009 SCC 32, [2009] 2 S.C.R. 353, which reformulated the test to be applied on a s. 24(2) application. He relied on the traditional test articulated in *R. v. Collins,* [1987] 1 S.C.R. 265. The *Collins* factors to be considered in determining whether evidence should be excluded are (i) the effect of admission on the fairness of the trial; (ii) the seriousness of the violation; and (iii) the effect of excluding the evidence on the administration of justice.

a. Review of the Trial Judge's Analysis of the Appellant's Post-Arrest Statement Under the Traditional *Collins* Test

[44] The trial judge concluded that trial fairness would not be adversely affected by admission of the statement. He was satisfied that the appellant would not have acted any differently in his interview with Sergeant Tost had he known that the police were also interested in the surveillance camera incident, the shopliftings, and the Rockwood Camp. The trial judge was also satisfied that the

police had not acted in bad faith. Drawing on *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 213, in making the former finding, the trial judge relied on the following as "positive evidence supporting the inference that [the appellant] would not have acted any differently ... had his rights been fully respected":

- N.Y. understood he was arrested for the very serious offence of terrorist activity in relation to the Washago camp;
- after being advised of his right to remain silent and his right to consult counsel in relation to the Washago camp allegations, N.Y. volunteered that it was just a camping trip;
- N.Y. received legal advice based upon the fact he faced this very serious charge;
- Sergeant Tost made clear at the beginning of questioning that there were two charges, one relating to the Washago camp and the second relating to activities over the period March 1, 2005, to June 2, 2006;
- N.Y. stated that he had been advised by counsel that he should not say anything, or not much of anything, to the police;
- despite legal advice in relation to the Washago camp charge, and advice from Sergeant Tost there was a second broader charge, N.Y. chose to speak to the police at some length offering guarded and generally exculpatory answers;

- the shopliftings and other activities flowed from and were a continuation of the activities at the Washago camp; and
- N.Y.'s approach to all of the questioning was to the same effect, namely that there was no terrorist motivation or, if there was, it was lost on him.

[45] In addition, the trial judge was satisfied that if, despite the foregoing evidence, there was some reason why the appellant would have acted differently if he had been aware of the other allegations, this was a matter "clearly within his knowledge" and he had not provided any evidence that he would have acted differently. This was a factor in favour of the Crown having satisfied its onus of establishing that the appellant would have given his statement in any event, had he been fully apprised of his rights: see *Bartle*, at p. 213, where Lamer C.J. observed that if there is positive evidence that the accused would not have acted differently, an accused who fails to provide evidence that he or she would have acted differently – "a matter clearly within his knowledge" – runs the risk that the Crown will satisfy its burden of persuasion.

[46] The implications of the questioning about the Rockwood Camp and the appellant's lie that he was not there is troubling as it turned out to be a factor in the trial judge's ultimate assessment of N.Y.'s credibility. There is no easy way to know if the appellant would have decided to stay silent, or if he would have told

the truth had he known that his participation at Rockwood formed part of the underpinning charges against him.

[47] Nonetheless, the trial judge made the finding that the appellant would not have acted differently. That finding was open to him to make and there was ample evidence to support it.

[48] As the trial judge noted, the appellant knew that he was being charged with participating in terrorist activities, a very serious charge; yet, against the advice of his lawyer, he chose to speak with the police. Sergeant Tost informed him at the beginning of the interview that there were two charges: one relating to the Washago Camp, and a second relating to the activities between March 1, 2005, and June 2, 2006. Nevertheless, N.Y. disclosed a wide range of activities, which the trial judge concluded were so closely related that they could be considered as part of a single transaction. These included the shoplifting of the walkie-talkies and the camping equipment, which post-dated the Washago Camp (and for which the appellant gave an exculpatory explanation – he did so for personal reasons because he was a shoplifter, and not at the direction of anyone else). In general, as the trial judge found, the appellant's approach to all questioning was "that there was no terrorist motivation or, if there was, it was lost on him."

[49] Moreover, in making the finding the trial judge was aware – indeed, it was common ground – that the appellant had falsely stated he only attended one

camp. This fact was expressly noted by the trial judge in the course of assessing the Crown's argument about the potential significance of the statement as corroboration of other evidence, particularly that of Shaikh, in the context of what the Crown was anticipating to be "a vigorous attack on the credibility of [Shaikh]" at trial – an anticipation with which, as the trial judge noted, "the defence did not take issue." It is clear, therefore, that the trial judge made his finding fully recognizing the potential significance of the lie about the attendance at the Rockwood camp in the credibility exercise that would roll out at trial.

[50] The finding that the appellant would not have acted differently if he had known the police were interested in matters subsequent to the Washago Camp was coupled with another significant step in the trial judge's analysis: the finding that in spite of the police error in explaining the full extent of the appellant's jeopardy and their failure to afford him a further opportunity to consult counsel fully appraised of that jeopardy, the police acted in good faith.

[51] In concluding that the police acted in good faith, the trial judge relied on the testimony of Sergeant Tost and Constable Delguidice, the arresting officer who misinformed N.Y. that he was being charged because "he attended the terrorist training camp at Washago in December." The trial judge was well-satisfied that Constable Delguidice acted in good faith, and that his intention was not to mislead; rather, his error was the result of the fact that he only possessed a

general knowledge of the case and was unprepared to go beyond telling NY that he was being charged with “terrorist activities”. The trial judge found that his response would have been accurate if he had prefaced his statement by saying that the Washago camp was only “one example” of terrorist activity. However, the trial judge also recognized that Constable Delguidice did not want to engage in conversation with N.Y. because he knew that it was not his role to conduct the interview. Further, N.Y. responded by starting to explain his conduct and Constable Delguidice, not wanting to elicit a confession, thought that the less said the better.

[52] Sergeant Tost’s failure to rectify the *Charter* violation was also inadvertent. He began his interview by stating that there were two separate charges. While this may have warranted repetition, he was under time constraints to finish the interview and he had every reason to believe that NY had been properly advised by Constable Delguidice.

[53] These two findings – that the appellant would not have acted any differently and that the police acted in good faith – were the underpinnings for the trial judge’s conclusion that the first *Collins* factor (the impact on trial fairness) would not be compromised by the admission of the statement. For similar reasons, he concluded that in all the circumstances, the breach of the appellant’s ss. 10(a) and 10(b) rights was relatively minor (the second *Collins* factor). Finally,

the foregoing factors, coupled with the serious nature of the criminal charges facing the appellant and the relative importance of the statement to the Crown's case at trial, all favoured the conclusion that the exclusion of the evidence would tend to bring the administration of justice into disrepute (the third *Collins* factor).

[54] Would the same result follow if the newly-formulated *Grant* criteria were applied to the facts before the trial judge? In my opinion it would.

b. Application of the Modern *Grant* Test to the Trial Judge's Finding

[55] Since *Grant*, the court's role in a s. 24(2) analysis is to assess and balance (i) the seriousness of the breach, (ii) the impact of the breach on the *Charter*-impacted rights of the accused; and (iii) the interest of society in having criminal matters determined on their merits. These concerns, "while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence": *Grant*, at para. 71.

[56] In arriving at this overall approach to the admissibility or exclusion of evidence in the event of a *Charter* breach, the Supreme Court retreated somewhat from the principle that evidence classified as "non-discoverable conscriptive evidence" was almost automatically to be excluded on trial fairness grounds. The Court observed that this general understanding had erroneously evolved since *Collins* and a later decision of the Court in *R. v. Stillman*, [1997] 1

S.C.R. 607: see *Grant*, at paras. 64-65. Evidence was classified as conscriptive when "an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples": *Stillman,* at para. 80, per Cory J.

[57] Thus, to the extent there ever was one, since *Grant* there is no general rule that a statement obtained in violation of a *Charter* right, as in this case, is to be automatically excluded. Indeed, even prior to *Grant*, the Supreme Court had recognized that there may be circumstances – albeit rare – where, if the statement would have been made in any event, notwithstanding the violation, the impact of the breach may be tempered and the "all-but-automatic exclusion" rule not applied. As the Court noted in *Grant*, at para. 96:

> … when a statement is made spontaneously following a *Charter* breach, or *in exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the Charter breach* (see *R. v. Harper*, [1994] 3 S.C.R. 343)*, the impact of the breach on the accused's protected interest in informed choice may be less.* Absent such circumstances, the analysis under this line of inquiry supports the general exclusion of statements taken in breach of the *Charter.* [Emphasis added.]

[58] Accordingly, just as they were central to the trial judge's analysis under the *Collins* criteria, the findings that the police violation was inadvertent, that the police acted in good faith, and that the appellant would have acted no differently had the breach not occurred, are central to the *Grant* analysis as well.

[59] Any *Charter* violation is serious, but not all violations are equal on the seriousness spectrum. Given the finding that the police violation was inadvertent, that the police acted in good faith, and that the appellant would have acted no differently had the breach not occurred, it cannot be said that the breach here is sufficiently serious that admission of the statement would "send the message the justice system condones serious state misconduct" (the first *Grant* factor). For similar reasons, the impact of the breach on the *Charter*-protected interests of the accused is attenuated as well; the impact cannot have been significant if the appellant would have made the statements he made in any event (the second factor). Finally – particularly given the foregoing – society's interests in having a serious case, such as this case, adjudicated on the merits is high (the third factor).

[60] All of these considerations, taken individually, and balanced and assessed as a whole, weigh in favour of admissibility, in my opinion. The admissibility of the statement would not bring the administration of justice into disrepute.

[61] I would not give effect to this ground of appeal either.

3. Admissibility of Hearsay: The Co-Conspirators' Exception

[62] A significant part of the Crown's case was based on the evidence of Shaikh about his conversations with Ahmad and statements that Ahmad had made to him about the activities and statements of other members of the terrorist

plot, including the appellant. The appellant argues that this evidence should have been excluded, or at least not afforded ultimate reliability.

[63] At its heart, the appellant's complaint is that Shaikh's evidence does not possess the required indicia of necessity and reliability – the twin pillars underpinning the principled approach to the admissibility of hearsay testimony developed by the Supreme Court of Canada in *R. v. Khan*, [1990] 2 S.C.R. 531 and *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144. This is primarily because Ahmad was available to testify and be subjected to cross-examination. Therefore, his evidence should not be permitted to go in through the mouth of another witness through whom he could not be cross-examined (the necessity factor). Also, Ahmad's evidence was riddled with lies and exaggerations and therefore could not be tested by cross-examination and subjected to the in-court assessment of the trial judge (the reliability factor).

[64] The appellant recognizes that in *R. v. Mapara*, [2005] 1 S.C.R. 358, the Supreme Court of Canada confirmed the continued existence of the co-conspirators' exception as a valid exception to the hearsay rule and refused to set it aside or alter it in spite of the development of the principled approach to hearsay. However, the appellant makes two points with respect to this exception to the rule. First, he submits that *Mapara* did not confirm the continued existence of the exception for cases where, as here, the co-conspirator whose statement is

sought to be tendered (Ahmad) is available to testify (in *Mapara*, the co-conspirators were not available to testify). Secondly, he submits that the trial judge erred in importing conspiracy-law principles into the terrorist context, and additionally, that in doing so the trial judge conflated the proof of admissibility of the hearsay with proof of the elements the Crown was required to prove for the terrorist offence with which the appellant was charged.

[65] Finally – returning to where he began – the appellant contends that, even if Shaikh's testimony might otherwise be admissible under the co-conspirator's exception to the hearsay rule, this is one of those "rare" cases where the evidence should nonetheless have been excluded, or at least not found to be ultimately reliable on necessity and reliability grounds: *Starr*, at para. 214; *Mapara*, at para. 34; and *R v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), at paras. 125, 132.

[66] I do not accept these submissions. While the issues of necessity and reliability run through much of the debate, I will start with the co-conspirators' exception.

a. Application of the Co-conspirators' Exception to the Hearsay Rule

[67] Under the co-conspirators' exception to the hearsay rule, hearsay evidence about the acts and declarations of an accused's alleged co-conspirators, done or said in furtherance of the conspiracy or a common criminal

design, is presumptively admissible. In *Mapara*, at para. 8, McLachlin C.J. summarized the exception in this way:

> The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p.303). Following *Carter*,[2] co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.

[68] On the issue of necessity, McLachlin C.J. adopted the analysis of this Court in *Chang*, at para. 105, that "necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy." On the issue of reliability, the Chief Justice ultimately concluded that "the conditions of the *Carter* rule provide sufficient circumstantial guarantees of trustworthiness necessary to permit the evidence to be received" (para. 27). She arrived at this conclusion despite inherent reliability concerns arising out of "the

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[2] *R. v. Carter*, [1982] 1 S.C.R. 938.

character of the declarants and the suspicious activities in which they are engaged" (para. 19). Concerns at the threshold reliability level were adequately met, in the end, by the fact that the co-conspirators' exception only becomes applicable once the trial judge has determined,

> a) that the first two requirements of the *Carter* test for conspiracy have been met, namely, that the existence of a conspiracy has been established beyond a reasonable doubt, and that the accused has been found on the balance of probabilities, based on evidence directly admissible against him or her, to have been a member of the conspiracy; and,
>
> b) that only those statements made in furtherance of the conspiracy may be considered.

[69] In her reasons, McLachlin C.J. placed considerable emphasis on the latter point (para. 26).

[70] The appellant argues, however, that *Mapara* was a case in which the co-conspirators were not available to testify because they were being tried together. The hearsay testimony was therefore necessary. He contends that the Supreme Court did not intend to extend the reach of its ruling to situations where, as here, the declarant is available to be called as a witness. Cases where the declarant is available to testify must therefore be analysed, he says, under the mantle of the "rare case" scenario and in accordance with the necessity and reliability considerations set out in the principled approach to the admission of hearsay. In

this respect, he relies upon the subsequent decision of this Court in *R. v. Simpson*, 2007 ONCA 793, 230 C.C.C. (3d) 542.

[71] Mr. Simpson was convicted of various drug-related offences. The Crown alleged that he was the supplier to a drug dealer named Williams, who in turn sold cocaine to several undercover officers. At trial, one of the undercover officers testified that she had conversations with Williams in which Williams indicated that he had obtained drugs from his "guy". The undercover officer interpreted this to be his supplier, Simpson. She also testified that Williams then phoned Simpson and attended at the premises Simpson rented. Williams was not called at trial. He had originally been charged as a co-accused, but had resolved those charges by the time of Simpson's trial.

[72] Writing for the court, LaForme J.A. conducted a careful analysis of the relationship between the co-conspirators' exception and the principled approach to hearsay evidence. He underscored this Court's statement in *Chang* that the necessity component is satisfied in the context of the co-conspirators' exception by the combination of three justifications, not simply one relating to the quality or unique character of the evidence alone. To repeat, the three justifications are "the non-compellability of the co-accused declarant, the undesirability of trying alleged co-conspirators separately, *and* the evidentiary value of

contemporaneous declarations made in furtherance of an alleged conspiracy" (emphasis added): *Chang*, para. 105.

[73] At the end of the day, however, the decision in *Simpson* was founded on the "rare case" scenario as articulated in *Starr* and *Mapara*, namely that "[i]n 'rare cases', evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case": *Mapara*, para. 15; see also *Simpson*, paras. 12, 27. In all of the circumstances of *Simpson*, LaForme J.A. concluded that the evidence of the undercover officer about Williams' statements concerning Mr. Simpson did not meet the necessity and reliability tests and should not have been admitted. He allowed the appeal and set aside the conviction.

[74] *Chang* raised, but left open, the question whether the co-conspirators' exception should apply at all, or in some modified form, where the declarant is available to testify. In *Simpson*, LaForme J.A. concluded that the Court in *Mapara* limited its decision on the issue of necessity to circumstances where the declarant was unavailable (at para. 35). As Williams was available (no reason was given for not calling him), LaForme J.A. focussed his analysis on the indicia of necessity and reliability, although he did so under the rubric of the "rare case" scenario. He concluded that there were not sufficient indicia of necessity and

reliability in that case, and that the statement of the undercover officer should not have been admitted. He allowed the appeal. I concurred in that decision.

[75] Like the trial judge, however, I do not understand *Simpson* to stand for the proposition that the co-conspirators' exception to the hearsay rule – that is, that the out-of-court declarations are presumptively admissible – may never apply where the declarant is available to testify. Indeed, at para. 36, LaForme J.A. said:

> There is no doubt in my mind that the availability of the declarant, *in some circumstances*, can support the "rare exception" in which the *Carter* test *might yield* to that required by *Starr*. In other words, the availability of the co-conspirator declarant as a witness, *may require* that the declaration be adduced through the testimony of the declarant. [Emphasis added.]

[76] This is a far cry from stating that the co-conspirators' exception cannot apply at all when the declarant is available to testify.

[77] Indeed, such a proposition would be inconsistent with the flexible approach taken to the notion of necessity in the jurisprudence since the development of the principled approach. As the trial judge noted in his ruling on admissibility, necessity is broader than unavailability of the declarant and extends to the nature and quality of the evidence. He relied upon the following statement in *Chang*, at para. 105, for that opinion:

> … under the principled approach, necessity can be grounded in more than just the unavailability of the declarant. *In Smith,*[3] *Lamer C.J.C. held at pp. 933-934 that "the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations.* What these situations will have in common is that *the relevant direct evidence* is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations". He then cited Wigmore's suggestion that *the categories of necessity should include not only instances where the declarant is unavailable for the purpose of testing through cross-examination, but also situations where "we cannot expect … to get evidence of the same value from the same or other sources"….* In our view, in the case of co-conspirators' declarations, necessity will arise from the combined effect of the non-compellability of a co-accused declarant, the undesirability of trying alleged co-conspirators separately, and the evidentiary value of contemporaneous declarations made in furtherance of an alleged conspiracy. [Emphasis added.]

[78] *Chang* did not say that the combined effect of its three listed factors is the *only* way in which necessity may be found in the case of co-conspirators' declarations. Others as well as Lamer C.J. in *Smith,* have noted that it is *the availability of the evidence, not the availability of the witness*, that is of ultimate significance, and that, while co-conspirators may be physically available, their testimony rarely is: see e.g. *R. v. Barnes*, (2007) O.J. No. 468 (S.C.), at para. 16; *R. v. Pilarinos*, 2002 BCSC 855, 2 C.R. (6th) 273, at para. 14; *R. v. Lam*, [2005] A.J. No. 307, at paras. 38-45; and *Wilder*, at paras. 672-81.

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[3] *R. v. Smith*, [1992] 2 S.C.R. 915.

[79] I therefore conclude that the trial judge was correct when he determined that the theoretical availability of Ahmad to testify at the instance of the Crown or the defence was not an insurmountable impediment to the application of the co-conspirators' exception in the circumstances of this case. I will return to his analysis of the necessity criterion later in these reasons.

b. Were a Conspiracy or Common Criminal Design, and the Appellant's Participation in it, Established? The Carter Steps

[80] The appellant further argues, however, that the trial judge erred in importing the co-conspirators' exception into the terrorist context without proof that a conspiracy or common criminal design existed. In this way, the appellant seeks to deflect the application of the exception by undermining the trial judge's findings that a conspiracy or joint criminal design to engage in terrorist activities did, in fact, exist and that the appellant was probably a member of that plot. This attack cannot succeed, however. As the Crown argues, the terrorist group was the joint criminal enterprise. By definition a "terrorist group" includes "an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity": *Criminal Code*, s. 83.01. The notion of a joint criminal enterprise is inherent in that definition.

[81] The trial judge found the evidence that a terrorist group headed by Ahmad and Amara existed to be "overwhelming." The group's grand design was to attack, and level, major symbols of Canada's political, security, military, and

financial infrastructure. There was abundant evidence in the form of the intercepted communications (admitted on consent), the videos, the Agreed Statement of Fact, and the direct evidence of the acts of Ahmad, Amara and others, to support that finding.

[82] The appellant does not seriously challenge the finding that the conspiracy existed, but argues that he was unaware of the details of the grand scheme and that there was insufficient evidence to establish that he agreed to join and participate in such a conspiracy. I disagree.

[83] The trial judge also found that by the end of the Washago Camp the appellant understood the terrorist nature of the group in which he had become involved, the terrorist intentions of Ahmad, the purpose of the camp, and the fact that Ahmad considered him to be part of the group. Thereafter, the appellant continued his close association with Ahmad, attended other meetings of the group, and participated in further activities designed to further the common criminal enterprise and to enhance the development of the terrorist plot.

[84] The evidence to support these findings includes:

- The appellant's attendance at the Washago Camp, together with the evidence of the *halaqahs*, the video, and the training on live weapons at that Camp;
- His attendance at a meeting on March 11, 2006, with a number of the Washago group where graphic jihadist material was viewed on Ahmad's computer;

- His subsequent attendance and participation at the Rockwood Camp and, in particular, the river-crossing exercise captured on video and conducted as part of the activities there;

- His shoplifting activities, including the theft of camping supplies, a machete, and of a number of walkie-talkies;

- The fact that the police ultimately seized camping equipment, machetes, and a dozen two-way radios/walkie-talkies from Ahmad's house;

- The fact that the video of the Rockwood Camp showed the presence of a walkie-talkie;

- The appellant's close association with Ahmad from November 27, 2005, through June 3, 2006; and

- The fact that in one of the intercepted telephone conversations between Ahmad, another youth (against whom the charges were ultimately withdrawn) and the appellant, the youth referred to the appellant as having a "new guy" in the sense of a recruit (the intercepts were admitted into evidence by agreement).

[85] There was therefore ample evidence directly admissible against the appellant to support the finding, on a balance of probabilities, that the appellant was knowingly a member of the joint criminal enterprise with a common criminal purpose, namely the pursuit of a plan to carry out terrorist activities in Canada.

[86] The appellant complains that in conducting the *Carter* analysis for purposes of assessing the admissibility of Shaikh's hearsay testimony, the trial judge somehow "conflated the proof of admissibility of the hearsay with the elements the Crown was required to prove." In this way, if I understand the

argument correctly, the trial judge erred by merging proof of participation in the offence and proof of membership in the conspiracy. Why? Because, says the appellant, the effect of such an approach is to lower the standard for admissibility, since proof of membership in a terrorist group (requiring only proof of participatory acts) involves a lower threshold than proof of probable membership in a conspiracy (requiring proof of an actual agreement).

[87] This argument does not assist the appellant. First, I am not persuaded the trial judge adopted such an approach. Secondly, even if he did, he conducted the admissibility inquiry on the basis of the *Carter* approach to the establishment of a *conspiracy*. He concluded there was a conspiracy and that the appellant was a probable member of it. He therefore applied the higher threshold analysis the appellant submits was called for.

[88] In any event, although this is a case involving participation in or contribution to the activities of a terrorist group, I am satisfied that the trial judge's application of the co-conspirators' exception to the hearsay rule was correct. The principles rendering out-of-court acts and declarations of co-conspirators done or made in furtherance of the conspiracy presumptively admissible, can apply by analogy, to similar acts and declarations of participants in the activities of the terrorist group where a common criminal intent or joint criminal enterprise relating to the activities of the terrorist group is established. I agree with the trial judge's

view that the co-conspirators' exception extends beyond conspiracies to other situations where there is a common criminal intent or design or a common criminal enterprise: *R. v. Koufis*, [1941] S.C.R. 481, at p. 488;*R. v. Wilder*, [2003] B.C.J. No. 2884 (B.C.S.C.), at para. 649; S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, loose-leaf (consulted on 8 October 2012), (Toronto: Canada Law Book, 2011) at pp. 7-138, 7-141; and David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2012) at 370-71**.**

[89] A conspiracy is complete upon proof of an agreement to carry out an unlawful act: *R. v. O'Brien*, [1954] S.C.R. 666, at p. 668; and *R. v. Paradis*, [1934] S.C.R. 165, at p. 168. It was not necessary for the appellant to be aware of all of the details of the scheme, or of everyone who was involved or their respective roles. It is sufficient that he be aware of the general nature of the common design and agrees to adhere to it: *R. v. Cotroni*, [1979] 2 S.C.R. 256, at p. 276; *R. v. Root* (2008), 241 C.C.C. (3d) 125 (Ont. C.A.), at para. 68; and *R. v. Khawaja*, (2006) 214 C.C.C. (3d) 399 (Ont. S.C.), at para. 36.

c. <u>The Rare Case – Necessity and Reliability</u>

[90] Hearsay evidence that meets the *Carter* requirements is presumptively admissible. But the trial judge was nonetheless required to consider whether the hearsay evidence led through Shaikh – particularly that of Ahmad – should have

been excluded on the basis that this was one of those rare or exceptional cases where necessity and reliability concerns trumped the application of the co-conspirators' exception. He did so, and I see no basis for interfering with his conclusion to admit the evidence.

i. Necessity

[91] Even though Ahmad was theoretically available to be called to testify by either the Crown or the defence, the trial judge was satisfied that the necessity requirement had been met for purposes of admissibility on two bases. First, he relied upon what he viewed as the "far superior" nature and quality of the co-conspirators' evidence as spoken at the time – supported as it was by Shaikh's generally contemporaneous reports and notes, and by various intercepted communications. Secondly, he concluded that, even though Ahmad and other declarants may have been available to testify, they were unlikely to be cooperative witnesses and therefore the true nature of their evidence was not available in that sense. These were both appropriate considerations, in my view.

[92] As noted above, and as the trial judge observed, necessity can be grounded in more than the availability of the witness; it must be given a flexible definition, and may arise in cases in which one cannot *expect* to get evidence of the same "value" or quality from other sources: see *Chang*, at para. 105, and *R. v. Smith*, [1992] 2 S.C.R. 915, at pp. 933-34. Statements made by co-

conspirators in furtherance of the common design assist in providing a picture of the conspiracy that is unlikely to emerge were the evidence to be given directly by the co-conspirator at trial several years after the events. In *United States v. Inadi*, 106 S.Ct. 1121, at 1126 (1986), the United States Supreme Court made the same point very succinctly: “Conspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand.”

[93] Here, in addition to the foregoing factors, the trial judge properly pointed out that he was being asked to consider “the ‘value’, or what [he took] to be the nature and quality, of the evidence that one can reasonably expect from a co-conspirator called to testify, two years after the fact, as to the words spoken by ten or more co-conspirators at various meetings, camps and in conversation over a period of six month.” This distinguishes *Simpson*, where the requirement of necessity was held not to have been met. In this regard, the trial judge noted in his ruling on admissibility of hearsay:

> Each case falls to be decided on its facts. If we consider cases on a spectrum, at one end would be cases, similar to N.Y., in which the Crown alleges a multi-party conspiracy over an extended period of time. At the other end of the spectrum would be a case such as *Simpson*, in which there was really one question for the declarant if called to give evidence: “Were you Mr. Simpson’s drug supplier on the offence date”. There would be no reason to think that the declarant would not have a clear memory on that straightforward point. Thus, in *Simpson*

> the quality of the evidence of the declarant would be at least equal to that of the police officer assuming, as the Court did, that the declarant would be co-operative.

[94] I agree with this distinction and with this analysis.

[95] Whether the "far superior" nature and quality of co-conspirators' declarations in furtherance of the conspiracy are sufficient in themselves to meet the requirements of the co-conspirators' exception or to overcome necessity concerns need not be addressed in this case. The combination of that consideration with the second ground for the trial judge's decision that necessity concerns had been met – the declarants would likely be uncooperative witnesses – is sufficient, in my view.

[96] There was ample evidence to support the trial judge's conclusion about the likely lack of cooperation, including the wisdom of the jurisprudence, reflected above, that while declarants in conspiracy cases may be physically available to testify, the true quality of their evidence is not likely to be. Ahmad and the other declarants were still in the process of being prosecuted, albeit in separate trials. In addition, part of the record that was put before the trial judge by agreement on the admissibility motion consisted of what was called "Evidence of the Declarants' Unwillingness to Cooperate." This evidence included intercepted communications in which Ahmad expressed his disrespect for, and distrust of, authority, his willingness to defy it, and his view that lying is justified when it is "in

a situation that somehow relates to Islam." The evidence also included statements by Ahmad and Amara to the effect that they were prepared to kill the police if approached.

[97] The trial judge made no error in concluding that the necessity requirement had been met in the circumstances of this case. Nor did he err in concluding that both threshold and ultimate reliability concerns had been met, in my view.

ii. Reliability

[98] Statements admitted pursuant to the co-conspirators' exception to the hearsay rule possess sufficient circumstantial indicators of threshold reliability as explained earlier in these reasons. As McLachlin C.J. observed in *Mapara*, compliance with the first two stages of the *Carter* process may provide some corroboration of the statements at issue but, more importantly, provides circumstantial indicators of reliability (at paras. 24, 26):

> 24. … Proof that a conspiracy existed beyond a reasonable doubt and that the accused probably participated in it does not merely corroborate the statement in issue. *Rather, it attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise*. It is similar in its effect to the *res gestae* exception to the hearsay rule, where surrounding context furnishes circumstantial indicators of reliability. The concern is not with whether a particular statement is corroborated, but rather with circumstantial indicators of reliability.
>
> …

> 26. In addition to these preliminary conditions, the final *Carter* requirement, i.e. only those hearsay statements made in furtherance of the conspiracy can be considered, *provides guarantees of reliability in the more immediate circumstances under which the statement is made. "In furtherance" statements "have reliability enhancing qualities of spontaneity and contemporaneity* to the events to which they relate" (*Chang*, at paras. 122-23). They have *res gestae-type qualities, being "the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence"* (*Chang*, at para. 123). This "minimizes the motive and opportunity for contrivance" (*Chang*, at para. 124). The characters' doubtful reputation for veracity is not a factor at this stage of the analysis. Rather, it is to be taken into account by the jury when assessing the ultimate reliability of such characters' statements. [Emphasis added.]

[99] In this sense, while it may go to the necessity analysis and to trial fairness concerns, absence of the declarant's ability to testify does not deprive statements made in furtherance of the conspiracy – where the *Carter* requirements have been met – of the "circumstantial indicators of reliability" that supports their admissibility. The *Carter* screening still clothes them with those characteristics. Accordingly, whether the presumptive admissibility effect of compliance with the co-conspirators' exception, as confirmed in *Mapara*, applies to situations where the declarant is available to testify, the underlying circumstantial indicators of trustworthiness emerging from compliance with *Carter* remain as a starting point for the "rare case" analysis.

[100] In addition to the foregoing, the appellant argued strongly that Ahmad's lack of credibility and reliability rendered his statements inadmissible. As the trial judge noted, the chief complaint was that Ahmad's evidence was riddled with exaggeration and fabrication "so that when, in his conversations with Mr. Shaikh, he makes reference to N.Y. he may be making things up to give the impression his plans are moving forward or exaggerating the role N.Y. actually played." The trial judge rejected this argument, however, as he was entitled to do so on the record, because of the built-in circumstantial indicators of reliability where evidence is admitted under the co-conspirators' exception, and because similar reliability concerns are characteristic of most such evidence in conspiracy cases. As the Court noted in *Mapara*, at para. 36, "[such] weaknesses go to the ultimate weight of the evidence, which is for the jury to decide."

[101] In addition, circumstantial guarantees of the trustworthiness of the statements, for threshold admissibility purposes, were found in numerous recorded, intercepted communications (the admissibility of which was not challenged), Shaikh's contemporaneous notes of his encounters with the declarants in the form of his Source Debriefing Reports to his superiors, and his own notes. These are relevant considerations in determining threshold admissibility: see *R. v. Khelawon*, [2006] 2 S.C.R. 787. Indeed, at trial,

appellant's own counsel acknowledged that "there's no question that [Shaikh's] evidence is of high quality in terms of reliability of documentation."

[102] Finally, the trial judge was entitled to find that, although Ahmad was "of extremely unsavoury character" whose statements were regarded "with the greatest care," Ahmad had not lied about everything. This included statements admitted for the truth of their contents to show (a) that there was in fact a terrorist group, (b) that the appellant committed acts in furtherance of the aims of the terrorist group (i.e., "stealing stuff for [Ahmad]", shoplifting walkie-talkies and camping equipment, and removing the surveillance camera), and (c) that Ahmad had told the younger members of the group at the Washago Camp to keep silent about what Shaikh took to be "the more nefarious" aspects of the Camp.

[103] The appellant argued at trial, and again on appeal, that Ahmad was grandiose, delusional, and totally incredible and that anything he said concerning the appellant should simply be ignored. The trial judge did not accept this position. He acknowledged that Ahmad "was generally untrustworthy with no compunction about lying if it suited his purposes", but pointed out that sometimes those purposes were strategic and consistent with advancing the aims of the group. For example, exaggerating the number of members in the group and suggesting that he had access to large and imminent infusions of cash and weapons served to boost morale and placate doubts.

[104] It is well accepted that a trial judge may accept all, none, or some of the evidence of a witness. That the trial judge here might have taken a view contrary to the appellant's is not the issue. It was open to the trial judge on the record to take the view of the evidence that he did and to accept the forgoing inculpatory statements about the group's terrorist activities and the appellant's role in them.

[105] It was also open to him as well to find that the impugned statements were made in furtherance of the common criminal design. In his Reasons for Judgment, the trial judge states the following:

> The "in furtherance of the objects of the group" requirement is met in that:
>
> (a) Ahmad informing Shaikh about the discovery of the surveillance camera was to draw on his perceived security competence with a view to protecting the group;
>
> (b) Amara questioning Ahmad about N.Y. stealing 16 walkie-talkies and other items was a report by one leader of the group to another; and
>
> (c) Ahmad and Amara discussing the arrests at Canadian Tire two days before and Ahmad's statement that they were stealing for him were reports as to an important event affecting the security of the group. For example, Amara would logically want to know if N.Y. was acting on his own or as directed, and what, if anything, he disclosed to the police.

[106] Similarly, Ahmad's statements that helped establish the existence of the terrorist group – for example, his statements to Shaikh about planning a terrorist

camp, his need for a trainer “to train guys to do this stuff”, his expected targets, his exhortation to the youth members of the Washago group to keep quiet about the criminal nature of the Camp’s activities, and his comments about the size of his group and the pending availability of large amounts of cash and weaponry (albeit exaggerated) – were all designed to encourage and advance the objects of the group. They were made “in furtherance of” the common criminal design.

[107] Moreover, as the Crown points out, many of Ahmad’s out-of-court declarations were corroborated by other extrinsic evidence. His bragging to Shaikh about the appellant’s theft of the walkie-talkies is supported by (i) a telephone intercept of January 23, 2006, in which the appellant called Ahmad and asked whether he could drop some stuff off at Ahmad’s house; (ii) a further telephone intercept shortly thereafter in which Ahmad advised Amara that the appellant had acquired six walkie-talkies for the group, (iii) video footage of the Rockwood Camp showing the appellant as part of a group sitting cross-legged, faces masked, reading a document flanked by large knives and a walkie-talkie; (iv) items seized by police from Ahmad’s home, as described above; and (v) the appellant’s admission in his interview with Sergeant Tost that he stole walkie-talkies. Ahmad’s statement to Shaikh that he intended to purchase property for training purposes or a hideout was supported by intercepted telephone conversations. These intercepts showed that in February 2006, Ahmad, Shaikh

and others travelled to Opasatika, a northern community, to scout out a safe house that could be used for these purposes. Finally, Ahmad's statement to Shaikh that he intended to hold a training camp came to fruition when the Washago Camp was, in fact, held.

[108] For all of these reasons I am satisfied that the trial judge was correct to consider, and apply, the co-conspirators' exception to the hearsay rule in the circumstances of this case, and to conclude – based on a thorough examination of the record – that this was not one of those "rare cases" where the evidence should be excluded, nonetheless, because the required indicia of necessity and reliability were lacking in the particular circumstances. I see no basis for interfering in his findings and conclusions in this regard.

4. Abuse of Process

[109] At the end of trial, the appellant applied for a stay of proceedings pursuant to s. 24(2) of the *Charter* on the basis of an alleged abuse of process. In essence his submission was, and is, that Shaikh's state-authorized conduct at the Washago Camp and his role as leader in inducing the appellant (and other young people) to embrace the ways of terrorism were so offensive that they offend the community's sense of fair play and decency, and undermine the integrity of the justice system. They ought not to be countenanced, therefore, and a stay of conviction ought therefore to be imposed.

[110] Counsel for the appellant break this argument down into three separate, but related submissions, contending that the trial judge erred (i) in finding that Shaikh was not a state agent, (ii) in failing to find that Shaikh committed a range of criminal offences and that this and other misconduct amounted to an abuse of process, and (iii) in failing to find that that Shaikh used a position of authority to exploit a distinctly vulnerable youth, contrary to community values of decency.

[111] Counsel submit these questions required careful judicial scrutiny of whether Shaikh operated as a state agent, as opposed to a mere confidential informant, at the Washago Camp. They also required a careful analysis of whether Shaikh's conduct in relation to the young recruits, including the appellant, constituted entrapment and/or offended the community's sense of decency and fair play in a manner sufficient to justify a stay of conviction. The difficulty with the appellant's position, however, is that the trial judge did conduct the very types of analyses and evaluations that the appellant contends were required. He simply came to a different conclusion on the facts as he found them than the appellant would have liked.

a. Shaikh as Confidential Informant or State Agent

[112] The appellant argues that the trial judge erred on the facts in finding that Shaikh, a paid civilian, was not a state agent. The appellant points to Shaikh's key leadership role at the Washago Camp as military trainer, his superior

religious knowledge, and his influence over the target group of youths, including the appellant. In particular, the appellant contends that the trial judge relied too heavily on the fact that Shaikh had not signed a Letter of Agreement with the RCMP at the time of the training camp, thus misconstruing the indicia of agency and elevating form over substance.

[113] These submissions cannot succeed, in my view.

[114] First, whether an actor is a state agent, as opposed to a confidential police informant, is a question of mixed fact and law. The trial judge was entitled to make the findings he made, and we see no basis for interfering with his conclusion that Shaikh was not a state agent at the time of the Washago Camp.

[115] Secondly, while Shaikh did in fact play a leadership role – perhaps even a key role – in relation to the targeted youth, the trial judge found as a fact that the Washago Camp would have taken place, and the events would have unfolded, much as they did whether Shaikh or someone else had been there. Chad had already been secured as a potential trainer before Shaikh became involved, for example. The trial judge found that the relationship between Shaikh and the RCMP had little or no impact in terms of what happened at the Camp.

[116] The finding that Shaikh was not a state agent at the time of the Washago Camp was based on the combination of a number of facts as found by the trial judge:

- Shaikh wished to be treated as a confidential informant, and was treated in that fashion by the RCMP in accordance with their legal obligation;

- Shaikh had not signed a Letter of Agreement with the RCMP at the time of the Washago Camp (he did so in February and from that point on was admittedly a state agent);[4]

- Although the RCMP encouraged him to attend the Camp, Shaikh was given no direction as to what he was to do there, except that he was to keep his eyes and ears open and was not to break the law (the fact that he did break the law, at least in relation to the firearm that was present – and lied to the police about its presence – cannot amount to an indicia of control by the RCMP);

- Shaikh's presence at the Camp was not covered by a false identity or a state-fabricated story;

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[4] The state is obliged to protect the identity and confidentiality of a confidential informant. A Letter of Agreement could not be signed until it was clear Shaikh was willing to the step from informant to state agent. Nor could the RCMP have obtained an order under s. 25.1 of the *Criminal Code* before that time. An order under s. 25.1 would provide statutory justification for the commission of crimes in accordance with the requirements of that provision.

- The Washago Camp was planned by Amara and Ahmad prior to any relationship between Shaikh and the RCMP, and prior to any contact between Shaikh and the terrorist leaders or the targeted youth; another individual, Chand, had been recruited as a trainer; unbeknownst to Shaikh, Amara brought the handgun and ammunition to the Camp; Ahmad supplied the jihadi video presentations and made his exhortation to the group; in short, the information and indoctrination presented to the appellant was not influenced or affected by any state action;

- There was limited contact between the appellant and Shaikh after the Washago Camp, and not a great deal of contact during it;

- It was Ahmad, not Shaikh, who counselled the appellant that it was “permissible and even laudable to steal from non-believers”; and

- The appellant’s guilt was based on acts that occurred after the Washago Camp (shoplifting, removing the surveillance camera, and attending the Rockwood Camp.

[117] It is true, as the appellant points out, that there were other factors at play on the record: Shaikh was at least partially motivated to attend the Camp by his desire to help the RCMP interrupt a terrorist plot (enhanced by police blandishments about the importance of his doing so); he would be compensated only if he went to the camp; and before he attended the Camp Shaikh had decided that he would do so and testify if necessary. However, the trial judge concluded that the determining factors leading Shaikh to attend the Camp were his moral and religious convictions (an interest in the de-radicalization process, a sense of pride in frustrating the terrorist plans, and his moral obligations under Islam) rather than the direction of the RCMP or the compensation for attending.

[118] Counsel for the appellant robustly attack many of the foregoing findings, thereby seeking to enhance the role of Shaikh and his influence over the appellant and others. But, all of the findings were supported on the record and were open to the trial judge to make, as was his ultimate finding that Shaikh had not acquired the status of state agent at that time. I see no basis for interfering with them.

[119] The appellant placed some emphasis on the trial judge's use of the lack of a signed Letter of Agreement in concluding that Shaikh was not a state agent, arguing that he misconstrued the indicia of agency in this respect or that he improperly elevated form over substance in his analysis. I do not agree.

[120] It is apparent from the foregoing findings that the lack of a formal Letter of Agreement between Shaikh and the RCMP at the time of the Washago Camp was only one of a number of factors the trial judge assessed in making his finding that Shaikh was not a state agent. The transformation from confidential informant – Shaikh's status when he came to the RCMP from CSIS – to state agent is a subtle one, as the trial judge noted. A Letter of Agreement is one of the final steps and its absence in this case was telling.

[121] To understand this, it is helpful to recognize the significant difference between a confidential informant and a police agent and the state's obligations in relation particularly to the former.

[122] A confidential informant is a voluntary source of information to police or security authorities and is often paid for that information, but does not act at the direction of the state to go to certain places or to do certain things. A state agent does act at the direction of the police or security authorities and, too, is often paid. The state agent knows that if charges are laid, his or her identity may be disclosed to the defence and that he or she may be required to testify. A major distinction is that a confidential informant is entitled to confidentiality (subject to innocence at stake considerations) and may not be compelled to testify – protections that are vital to the individuals who provide such information, as they

often put their lives on the line to provide information that may be vital to state security. A state agent is not afforded such a shield.

[123] The state has an obligation to protect the confidential nature of an informant's identity and it is a big step for a confidential informant to become a state agent. The RCMP therefore had a clear duty to protect Shaikh's status as a confidential informant until the police were sure that he had agreed to cross the Rubicon into police-agency territory, and Shaikh had much to consider before agreeing. The trial judge found that in January 2006 Shaikh was still discussing the implications of becoming a state agent with his family, and that at the time he attended the Washago Camp he was still undecided but was prepared to go to the Camp and run the risk that it would not be possible to protect his confidentiality. His belief in Islam compelled him to do this.

[124] A Letter of Agreement is not a mere formality. Before it can be executed, the police must interview the individual and prepare a risk assessment to determine the nature of the support that will be provided (including, in this case, whether it would extend to the relocation of Shaikh and his family). As the trial judge observed, Shaikh could make no informed and effective waiver of his rights to confidentiality until he had this information. The Letter of Agreement would make it clear that Shaikh was voluntarily waiving any confidentiality privileges that he had, and would specify the expectations and obligations of the RCMP.

The fact that Shaikh had not executed such a document before the Washago Camp was a legitimate consideration for the trial judge to weigh in determining whether Shaikh had or had not become an agent of the state at that time.

[125] Whether Shaikh was or was not a state agent was an important issue for the defence because if he were, that fact would lend more force to the appellant's arguments on entrapment and abuse of process. I would not interfere with the trial judge's finding that Shaikh was not a state agent. That said, the trial judge concluded that, even if he were wrong in making that finding, it would have made no difference because a stay was not justified on either of the other two arguments raised by the appellant – entrapment and Shaikh's conduct as an affront to the community's sense of "fair play and decency."

[126] I turn to those arguments now.

b. Entrapment

[127] In my view, the argument that the state entrapped the appellant into embracing the terrorist plans and committing the crimes that underpinned his conviction for the terrorist offence fails for two reasons. First, it was Ahmad and Amara who provided the opportunity for the appellant to do these things, not the state acting through Shaikh. The RCMP was acting on a reasonable suspicion that the appellant was already engaged in terrorist activities, or it was making a *bona fide* inquiry into potential terrorist activities in which he happened to be

involved. Secondly, even if the state, acting through Shaikh, did provide the opportunity, it did not go beyond providing an opportunity and induce the commission of the offence. These are the requirements for entrapment: see *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 964-65, per Lamer J.

[128] As to the first branch of the test, before the Washago Camp, the appellant was at the Taj Banquet Hall meeting and was seen there associating with and deferring to Ahmad. Ahmad had shared his plans to attack and destroy major Canadian institutions with Shaikh at that meeting. The appellant attended the Camp at the invitation of Ahmad, not Shaikh. When the appellant appeared for the supply run on the eve of the Camp, he seemed to the police to be part of a small group of young men embarking on a journey to a suspected terrorist training camp. The police were therefore acting on a reasonable suspicion that the appellant was already engaged in the terrorist plan or, at least, found himself in a position where his involvement was the object of a *bona fide* inquiry.

[129] Once at the Camp, Shaikh could scarcely avoid interacting with the appellant and the others without undermining his purpose.

[130] As to the second branch of the test, the trial judge properly found that it was not the state acting through Shaikh, but rather Ahmad and Amara who created the opportunity for the appellant to become involved and, following the Camp, induced him to commit the shoplifting offences, remove the surveillance

camera, and attend the subsequent Rockwood Camp. As outlined above, Ahmad and Amara had already planned the Washago Camp before Shaikh became involved. Also, the trial judge found that the Camp and the training events would have evolved as they did regardless of whether Shaikh or someone else had been the designated trainer. It was Ahmad, in particular, who had a continuing influence on the appellant after the Camp and who was his confidant, leader, and "*amir*." It was Ahmad who instigated the shoplifting incidents and who arranged to have the appellant remove the surveillance camera. It was Ahmad who persuaded him to attend the Rockwood Camp. Shaikh had very little contact with the appellant following the Washago Camp.

[131] Entrapment evokes society's view "that there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions": *Mack*, at p. 941. However, it is also clear that a finding of entrapment is not to be made lightly, and only in the clearest of cases. Lamer J. also observed in *Mack*, at pp. 975-76, that:

> More fundamentally, the claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in its fight against crime in society. It is only when the police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply.

[132] In *Mack*, at p. 966, Lamer J. outlined a series of factors to be considered when assessing the second branch of the entrapment test (going beyond opportunity to inducement). The trial judge considered each of these factors and, in applying them to the facts of the case, arrived at the following findings:

> (a) The criminal activity and threat being investigated was of the utmost seriousness and alternative techniques were not available to detect what was said, done, and planned at the camp;
>
> (b) An average person, with both strengths and weaknesses, in the position of N.Y., would not have been induced to commit a terrorist offence by anything Shaikh did. As stated, Shaikh's presence had little impact on how the camp unfolded;
>
> (c) Shaikh did not persist or make an attempt to have N.Y. commit an offence;
>
> (d) As to timing, the planning of the camp preceded any involvement by Shaikh;
>
> (e) Shaikh did not exploit any vulnerability of N.Y. to the extent N.Y. was vulnerable as a young and recent convert. Shaikh moderated the indoctrination N.Y. was receiving from Ahmad and others. Certainly, Shaikh had nothing to do with the respect and affection N.Y. had for Ahmad;
>
> (f) Shaikh did not threaten N.Y. in any way;
>
> (g) The conduct of Shaikh was not directed at undermining other constitutional values; and
>
> (h) The conduct that resulted in N.Y. being found guilty occurred after he turned 18 and had little connection to Shaikh and, in the case of the second camp, no connection at all to Shaikh.

[133] In making these findings – which, again, were all supported on the record – the trial judge specifically took into account "N.Y.'s youth, relative naiveté and position as a recent convert to Islam with limited religious knowledge at the time he first met Ahmad and his associates." Contrary to the appellant's submissions, he expressly applied, and agreed with,

> the general principles advanced by the defence derived from the *Youth Criminal Justice Act* and related jurisprudence to the effect that [he accepts] the following:
>
> (a) "A young person is usually far more easily impressed and influenced by authoritarian figures";
>
> (b) "In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons"; [and]
>
> (c) "… age plays a role in the development of judgment and moral sophistication". [Citations omitted.]

[134] The trial judge did not err in dismissing the defence of entrapment.

c. Shaikh's Conduct Did Not Otherwise Warrant A Stay

[135] At the heart of the appellant's stay application is an underlying theme (also important to the entrapment argument): Shaikh's conduct – both in its pervasive criminality and in its objective of luring vulnerable and impressionable young men into terrorist pursuits – was so egregious as to shock the conscience and, in its

totality, to constitute an affront to the community's sense of "fair play and decency" in relation to a youth. To countenance such conduct would undermine the integrity of the justice system. A stay of conviction should therefore be imposed.

[136] In the appellant's view, Shaikh's criminal conduct was pervasive at the Washago Camp. He committed a number of crimes in relation to the 9 mm handgun brought to the Camp by Amara – including acquiring ammunition for it and using it to train recruits in the use of firearms. "More significantly," counsel argue, Shaikh "was liable for prosecution under virtually every provision [in the *Criminal Code*] relating to terrorism" because of the activities he engaged in at the Camp. These acts included training in counter-surveillance techniques; teaching camp attendees to undertake military activities such as marching, running obstacle courses, and handling and shooting firearms; and tacitly endorsing jihadist statements by Ahmad and other communications.

[137] The trial judge did not accept these submissions but concluded, in any event, that even if Shaikh had engaged in the criminal and other conduct alleged, the conduct was not "sufficiently egregious" to justify the "rare case" imposition of a stay of conviction. I agree with him in this regard.

[138] Whether Shaikh had actually participated in terrorist-related offences turned on the question of his motive in attending the Washago Camp and

undertaking the activities he engaged in: *Criminal Code*, s. 83.18(1). The trial judge found that Shaikh's motive was not to enhance the ability of the terrorist group to facilitate or carry out a terrorist activity. Rather, it was the opposite: Shaikh's motive was to disrupt the group and foil the terrorist plans.

[139] In holding that an additional level of subjective intent (or motive) was an essential element of the offence to be proved by the Crown, the trial judge relied on the decision of Rutherford J. in *Khawaja* to that effect. This Court upheld Rutherford J. on the issue of motive as an essential element of the offence of participating in terrorist activities (although it disagreed that the existence of the motive requirement rendered s. 83.18 unconstitutional): *R. v. Khawaja*, 2010 ONCA 862, 103 O.R. (3d) 321. Leave to appeal to the Supreme Court of Canada was granted. The appeal was argued in June of this year and the decision remains under reserve.

[140] In relation to the firearms-related offences, the trial judge agreed that Shaikh may have committed a crime in purchasing ammunition for the handgun Amara had brought to the Camp – a relatively minor crime in the overall scheme of things – but he declined to find that Shaikh had committed a crime in utilizing the handgun to train the recruits. His rationale was that the defence of necessity may well apply in the circumstances. Shaikh's evidence was that it was necessary for him to take control of the handgun, under the pretext of providing

instruction, to protect himself and others (Amara was inexperienced with weapons, had referred to hollow point bullets as “cop killers”, and had threatened to put a bullet in the head of any CSIS agent who might confront him). As the trial judge observed, “[a] refusal by Shaikh to hold or fire the gun would be a strong indicator that he was a police informant or agent, a distinction unlikely to matter much to Ahmad or Amara.”

[141] While I am inclined to agree with the trial judge in this analysis (even though the Crown disavowed reliance on necessity at trial), I do not have to resolve the issue of whether the technical defence of necessity would apply for purposes of the appeal. As noted above, I am satisfied that even if Shaikh’s impugned conduct during the Camp activities amounts to criminal activity, neither his conduct nor that of the RCMP in relation to the Washago Camp justified the imposition of a stay of conviction in the circumstances.

[142] A stay of proceedings is an exceptional remedy to be employed only in rare cases and as a last resort. Here, we are concerned with the application of the court’s “residual” power to impose a stay where the impugned conduct does not touch on trial fairness or other procedural rights under the *Charter* but is otherwise so egregious that it contravenes fundamental notions of fairness and justice and thus undermines the integrity of the justice system: *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 73, per L’Heureux-Dubé.

[143] In *R. v. Regan*, [2002] 1 S.C.R. 297, at para. 55, LeBel J. summarized the concept in this fashion:

> [M]ost cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system…. *When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive"* [Emphasis added.] [Citations omitted.]

[144] In addition, not all illegal police conduct will result in an abuse of process. As Doherty J.A. noted in *R. v. Jageshur* (2002), 169 C.C.C. (3d) 225 (Ont. C.A.), at para. 19,

> [t]he ultimate question is not legality, but whether the police conduct was sufficiently egregious so as to shock the conscience of the community and demand that the court not lend its process to a prosecution flowing from such conduct. This inquiry demands not only a qualitative assessment of the nature of the misconduct, but also a consideration of the societal interests served by allowing the prosecution to proceed despite the police misconduct. [Citations omitted.]

[145] Finally, in deciding whether or not to grant a stay based on its "residual category" powers, a court must balance the interests in granting a stay against society's interest in having a trial on the merits. All of the foregoing principles

were canvassed in this Court's recent decision in *R. v. Zarinchang*, 2010 ONCA 286, 99 O.R. (3d) 721, at para. 60:

> However, the "residual category" is not an opened-ended means for courts to address ongoing systemic problems. In some sense, an accused who is granted a stay under the residual category realizes a windfall. Thus, it is important to consider if the price of the stay of a charge against a particular accused is worth the gain. Does the advantage of staying the charges against this accused outweigh the interest in having the case decided on the merits? In answering that question, a court will almost inevitably have to engage in the type of balancing exercise that is referred to in the third criterion [i.e., balancing of the interests in granting a stay against society's interest in having a trial on the merits]. It seems to us that a court will be required to look at the particulars of the case, the circumstances of the accused, the nature of the charges he or she faces, the interest of the victim and the broader interest of the community in having the particular charges disposed of on the merits.

[146] *Zarinchang* involved a stay granted on a pre-trial *Charter* motion. I would simply add that, in my view, the foregoing considerations apply with even greater force where, as here, a stay is sought to be imposed after an otherwise proper conviction has been entered, particularly in a case of this nature.

[147] Here, the trial judge reviewed and applied the foregoing principles. As I have noted before, the relevant findings were open to him on the record. Having found that Shaikh committed, if anything, a minor offence relating to ammunition, the trial judge concluded that the appellant was clearly not entitled to a stay

remedy. But he did not stop there. He also concluded that, even if Shaikh had inadvertently participated in terrorist offences and committed other firearms offences with respect to the use of the handgun, the police conduct did not amount to the very serious type of unacceptable behaviour necessary to justify a stay. I agree with those conclusions.

[148] In the Summer and Fall of 2005, the RCMP was faced with a dangerous and potentially lethal threat to the security of the Canadian public. Information which they believed to be credible indicated that a terrorist plot was brewing and that it involved the procuring of firearms (the August weapons' importation across the border by Dirie, Ahmad's brother-in-law) and the planned attacks on various military, security, financial and political targets (a military base, buildings housing important financial institutions, Parliament, and the headquarters of CSIS and RCMP). The police had to act, and did. In my view, they did so in an entirely reasonable fashion, and are to be commended for their measured and effective response.

[149] The RCMP had a trusted and able informant in Shaikh who, in turn, earned the trust and confidence of the leaders of the terrorist group. He was invited by those leaders to attend a terrorist training camp intended to recruit new members. The RCMP therefore encouraged Shaikh to attend the camp and to report his observations to them. Shaikh was instructed not to commit any crimes.

The police had no other investigative techniques or means of surveillance available to them at that time.

[150] Even counsel for the appellant, in his trial submissions, conceded the seriousness of the situation and the limited options open to the police:

> The allegations were grave and urgent. There were limits to surveillance. They hadn't received that Part 6 authorization yet. They had no other source of information. And the threat appeared to be immediate.
>
> [The RCMP] knew that this was a terrorist training camp.

[151] Neither Shaikh nor his handlers knew that guns would be involved. When he arrived at the Camp, Shaikh discovered that Amara had brought the handgun. He lied to the police about the presence of weapons but, as explained above, felt that he had to take possession of the handgun for his own safety and that of others at the Camp. He also felt that he had to participate as a weapons trainer to justify the need for possessing the gun and because of his "role" at the Camp. Similarly, he had to participate in the other activities of the group in order to preserve the secrecy of his undercover role and to be seen to be performing the role that he had been asked by Ahmad and Amara to perform. Otherwise, his cover would have been blown and the entire investigation compromised.

[152] In *Khawaja*, at para. 231, this Court highlighted the unique level of terrorist crimes:

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

[153] This context notwithstanding, the appellant argues that the conduct of Shaikh and the RCMP would "shock the conscience" of the Canadian community, particularly in view of the appellant's youth. Quite the contrary, in my view. Had the police not acted as they did to protect the security of the Canadian public, the conscience of the Canadian community would have been shocked. That the appellant happened to be two months shy of his eighteenth birthday when he attended the Washago Camp (albeit an adult when he engaged in the shoplifting activities, removed the surveillance camera, and attended the Rockwood Camp) does not alter this analysis. While undercover operatives in Shaikh's position are required to act within the parameters of the law, it is unrealistic – given the seriousness and urgency of the situations in which they find themselves – to expect that they will be able to act as if they were unvarnished models of purity, and both refrain from engaging in the activities they are underground to investigate and dissuade other participants from getting drawn into those activities, whether they are young persons or not.

[154] Similarly, the trial judge correctly rejected the "institutional failure" argument advanced by the appellant. To impose on the police an obligation to ensure that undercover operators infiltrating a potential terrorist camp be equipped with some sort of strategy to warn youth (who may or may not be present) of the potential error of their ways, is neither tenable nor realistic. The prospects of such a strategy subverting the investigation, and possibly endangering the safety of the operative, are limitless. In my opinion, there was simply no obligation on the state in these circumstances to actively dissuade or protect the appellant from the influence of the other camp attendees. Likewise, the state was not obligated to refrain from engaging with young persons in the course of the type of investigation that Shaikh was participating in, or to be proactive in protecting the appellant and others from exposure to criminal activity.

[155] This is not one of the "exceptional" or "relatively very rare" cases where the conduct of the police, its informant, or agent would justify a stay of conviction; the trial judge made no error in exercising his discretion to that effect.

DISPOSITION

[156] For all of the foregoing reasons, I would dismiss the appeal.

"R.A. Blair J.A."
"I agree S.T. Goudge J.A."
"I agree K. Feldman J.A."

Released:

APPENDIX

Factual Finding Challenged by the Appellant	Evidence to Support the Finding and Response
The trial judge put too much weight on what the appellant saw and heard at the Washago camp because, • the criminal terrorist intent of the group was "equivocal", and • the appellant had an "undeveloped understanding of social, political and religious references."	The trial judge found it "inconceivable" that by the end of the camp there was any doubt about its purpose": • At the Washago Camp, the appellant was exposed to terrorist rhetoric and exhortations, combat training, firearm training while wearing masks and camouflage clothing, shooting of an unregistered 9 mm semi-automatic firearm, and participated in videos of the activities. • The trial judge specifically turned his mind to the appellant's age, education and other personal circumstances and stated that he was "cognizant of and made full allowance for" the very factors that the appellant now claims he did not consider.
The trial judge engaged in impermissible speculation when he concluded that the appellant "would not have stolen items without having been instructed by Ahmad that it was permissible to do so."	The trial judge relied on the following evidence: • Shaikh's testimony that the appellant and two other youths were members of the "procurement unit", tasked by Ahmad to steal materials for his overall purpose. Members were taught by Ahmad that it was acceptable to steal from non-believers. • Ahmad's frequent discussions about the justification for stealing from non-believers with Shaikh. This belief was contained in a document given to Shaikh by Ahmad soon after they met, entitled "Blood, Wealth and Honour of the Disbelievers." • Ahmad was the appellant's mentor. By the end of 2005, the appellant was an earnest Muslim who had made his faith the "centre of his life." Shaikh testified that the appellant would have done "what he was told to do" regarding his faith and that he was very eager to be accepted in his new religion. • The trial judge found, "N.Y. was highly motivated to follow what he understood to be the precepts of Islam as interpreted by Ahmad." This is a reasonable conclusion based on the evidence.

	• In his post-arrest statement, the appellant told police that Ahmad "reads a lot of books" and that the appellant "learns from him." The appellant said that he had been "chilling with [Ahmad] for like a long time." The appellant said that he sought Ahmad's advice on issues, such as how to deal with worldly life, family, marriage and why "past people" used violence to spread Islam. • Intercepted communications demonstrate that Ahmad guided the appellant on matters of faith and that Ahmad directed the appellant to shoplift: - Ahmad told Amara that he told the appellant that shoplifting was "*halal*." - Ahmad told Amara the appellant had stolen two walkie-talkies and told him they needed "probably another two." - Ahmad appears very proud of the appellant's past and planned future thefts. For instance, Ahmad said that the appellant had become "the most professional (laughs) like yo, let me show you what he got" and "[y]o he's so slick about it." - Amara asks Ahmad whether he feels "bad" about the appellant's shoplifting as "now he's hooked."
The trial judge misapprehended the appellant's post-arrest statement relating to the theft of the walkie-talkies because he found it corroborated Ahmad's comments.	Ahmad's statements regarding the appellant's shoplifting were "confirmed to some extent" by the appellant's admission. The trial judge was well aware, having carefully reviewed this evidence within the reasons for judgment, that the appellant denied stealing the walkie-talkies for the group and instead claimed that he shoplifted them for "the fun of it" and possibly to sell to friends.
There was insufficient evidence to justify the conclusion that the appellant removed the hidden surveillance	The trial judge's finding is supported by the following: • intercepted communications; • Shaikh's testimony on January 23, 2006, Ahmad told him that he found a surveillance camera hidden inside an exit sign outside of

camera from outside Ahmad's apartment.	his apartment and that the appellant removed the camera; • Ahmad's statement to Amara that same evening about finding the surveillance camera hidden in the exit sign, and telling Amara "I ripped uh…like some brother, he took down the whole thing"; The trial judge found there was no reason for Ahmad to mislead his trusted associates about these "routine and mundane statements." This conclusion was not unreasonable.
If the appellant removed the surveillance camera, there was insufficient evidence that he did so with the intent to enhance the ability of the group to facilitate or carry out a terrorist activity.	When the appellant removed the surveillance camera he had been aware of the terrorist nature of Ahmad's group for, at least, several weeks. By disabling the hidden surveillance camera, the appellant assisted the group in avoiding detection by law enforcement. This evidence supports the trial judge's conclusion that the appellant intended to enhance the ability of Ahmad's terrorist group to carry out terrorist activity.
The appellant argues that (i) the appellant's interest in resistance efforts overseas cannot support a finding that he had the requisite *mens rea* to participate in domestic terrorist activity, and (ii) the trial judge "wrongly placed the onus on the appellant to prove that he intended to go abroad at the same time that Ahmad sought to execute his attack in Canada."	The trial judge found that "N.Y. could readily contribute to Ahmad's efforts in Canada, while expressing an intention to…travel overseas." That conclusion is entirely sound: • it was not inconsistent for the appellant to express an interest in fighting in foreign conflicts while also knowingly participating in and contributing to Ahmad's domestic terrorist; • nothing in the trial judge's reasons suggests that he improperly shifted the burden of proof; • the trial judge correctly observed that there was absolutely no evidence that the appellant planned to be fighting in another country when Ahmad's group planned an attack in North America; • even if there had been compelling evidence that the appellant intended to fight in foreign conflicts at the same time as Ahmad planned to conduct a terrorist attack in Canada, given

	his contribution and participation, the appellant would still be guilty under s. 83.18.
The trial judge misapprehended Syed's evidence when he found that the appellant would have understood the terrorist nature of the Rockwood Camp.	The trial judge was "satisfied that by the time N.Y. went to the Rockwood camp, he had a full appreciation of the terrorist nature of the group": • The appellant had a long-standing relationship with Ahmad prior to the Rockwood Camp, including the Washago Camp. Thus, he was in a better position than Syed to understand the terrorist nature of the Rockwood Camp. • In contrast, Syed had known Ahmad for about two weeks prior to the Rockwood Camp. During that time their relationship only involved three or four brief exchanges of pleasantries. The trial judge found Syed was a very reluctant witness whose evidence was coloured with his sympathy towards the appellant. His evidence was also contradicted.
The trial judge erred by failing to consider that the appellant was unaware of the second camp before it began in light of Syed's evidence.	• While Syed testified that he was not told about the Rockwood camp until shortly before he left for the camp that does not mean that the camp was actually a "last minute decision" or that the appellant was not aware that there would be a second camp that weekend; • Even as early as the Washago camp, Ahmad and some of the other leaders talked about holding a second training camp; • By the conclusion of the Washago camp, the appellant was not only aware that the group planned to hold a second camp but Ahmad told the appellant he would be going to that camp; • During his post-arrest statement on June 3, 2006, the appellant admitted that after he was arrested for shoplifting camping equipment in February, 2006, he told the police officer that he could not attend court in March because he had a camping trip planned.