WARMING UP THE “CHILLING EFFECT”: A COMMENT ON THE
MOTIVE CLAUSE DISCUSSIONS IN R V KHAWAJA (2010)\(^1\) AND R V
KHAWAJA (2012)\(^2\)

J.L. Savarese*

Following the attacks on September 11, 2001, biased
surveillance and discriminatory law enforcement approaches
gained momentum. In 2003, Reem Bahdi published “No Exit:
Racial Profiling and Canada’s War Against Terrorism.” She
analyzed the influence that the declaration of a war against
terrorism by Western nations, including Canada, was having on
Arabs and Muslims. Other scholars critiqued aspects of
Canada’s anti-terrorism response, including the incorporation
of a motive clause into the Criminal Code sections prohibiting
terrorist offences. In R. v. Khawaja (2006), the Superior Court
reviewed the constitutionality of the motive element in the
definition of terrorism. It held that the motive clause facilitated
the targeted law enforcement practices that Bahdi and others
advocated against. This paper reports on a review of the
appeal decisions, R. v. Khawaja (2010) and (2012), which
held that the motive clause was consistent with the Canadian
Charter of Rights and Freedoms. The appellate decisions are
critiqued for their failure to adequately promote human dignity
and equality in keeping with the Charter’s spirit. As a result,
the paper concludes by arguing for a return to the insights of Bahdi
and others who encourage a rethinking of Canadian social
policy after 9/11 to ensure commitment to human rights
doctrines, particularly in regard to the racial profiling that the
motive clause seemed to animate.

Dans la foulée des attaques du 11 septembre 2001, des
chercheurs ont observé que les activités de surveillance biaisées
et les mesures discriminatoires d’application de la loi se sont
intensifiées. En 2003, Reem Bahdi a publié “No Exit: Racial

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1 R v Khawaja, 2010 ONCA 862 [Khawaja (2010)].
2 R v Khawaja, 2012 SCC 69 [Khawaja (2012)]. Mr. Khawaja’s appeal was heard with two other
cases: Sriskanadarajah v United States of America et al. and Nadarajah v United States of
America et al., (2012) SCC 70. The other individuals fought extradition to the United States,
where they faced terrorism-related charges. The cases were heard together because all three
applicants argued that the motive clause in the definition of “terrorist activity” was
unconstitutional.

* Department of Criminology and Criminal Justice, St. Thomas University. The author
acknowledges Adam King, a student at the University of New Brunswick, Faculty of Law, for his
invaluable research assistance and editorial support. The comments of the editors as well as those
of an anonymous peer reviewer also focused the paper’s direction and analysis.
I. INTRODUCTION

In 2003, Reem Bahdi encouraged policy and decision makers to respond more forcefully to racial profiling, which she argued received tacit acceptance in Canada after 9/11.\(^3\) What was generally regarded as a human rights violation became, after 9/11, a discussion about whether profiling was “morally, legally, or politically” justifiable as a tool in the War against Terrorism.\(^5\) Bahdi argued that policy-makers and the public were often blind to the significant injuries that occur from profiling. Profiling was commonly rationalized as a way to avoid further terrorist attacks. As Pue pointed out, supporters of Canada’s anti-terrorism law maintained that “overweening police powers are acceptable because they are lesser than the evil of racial profiling acts as our mirror—it reflects an increasingly racialized society that...tries desperately to avoid seeing itself through the gaze of its excluded others.”\(^3\)

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\(^3\) Reem Bahdi, “No Exit: Racial Profiling and Canada’s War Against Terrorism” (2003) 41 Osgoode Hall LJ 293 at 294. Bahdi draws from Sartre’s play “No Exit” where the three damned souls who have avoided each other, realize that they are each other’s torturers. At 294, citing Jean-Paul Sartre, No Exit, Four Contemporary French Plays, translated by Stuart Gilbert (New York: Random House, 1967).

\(^4\) Bahdi, ibid.

\(^5\) Ibid at 295.
terrorism.” Bahdi explained, however, that this practice also reactivated longstanding prejudices. She recommended that we examine our laws and policies through the eyes of the “excluded other” to avoid the “spirit injuries” or deep emotional harms that result from targeted policing.

The prosecution of Momin Khawaja, an Ontario-based software developer associated with persons plotting to bomb London sites, provides an important opportunity to evaluate an aspect of Canada’s anti-terrorism policy in reference to critiques by Bahdi and others. Khawaja was the first Canadian charged with criminal offences under Bill C-36, the Anti-Terrorism Act [ATA], introduced in 2001. The ATA amended the Criminal Code to include specific terrorist related offences and to incorporate a precise definition of “terrorism” in section 83.01(1)(b)(i)(A). This section, referred to as the “motive clause,” defines a terrorist act as one committed “for a political, religious or ideological purpose, objective or cause.” While facially neutral, the motive clause prompted Charter scrutiny based on its capacity to license discriminatory law enforcement.

In 2006, Rutherford J. of the Ontario Superior Court held that the motive clause was an unreasonable infringement of the freedoms of “conscience and religion” under s. 2(a) and “thought, belief and expression” under s. 2(b) of the Charter. The clause contributed to an environment of anxiety and suspicion thereby generating a “chilling effect” or a tendency to quell expressions of Islamic religiosity. Because only the definition of terrorism was declared void, the trial proceeded and Momin Khawaja was convicted of seven counts of terrorist-related offences on October 29, 2008. On March 12, 2009, Khawaja was sentenced to ten and a half years in prison, in addition to the five years he had already served in pre-trial detention. The Ontario Court of Appeal reviewed the Charter arguments as well as the convictions and sentence. The Ontario appellate court held that the definition of “terrorist activity” was constitutionally valid because it “[did] not

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7 Bahdi, supra note 3.
9 An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, 1st Sess., 37th Parl., 2001.
10 R v Khawaja, 2006 CanLII 63685 (ONSC) [Khawaja (2006)].
12 The Ontario Superior Court uses this phrase in Khawaja (2006), supra note 11 at para 58.
13 R v Khawaja, [2008] OJ No 4244 (QL) [Khawaja (2008)]. In R v Khawaja, [2009] OJ No 4279 (QL) [Khawaja (2009)], Rutherford J established at para 2 that Mr. Khawaja’s actions were in support of a terrorist organization. However, the Crown could not prove beyond a reasonable doubt that he was aware of the plot to bomb London sites.
14 Khawaja (2009), ibid at para 54.
prohibit or criminalize any political, religious, ideological thought, belief or opinion.” The Court concluded that “it is the nature of the activity and the nature of the state response that may generate the ‘chilling effect’, not the content of the legislation.” The Ontario Court of Appeal also confirmed Khawaja’s convictions and increased his sentence to life in prison. Leave to appeal was granted and the Supreme Court of Canada issued its judgment on December 14, 2012 upholding the constitutionality of the motive clause as well as the convictions and the sentence.

In this comment, I take the position that both appellate courts ignore findings by socio-legal scholars, as well as the Ontario Superior Court, that discriminatory attitudes influence the investigatory process resulting in unfair consequences for racialized communities. The higher courts’ emphasis on the formal language of the motive clause rather than the policing response overlooks the power of legal terminology to give license to intolerance by shoring up biased social, environmental and political factors. I argue that requiring a strict legal test to determine harm places an unreasonable burden on members of affected communities whose lived experience is not considered by the higher courts as relevant to social context or as reliable evidence to establish a problem in regard to policing discretion. As a result, the Court of Appeal’s decision, largely affirmed by the Supreme Court of Canada, signals a retreat from the Charter’s spirit and central tenets in relation to equality and religious freedom, broadly defined.

Prior academic analysis of the motive clause has primarily focused on assessing the Criminal Code amendments or, to a lesser extent, evaluating the Khawaja Superior Court decision. Through a synthesis of social science and legal methods, I address the limited academic scrutiny of the appeal decisions, including Khawaja (2012). I raise cautions on the appellate conclusions by critically interrogating what might otherwise be taken as neutral judicial findings. I pinpoint ways Khawaja (2010) and (2012) confirm the doubts raised prior to the case law that the motive clause reinforced stereotyping. Certain of my findings relate

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16 Khawaja (2010), supra note 1, at para 76.
17 Ibid at para 130.
18 Ibid at paras 253-255.
19 Khawaja (2012), supra note 2.
20 For a discussion of the interplay between law and discriminatory practices, see Margaret Chon & Donna E. Arzt, “Walking While Muslim” (2005) 68:2 Law & Contemp Probs 215. [Chon and Arzt]
22 The author acknowledges the anonymous peer reviewer whose comments were helpful in crystalizing this insight.
24 See e.g., Ronald Daniels, Patrick Macklem, & Kent Roach, The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill (Toronto: University of Toronto Press, 2001) as well as other scholars cited throughout this paper.
specifically to the Ontario appellate judgment given its more extensive commentary on the motive clause. I end the analysis by interrogating the Court of Appeal’s call for quantitative or “hard” evidence that directly establishes the “chilling effect” as a by-product of the motive clause. This approach, affirmed by the Supreme Court, gives limited credence to academic findings and personal accounts that urge greater sensitivity to the social environmental factors that give rise to profiling. I conclude by restating the call by Bahdi for anti-terrorist responses that promote equality by generating social inclusion.

II. SETTING THE CONTEXT

Khawaja’s trial was one of the most newsworthy and legally significant prosecutions under the Criminal Code amendments of 2001. The anti-terrorism statute revived and expanded upon the debates on racial profiling as a law enforcement practice that existed before 9/11. In the post 9/11 environment, the focus shifted to incorporate Arabs and Muslims as the bodies that mandated surveillance along with Black and Aboriginal Canadians.

A. Concerns about Racial Profiling in the Post 9/11 Environment

To Bahdi, the belief that profiling was less problematic than terrorist attacks became widely held after 9/11 due to misplaced confidence in profiling as a preventative strategy. Bahdi defined profiling as the identification of a segment of the population for “special scrutiny” to curb violence, crime, and other negative behaviour based on the criteria of suspicion and risk. Institutions charged with fighting the War against Terrorism often endorsed practices, and authorized their agents to adopt behaviours, fuelled by prejudice. Other scholars raised similar concerns in regard to the 2001 Anti-Terrorism Act. Both Sujit Choudhry and Faisal A. Bhabha outlined the human rights violations looming from the flawed and potentially unconstitutional law. Bhabha argued the Anti-Terrorism Act, taken as a whole, would likely violate s. 15(1) of the Charter given its probable intrusions on the human rights of Muslims in the divided, inflamed climate of the early 2000s.

According to Bahdi’s findings, discriminatory policing practices alienate minority communities. Racial profiling, whether direct or indirect, causes those

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26 For further information on the role of the social sciences in the law, see: David L. Faigman, “To have and have not: Assessing the value of social science to the law as science and policy.” (1989) 38 Emory LJ 1005.
27 Bahdi, supra note 3 at 294.
28 Ibid at 304.
29 Ibid at 295.
30 Ibid at 297.
31 SC 2001, c 41.
34 Ibid at 135.
affected to doubt that the Canadian state is committed to the realization of justice. In contradiction to the claims that targeted policing promotes national security and deters terrorism, Bahdi concluded that “racial profiling will generate high costs to both society and the individuals who are profiled.” In addition to exposing Muslim Canadians to more vigorous law enforcement, she was concerned that the resulting climate of distrust would undermine relationships leading to a collective sense of insecurity. Recent findings on the rise in hate crimes against Muslims, highlighted below, suggest Bahdi’s concerns were warranted. Statistics Canada found the number of police-reported hate crimes against all racial groups increased in 2009. The largest upsurge occurred in the number of hate crimes against Arabs and West Asians, which doubled from 37 incidents in 2008 to 75 in 2009. The number of hate crimes motivated by religion rose from 26 to 36, an increase of 38.5 per cent, when Islam was identified as the precipitating factor. The statistics also indicate that youth are responsible for the majority of crimes and that youth are typically the victims. In reaction to these figures, the President of the Canadian Arab Federation, Khaled Mouammar, described the Muslim community as “a very vulnerable community” that lacked numbers and resources. He commented that people were “silenced” and that they “try to avoid talking about issues to avoid being targeted.” In Mouammar’s view, the increase in hate crimes reported by Statistics Canada is evidence of the growing disempowerment of Arabs and Muslims.

In a 2008 qualitative study conducted in Vancouver and the Lower Mainland of British Columbia, Alnoor Gova and Rahat Kurd examined experiences with profiling and discrimination through in-depth interviews with 40 Muslim individuals. Most interviewees believed Muslims were subject to greater scrutiny and suspicion from state officials than others due to their religious affiliation. Factors that formerly discouraged law enforcement attention, such as age, ethnicity, gender, or place of birth, provided limited protection against targeting. Gova and Kurd worried that the media portrayed racial profiling in a positive light, with possible long term implications for the confidence that Muslim communities placed in civil society. Gova and Kurd also feared that Muslims’ sense of belonging was diminished by the heightened suspicion and surveillance. The participants in Gova and Kurd’s study hesitated to display ostensible Islamic

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35 Bahdi, supra note 3 at 311. Bahdi states “... if the laws, policies and practices that are in place to reach the professed end of fighting terrorism are perceived as ineffective and unjust, then individuals who hold such perceptions will be less likely to turn to them.”

36 Ibid at 304.


38 All figures quoted appear in ibid.


40 Ibid.

markers due to the belief that stereotyping was a real possibility. One participant stated:

When I see Buddhists crossing the street they are met with smiles. You know, because they are thought of as being peaceful, but as a person in hijab [or headscarf], it’s completely different...it’s not just race anymore. It’s religious, but only towards Muslims, I think...

Research participants in Bajit Nagra’s qualitative study were also aware that expressions of religious devotion could be interpreted as markers of terrorist-related affiliations and aspirations. After the 9/11 attacks, one research participant was encouraged by family members to shave his beard to avoid negative attention. Another was harassed on a bus for wearing a headscarf. Yet another stated racial discrimination was more common prior to 9/11, whereas after 9/11, the bias appeared to form around religious factors.

B. Background to the Motive Clause

One of the most controversial aspects of the 2001 anti-terrorism law was the incorporation of “motive” into the definition of terrorism. Numerous commentators raised concerns about the impact of the clause on policing activities. Wes Pue and Robert Russo argued that the Criminal Code definition of terrorism was viewed by many experts “as dangerously vague and overly broad, inviting racial and religious screening by state authorities.” For Kent Roach, incorporating motive in the criminal law meant the politics and religion of defendants would become an important focus in criminal trials, allowing biased attitudes to influence judicial decision-making. In contrast, David Jenkins rejected these findings, stating:

While inclusion of motivational elements is out of the ordinary, it is necessary to address terrorism as a peculiar criminal phenomenon undermining the normative foundations of liberal democracy.

42 Ibid at 20.
44 Ibid. Amineh, a 23-year-old who wears the hijab and is readily identifiable as Muslim, conveyed this story at 431:
After 9/11 in Canada, I stopped taking public transport because I started getting harassed a lot. I had these girls -teenage girls- blow condoms and, like, start hitting me with them and since that day I just stopped taking public transport so, yeah.
45 Ibid at 432.
Roach remained adamant in his opposition to the motive clause even after the Khawaja (2006) decision. Roach noted that his resistance was shared by a bipartisan Committee of Canada’s Senate which advocated for the removal of the motive clause because it might “encourage racial and religious profiling during investigations.” Others pointed out that the inclusion of motive was extraneous and anomalous; an individual’s reasons for committing a criminal act are not typically explored in traditional criminal law where only intention is a formal element of the crime.

More recently, Mégret wrote that the motive requirement supports “certain patterns of racial discrimination, not to mention orient[s] courtroom debates in very troubling directions where the motive itself may become the object of discussion.” Khawaja’s counsel raised similar arguments during the review of the constitutionality of the motive clause before the Supreme Court of Canada. Conversely, counsel for the Attorney General of Canada successfully argued for the clause’s retention.

C. Linking Facially Neutral Provisions to Racial Profiling

Bahdi identifies facially neutral provisions that may silently promote racialized divisions as troubling features of anti-terrorism and profiling-related statutes. In Bahdi’s view, these provisions have a particularly negative impact on Muslim and

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52 Supreme Court of Canada File No 34103, “Appellant’s Factum” (24 February 2012), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/factumsamenos/34103/FM-010_Appellant_Mohammad-Momin-Khawaja.pdf>. [“Appellant’s Factum”]

53 Supreme Court of Canada File No 34103, “Respondent’s Factum”, Nadarajah v United States of America et al, (April 2012), online: Centre for Constitional Studies, University of Alberta < http://www.law.ualberta.ca/centres/ccs/userfiles/Crown_Factum_Nadarajah.pdf> [“Respondent’s Factum”]. The Crown’s argument on the section 2 issues was outlined in the Crown’s factum in the Nadarajah v United States of America et al matter, as the arguments were identical to those presented in the Khawaja appeal.

54 Ibid at para 70; The arguments are all without merit. The types of harmful conduct set out in the definition of terrorist activity are methods of expression that are not protected under s. 2(b). Furthermore, the Appellants’ theory of a ‘chilling effect’ is without any evidentiary foundation. Even if there is a ‘chilling effect’, the ‘chill’, at best, arises from a concern as to how the police might inappropriately implement the legislation, rather than the legislation itself.

55 Ibid.

56 Bahdi, supra note 3.
Arab individuals and communities even though they are not specifically mentioned. To Bahdi, seemingly unbiased laws may be applied in discriminatory ways when interpreted in accordance with often unconscious stereotypes fuelled by popular culture and the media. While she does not list the motive clause to illustrate her point, it is the type of law that concerned her. The vilification of Arabs and Muslims may justify racially motivated policing practices to regulate an aberrant community. Racially-focused policing also has implications for the administration of justice more generally. As Bahdi stated:

When decision makers operate against a backdrop of ingrained, but often unconscious stereotypes, they are likely to filter and interpret facts or events through the lens of stereotypes rather than by making an individual and rational assessment based on the facts of a given case.

Bahdi found the portrayal of Arabs and Muslims as fanatical and violence-prone was standard in the North American popular presses, even prior to 9/11. After 9/11, scathing depictions became more commonplace, according to her research. Other North American studies replicate this finding. For example, Debra Merskin concluded that Former President George W. Bush’s speeches stereotyped Arabs as bloodthirsty and villainous. In her 2011 Ph.D. thesis, Megan Nicholson determined that Muslims were negatively depicted in the Canadian press, based on her study of “news and opinion discourse” between November 1, 2008 and April 30, 2009. Muslims who supported “mainstream Canadian values” thereby rejecting extremism by promoting tolerance and moderation were portrayed in more positive terms. According to Nicholson, the most obvious “negative identity constructions of Canadian Muslims” were found in media depictions of terrorism trials, including the case of Momin Khawaja.

III. THE MOTIVE CLAUSE AND THE KHAWAJA PROSECUTION

In 2006, the Ontario Superior Court accepted Khawaja’s claim that Section 83.01(1)(b)(i)(A) of the Criminal Code violated his fundamental freedoms under the Canadian Charter of Rights and Freedoms by infringing his rights under s. 2(a) which guarantees freedom of religion and conscience and s. 2(b) which

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57 Ibid.
58 Ibid at 305.
59 Ibid.
60 Ibid.
62 Ibid.
64 Ibid at Abstract.
65 Ibid.
guarantees freedom of thought, belief, opinion and expression. Consequently, that section was deemed constitutionally invalid and was severed from the Criminal Code on October 24, 2006.

A. The Motive Clause in the Khawaja Cases

In striking down s. 83.01(1)(b)(i)(A), the Superior Court argued that the motive clause would create a “chilling effect” for persons with religious practices and associations linked to terrorism. After referring to several prominent commentators who questioned the clause on human rights grounds, Rutherford J. concluded:

It seems to me that the inevitable impact to flow from the inclusion of the ‘political, religious or ideological purpose’ requirement in the definition of ‘terrorist activity’ will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad. Equally inevitable will be the chilling effect [Maureen Webb predicts].

Due to the commonly held view that global terrorist acts are often motivated by Muslim fundamentalism, Rutherford J. accepted the submission that Muslims would be subject to intensified scrutiny from the public and law enforcement officials. He held that the motive clause amounted to a prima facie infringement of the “freedoms of conscience, religion, thought, belief, expression and association” guaranteed under s. 2 of the Charter. At paragraph 80, Rutherford J stated that he saw “no compelling benefit or justification for the political, religious or ideological ‘motive’ provision in clause 83.01(1)(b)(i)(A)” that outweighed “its freedoms-infringing impact.” Due to its disproportionate effect on guaranteed freedoms, Rutherford J. held that the provision was not saved by s. 1 of the Charter, and was therefore “constitutionally invalid.”

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66 Charter supra note 12.
67 Khawaja (2006), supra note 11.
68 Ibid at para 58.
70 Khawaja (2006), supra note 11 at para 58.
71 Ibid at para 58.
72 Ibid at para 80.
73 Ibid.
The Ontario Court of Appeal, however, reversed Rutherford’s conclusion. The court concluded that the “germane” issue was the “undoubted power” of the federal Parliament to incorporate “motive” as a component of a crime.74 The Supreme Court similarly pronounced that the motive clause was constitutionally valid even though some other jurisdictions had not adopted similar clauses.75 In a conclusion approved by the Supreme Court, the lower appellate court found that the guarantees of freedom of expression under s. 2(b) were inapplicable to the motive clause due to the violent nature of terrorist activity.76 The Supreme Court acknowledged, however, that a subsequent case considering s. 83.01(1)(b)(ii)(E) might capture activity that fell “within the protected zone of free expression.”77 If this occurred, the infringement on free expression would be determined under s. 1 of the Charter.78

The Court of Appeal and the Supreme Court of Canada agreed that the failed s. 2(b) claim nullified other claims for fundamental freedoms under s. 2 of the Charter. Even so, both courts expanded on their reasoning for holding that the rights to freedom of conscience and religion guaranteed by s. 2(a) were not violated by the motive clause. In a finding affirmed by the Supreme Court, the Ontario appeal court held that the “chill” identified by the Superior Court was due to the criminal behaviour of terrorists rather than the legislation prohibiting their activities. Joining with the Ontario appellate court, the Supreme Court concluded that “the chill in the expression of religious and ideological views referred to by the trial judge flowed from the post-‘9/11’ climate of suspicion, not from the motive clause in the terrorism legislation.”79 According to the Supreme Court, “a causal connection” between the motive clause and the chilling of expression of religious or ideological views was not demonstrated by Mr. Khawaja.

The Superior Court’s concern that improper law enforcement practices could flow from the motive clause was dismissed by both appeal courts. The higher courts agreed that declaring a law unconstitutional because law enforcement officials might overstep their bounds was not warranted. The appellate courts dismissed as unfounded Rutherford J.’s view that the clause fostered an environment where discrimination and profiling might follow the �9/11’ climate of suspicion, not from the motive clause in the terrorism legislation.”80 The Supreme Court of Canada cited with approval the Ontario Court of Appeal’s statement: “Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional.”81 It rejected

74 Khawaja (2010), supra note 1 at para 94.
75 Khawaja (2012), supra note 2 at para 84.
76 Khawaja (2010), supra note 1 at para 101. The Ontario Court of Appeal held that “[v]iolent activity, even though it conveys a meaning, is excluded from [constitutional protection] because violence is destructive of the very values that underlie the right to freedom of expression and that make this right so central to both individual fulfillment and the functioning of a free and democratic society.” In Khawaja (2012), supra note 2 at para 70, the Supreme Court of Canada stated: “Threats of violence fall outside the s. 2(b) guarantee of free expression.”
77 Khawaja (2012), supra note 2 at para 74.
78 Ibid.
79 Ibid at para 81.
80 Ibid.
Khawaja’s position that the motive clause “would legitimize law enforcement action aimed at scrutinizing individuals based on their religious, political or ideological beliefs.”

While Rutherford J’s decision to sever the motive clause was incorrect, the Ontario appellate court deemed this error “of no moment” because the necessary motivations were established through the Crown’s evidence presented at trial. The Supreme Court of Canada reconsidered this issue at Khawaja’s request. The highest court rejected Khawaja’s argument that the deletion of the motive clause by the Superior Court and its subsequent reinsertion by the Ontario appellate court made the trial and convictions unfair. The Supreme Court affirmed the Ontario Court of Appeal’s decision to uphold the convictions under the curative proviso of the Criminal Code, s. 686(1)(b)(iii), based on the trial judge’s finding that motive was established through the trial evidence.


In this section, I argue that the Ontario Court of Appeal employed a formalistic and abstract analysis of government power and law enforcement, one which paid undue deference to state authority over matters of public safety. The Ontario appellate court’s apparent willingness to defer to the state when “national security” is invoked minimizes human rights and equality oriented concerns; this is part of the “chill” analyzed throughout this paper. These worrisome tendencies were not remedied by the 2012 Supreme Court of Canada decision. While both appeal decisions briefly denounce targeted discrimination, the responses are insufficient and fail to appreciate the lived experience of discrimination disclosed in the social science research. For example, the Supreme Court of Canada stated in general terms that belie the challenges experienced by racialized subjects at the ground level:

Criminal liability should not be based on a person’s political, religious or ideological views. Police should not target people as potential suspects solely because they hold or express particular views. Nor should the justice system employ improper stereotyping as a tool in legislation, investigation or prosecution.

This pronouncement downplays the motive clause’s potential to stimulate discriminatory outcomes through enforcement. In contrast to the appeal courts, the Ontario Superior Court found that the motive clause authorized wide enforcement discretion that could be exercised to the disadvantage of marginalized communities struggling to assert their rights in a fragmented and divisive political environment. Islamic followers could be exposed to unwarranted state surveillance.

82 Khawaja (2012), supra note 2 at para 76.
83 Khawaja (2010), supra note 1 at para 137.
84 Khawaja (2012), supra note 2 at para 92.
85 Ibid at para 94.
86 Ibid at para 83.
under the authority of the motive clause if their expressions of religious devotion were equated to violent extremism. Chon and Arzt’s exploration of the human rights concerns of Muslim Americans in the post 9/11 context is helpful in deconstructing the appellate courts’ findings. They assert that more complex understandings are needed in regard to the intersections between law and what they label “terror-profiling”, which they define as “the selectively negative treatment - both by government and private entities of individuals or groups - thought to be associated with terrorist activity, based on race, ethnicity, national origin and/or religion.” For Chon and Arzt, Muslim status is more than “an incidental correlation to more acceptable governmental classifications”, as it appeared to have been cast by the appellate court in Khawaja (2010) and by the Supreme Court in Khawaja (2012). Chon and Arzt argue that being Muslim in the racially charged climate that emerged in the early 2000s is more appropriately viewed as “a discriminatory proxy for racial difference.” The Superior Court decision more effectively captures this distinction because it emphasizes the motive clause’s potential to inflame racialized law enforcement even while facially neutral. As Chon and Arzt state:

Currently, the law’s simultaneous presence and absence in the domain of religion contribute to the social construction of an inferior racial category, resulting in discrimination proscribed by public rhetoric but tolerated and even extended through key omissions in the structures of legal doctrine and theory.

Their comment brings home the importance of scrutinizing official texts, like the Khawaja appeal judgments, to identify ways that the decisions might authorize racial hatred by providing rationalizations for profiling, however unwittingly. As Chon and Arzt explain, tacit approval for religious and racial discrimination may remain hidden in legal discourse unless subject to socio-legal scrutiny. Statements by the Supreme Court of Canada that the motive clause is “clearly drafted in a manner respectful of diversity” and that it “raises no concerns with respect to improper stereotyping” exemplify Chon and Arzt’s concerns by defending a law that was vigorously critiqued for its human rights implications.

V. LIMITATIONS

The motive clause passages in Khawaja (2010) and Khawaja (2012) were closely read and considered. From this qualitative content review, I isolate ways the appeal judgments bolster suspicion and stigma by applying the legal tests in ways that undermine substantive equality. I begin by identifying and discussing problems that are unique to the Court of Appeal decision. I discuss the Ontario appellate court’s problematic statement that affected members of the Muslim

87 Chon & Arzt, supra note 20 at 238.
88 Khawaja (2010), supra note 1.
89 Khawaja (2012), supra note 2.
90 Chon & Arzt, supra note 20 at 217.
91 Ibid at 218.
community were unaware of the law. Through a discourse analysis methodology, I isolate and analyze statements that imply acceptance of the trope of the radical Muslim terrorist thereby justifying suspicion and stigma. I elaborate on these deficiencies, drawing from the human rights inspired critiques by Bahdi and others. I then move to an assessment of the main point of convergence between the Ontario Court of Appeal and the Supreme Court of Canada— the discussions on the evidence required for the s. 2 claim. The responses to the motive clause in the Ontario Court of Appeal and Supreme Court of Canada decisions, summarized in the next passages, are insufficient given the charged climate where complaints about targeting are commonplace and where hate crimes are increasing. I suggest that the courts fall into error by overlooking the research on the lived experience of targeting found in the social science literature.

A. Findings from the Ontario Court of Appeal: The Assertion that the Muslim Community Was Unaware of the Law

The belief that Canadian Muslims have weak citizenship claims appears to have been a factor in the Ontario Court of Appeal judgment. In dismissing the s. 2 Charter claims, the lower appeal court asserted that the “chilling effect” could not be substantiated because the motive clause was “in all probability...unknown to the vast majority of persons who [were] said to be ‘chilled’ by its existence.” Yet, in Canada citizens and residents are presumed to know the law. This statement also suggests that Canadian Muslims are not part of national conversations regarding anti-terrorism law and the motive clause. It ignores the fact that Muslim organizations and leaders are active in discussions on anti-terrorism policies, and are at least generally aware of the main issues. Gova and Kurd found their research participants were versed in anti-terrorism policies and security practices.

The Court of Appeal’s claim that Muslims are largely unaware of the law implies that they are isolated from the mainstream and do not engage in ordinary pursuits,

93 In support of this conclusion, the Ontario Court of Appeal cited Reference re Marine Transportation Security Regulations, 2009 FCA 234 (CanLII). The court determined that those persons who were informed about the motive clause were also likely to be aware of s. 83.01(1.1) which permits “all forms of expression of political, religious or ideological belief unless these expressions coincide with forms of behaviour that constitute ‘terrorist activity.’” Khawaja (2010), supra note 1 at para 127.
95 Bahdi, supra note 3 at 299 describes Faisal Joseph’s efforts to provide advice on the anti-terrorism law. Joseph missed a flight he was scheduled to take to meet with the Minister of Justice to discuss how Canada’s anti-terrorism legislation promoted racial profiling and discrimination. He was pulled aside for a heightened security check resulting in delay. Joseph was legal counsel to the Canadian Islamic Congress and was carrying a business card from the Canadian Muslim Congress, factors that may have prompted the intensified scrutiny. See also: Canadian Muslim Lawyers Association Special Senate Committee on the Anti-Terrorism Act, Review of the Anti-terrorism Act (2 May 2005), online: <http://ejp.icj.org/IMG/submissionCMLA.pdf>.
96 Gova & Kurd, supra note 41 at 6. They state: “Many participants related details of their own direct encounters with security officials in Canada, in addition to describing the more general social, political, or cultural shifts they have observed and experienced in the years since new security measures, specifically the Anti-Terrorism Act, S.C. 2001, c. 41, and the Public Safety Act 2002, SC 2004, c.15, were enacted in Canada.”
like watching the Canadian news, where anti-terrorism plans are featured regularly. The Supreme Court of Canada is silent on this point.

According to Bahdi, justifications for profiling practices are fuelled by the belief that Arabs and Muslims represent a “foreigner within,” regardless of their citizenship. The thin frameworks of belonging mean they may not be imagined as genuine members of the broader society. The underlying concern is that Muslims are not in Canada with bona fide claims to citizenship. Rather, they are cast as “sleeper terrorists” who must be dealt with accordingly, through regular scrutiny and even containment.

A poll conducted by Maclean’s news magazine in 2009 supports Bahdi’s conclusion that Muslims are viewed as outsiders. The poll showed that Canadians harbour relatively negative attitudes towards Muslims. Seventy-two per cent of persons interviewed held favourable views towards Christianity, but only twenty-eight per cent held favorable views of Islam. Studies also document considerable bias against Arabs and Muslims in the United States. In a quantitative study by the Pew Research Centre, cited in the work of Sonia Chopra, respondents were invited to provide a single-word description of Islam; negative words were given by thirty per cent of research participants. The word “fanatic” was most common, with “radical” and “terror” mentioned with similar frequency. Notably, fifty-eight per cent of respondents acknowledged knowing little or nothing about Islam.

These attitudes are part of a larger reconfiguration of Canadian identity post-9/11. According to Sedef Arat-Koc, the social policy focus shifted emphasis from multiculturalism to the normalization of heightened suspicion after 9/11. In her view:

Racially coded, this reconfiguration of Canadian identity has made national belonging and the citizenship of racialized groups

97 Bahdi, supra note 3 at 315.
101 Ibid.
102 For study on wrongful conviction that explains why it is useful to look to American studies even when examining Canadian issues, see: Alan W Clarke & Laurelyn Whitt, “Problem without Borders: A Comment on Garrett’s Judging Innocence” (2007-2008) 33 Queen's LJ 619.
105 Ibid at 2.
more precarious than it was under the ambiguous and contradictory terms of liberal multiculturalism.\textsuperscript{106}

Arat-Koc’s findings bring the debate to a conceptual, philosophical level that reveals the racialized bias that underpins the appellate court’s assertion that Muslims were largely uninformed about the federal law. The appellate court’s statement is more than a neutral finding of fact. Instead, it positions Muslims as foreign and Other, justifying suspicion and stigma.\textsuperscript{107}

B. The Acceptance of the Trope of the Radical Muslim Terrorist

Passages from the \textit{Khawaja} decisions illustrate how persons charged with terrorist offences are cast as the “Other”. Research by Cyra Akila Choudhury verifies that Muslims are viewed as foreign and marginal. He found that Muslims are placed in three categories by the media: the “Terrorist”, who subscribes to violence; the “Believer”, who is a Muslim fundamentalist; and the “Moderate”, who has assimilated to the norms of Western societies.\textsuperscript{108} While this typology collapses a diverse group of people into simplistic classifications, it is not a recent development. Illeana Porras raised concerns about anti-terrorism language and rhetoric in a powerful 1994 article in which she reviewed how terrorism was constructed, reinforced and distributed through the media.\textsuperscript{109} Porras’ comments on the return of the terrorist within the political and social imagination are relevant in the post 9/11 climate, where Canadians are preoccupied with terrorism. Porras concluded:

\begin{quotation}
The moslem moorish turkish invader of Europe dark mysterious turban wearing merciless scimitar wielding head cutting harem keeping mosque going minaret prayer chanting magician christian hating jerusalem prophanator holy war maker of the past has made a remarkable comeback.\textsuperscript{110}
\end{quotation}

Porras described the anti-terrorism literature she reviewed as vitriolic. In comparison, the observations in \textit{Khawaja} (2010) and (2012) are measured and deliberate, lacking the hateful tone found in the literature Porras reviewed. The Supreme Court acknowledged, for example, that rehabilitation should be considered as a sentencing factor in terrorist related cases, even though the Court of Appeal implied otherwise.\textsuperscript{111} While the judgments’ overall tone is considered, certain passages hint at the inflamed, anti-Muslim typecasting that alarmed Porras.

\begin{thebibliography}{9}
\bibitem{107} See Patel, \textit{supra} note 21 for further comment on the operation of surveillance practices and the generation of stigma.
\bibitem{110} \textit{Ibid} at 133-134.
\bibitem{111} \textit{Khawaja} (2012), \textit{supra} note 2 at para 124.
\end{thebibliography}
and that Nicholson identified in her 2011 study. In the Ontario Court of Appeal judgment, Khawaja is described as a member of a group “whose singular goal was to eradicate western culture and civilization and establish Islamic dominance wherever possible.” The Supreme Court of Canada similarly concluded that Khawaja’s emails “showed that he encouraged and applauded violent jihad.” In refusing to overturn the life sentence imposed by the appellate court, Chief Justice McLachlin wrote on behalf of the court: “The appellant was a willing participant in a terrorist group. He was committed to bringing death on all those opposed to his extremist ideology and took many steps to provide support to the group.” In contrast, Khawaja seemed to believe that he was defending Muslims who were threatened and under attack. Khawaja advocated in favor of a ‘war-like mentality’ yet he clarifies that his aim is to retaliate against “those who commit acts of aggression.”

In one email cited in the Ontario appellate decision, he adopted an aggressive stance yet also expressed concern for Muslim causalties:

America is at war with Islam. Israel is at war with Islam, so we do not treat Ariel Sharon and George Bush with compassion, do we? They have slaughtered tens of thousands of our brothers and sisters. The blood of the Ummah has been spilt.

In email correspondence, Khawaja makes reference to Muslim domination, asserting that his goal was to “help out the cause of Deen so that the word of Allah dominates over all other ways.” This message understandably alarmed the Ontario appellate court. The evidence presented at trial, however, demonstrates the motivations for his behaviour were varied and complex. One of his stated aims, for example, was to “be a better Muslim.” Khawaja was further described by the Court of Appeal as being committed to traveling “anywhere” and performing any act “for the violent Jihadist cause.” Because the trial record reveals that he traveled to London and Pakistan, the claim that he was willing to travel to any location to defend the Muslim cause appears overstated. Khawaja made it clear that he wanted to join “the Mujahideen in the front-lines of Jihad” and to fight against the Western forces yet his main aim was to join the insurgency in Afghanistan.

112 Nicholson, supra note 63.
113 Khawaja (2010), supra note 1 at para 230.
114 Khawaja (2012), supra note 2 at para 118.
115 Ibid at para 128.
117 Ibid at para 24.
118 Ibid. Emphasis added in the original.
119 “Appellant’s Factum”, supra note 52.
120 Khawaja (2008), supra note 14 at 32.
121 Khawaja (2010), supra note 1 at para 230.
123 Ibid at paras 8 and 32.
correspondence that support more altruistic conclusions. The appeal courts’ interpretation makes it difficult to imagine Momin Khawaja as desiring peace, albeit militarily-imposed, that would end threats to the Muslim ummah, an Arabic word meaning “community” or “nation.”

Before the Supreme Court of Canada, Khawaja argued that the defence altered its approach at trial after the motive clause was severed by the Superior Court in 2006. Khawaja argued that he would have testified in his own defence to raise a reasonable doubt if motive had remained an essential element of the crimes.

For the Supreme Court, Khawaja’s position lacked “an air of reality” and was “disingenuous.” The highest court stated: “He literally describes dedicating his life to violent jihad.” At the same time, Khawaja was adamant that he could provide different explanations for his behaviour beyond terrorist motivations. The Supreme Court was disinterested in this evidence and preferred the appellate court’s conclusions on Khawaja’s culpability.

The language in Khawaja (2010) particularly suggests an exaggerated anti-terrorist discourse is in play. Here, I apply Tator and Henry’s critical discourse analysis methodology to the appellate decision to reveal how “racism manifests itself in the everyday discourses of the White elite.” Tator and Henry argue that prominent texts, ranging from news reports, government studies, and by inference, court decisions, are appropriately viewed as “ideological expression[s] of Whiteness” that reinforce racially based divisions. According to their research, the profiling of Black Canadians is justified by institutional texts that strengthen the dominant society’s ideology and power. When scrutinized through a critical discourse lens, the appellate court’s language and rhetoric over-emphasized the “terrorist” threat posed by Khawaja specifically, and by Muslims generally.

In its deliberations on the motive clause, the Court of Appeal attributed the “chilling effect” to several causes. One was the “reality of the world we live in,”

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124 Ibid at para 33 quotes from an email from Mr. Khawaja: “So sometimes things that seem wrong from face-value due to our lack of info or understanding, such as certain operations that Muj carry out against the kuffar [or non-believers], may in fact be very noble deeds with great long-term benefits for the Muslim Ummah.” For further discussion of the depictions of Khawaja in the press see Nicholson, supra note 63.

125 Khawaja (2012), supra note 2 at para 87.

126 Ibid.

127 Ibid at para 90.

128 Ibid at para 91.

129 Ibid at para 89.

130 “Appellant’s Factum, supra note 52 at para 65.


133 Tator & Henry, ibid at 35.

where terrorism and the fear it generates are “facts of life.”\textsuperscript{135} The court suggested that the “suspicion based on ignorance and stereotyping” in Canadian society was a product of fear rather than the operation of the law. The fact that Muslim Canadians were mistrusted resulted from their over-involvement in global terrorism. Without citing any “hard” evidence, as it had demanded from the defence on links between a negative climate and the motive clause, the Court of Appeal attributed a significant portion of terrorist activities to Muslim radicals while acknowledging that terrorist behaviour was not limited to any religious minority. It stated that “[m]any, but by no means all, of the major terrorist attacks in the last 10 years have been perpetrated by radical Islamic groups.”\textsuperscript{136}

A 2011 study, however, found that the claim that terrorists are disproportionately Muslim was not empirically supportable. In The Missing Martyrs: Why There Are So Few Muslim Terrorists, Charles Kurzman, a professor of Sociology at the University of North Carolina, Chapel Hill, described the risk of Islamic terrorism as a narrow and tightly confined threat.\textsuperscript{137} Muslims who supported terrorism were found to be marginalized and at the fringes of their own communities without widespread support.\textsuperscript{138} Kurzman’s findings that low numbers of Muslims are actually involved with terrorism suggest the appellate court’s reasoning – that negative images and fear of Muslims were based in the reality of their over-involvement in terrorism – was not informed by a comprehensive survey of the research.\textsuperscript{139}

The Ontario Court of Appeal also reduces the causes of terrorist actions to “a potent mix of religious and political fanaticism.”\textsuperscript{140} In making this assertion, the court simplified the complexity of terrorist behaviour by suggesting that, unlike secular bodies, Muslims as a religious group are prone to violence. Alternatively, the United Nations attributes global terrorism to a range of social environmental factors, including “poverty, underdevelopment, inequality, disease, and other economic and social problems.”\textsuperscript{141} While Momin Khawaja did not directly

\textsuperscript{135} Khawaja (2010), supra note 1 at para 126.
\textsuperscript{136} Ibid.
\textsuperscript{137} Charles Kurzman, The Missing Martyrs: Why There Are So Few Muslim Terrorists (New York: Oxford University Press, 2011) at 23 [Kurzman]: “As the trauma of 9/11 recedes, Americans will come to realize that – for all its faults and dangers – the world today is safer than it has ever been.” He further states: “Terrorism kills fewer people now than it did in the 1980s.”
\textsuperscript{138} Ibid at 11: “Global Islamist terrorists have managed to recruit fewer than 1 in 15,000. Muslims over the past quarter century and fewer than 1 in 100,000 Muslims since 9/11.”
\textsuperscript{140} Ibid.
\textsuperscript{141} United Nations, “Terrorism Must be Addressed in Parallel with Poverty, Underdevelopment, Inequality, General Assembly Told, as General Debate Concludes” online: United Nations
experience these challenges, he voiced, via the email admitted as evidence at trial, a desire to end the suffering of his "oppressed brothers and sisters."  

Following its assertions on the prominence of Muslim terrorists in the commission of violent acts, the Ontario Court of Appeal observed:

> It is hardly surprising that, in the public mind, terrorism is associated with the religious and political views of radical Islamists. Nor is it surprising that some members of the public extend that association to all who fit within a very broad racial and cultural stereotype of a radical Islamist.

By using such language, the court amplifies and reproduces the view that a sizeable portion of terrorists are Muslim, thereby linking a form of criminal activity to a cultural and religious minority. This connection implicitly condones policing practices that contain and control a Muslim population that is considered flat, without diversity and variation. If this is the case, an entire community is identified for regulation and control as a uniform criminal threat. However unintentionally, the appellate court accepted the menacing figure of the "Muslim monster-terrorist", to use Neel Ahuja’s terminology, as the protagonist of international terrorism, leading to a sweeping denigration of a community.

C. The Requirement for Evidence of Negative Effects in *Khawaja (2010) and (2012)*

In his 2008 critique of *Khawaja* (2006), Ben Saul observed that Rutherford J. relied on academic articles not supported by objective evidence in his decision to

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142 Khawaja (2010), supra note 1 at para 23. The email quotation reads:

> I strongly believe in the concept of Hijra and Jihad. Basically, migrating to preserve and build our Deen, and supporting our oppressed brothers and sisters in any and every way possible, whether physically, financially, or morally, in deterring those who wish to destroy Islam and the Muslims. (emphasis added in the original)

143 Ibid at para 126.

144 Bahdi, supra note 3.

145 Barbara Perry & Scott Poynting, “Inspiring Islamophobia: Media and State targeting of Muslims in Canada since 9/11” (Paper delivered at the TASA Conference, University of Western Australia and Murdoch University, 4-7 December 2006), online: TASA <http://www.tasa.org.au/conferences/conferencepapers06/papers/Indigenous%20issues,race,%20ethnicity%20and%20migration/Perry,Poynting.pdf>. According to Perry and Poynting’s figures (2006) the Muslim community is concentrated in larger urban centres and is diverse. They state at 2:

> Muslims comprise approximately 2% of the Canadian population in the 2001 census. Some 86% of Canadian Muslims live in major metropolitan areas, with over 300,000 resident in the Greater Toronto region, and over 150,000 in Montréal. Vancouver and Ottawa have smaller but significant numbers of Muslims. Roughly one third are of South Asian background, a third of Arab background and a third of other backgrounds, including African and European.

146 Neel Ahuja, “Abu Zubaydah and the Caterpillar” (2011) 29:1 Social Text 106 at 127.
void the motive clause. Saul stated there was a need for “some hard evidence” to verify that the risks would “actually materialize.” His perspective was persuasive in the Khawaja appeal cases. In its reasons upholding the constitutionality of the motive clause, the Ontario Court of Appeal held that Mr. Khawaja had presented insufficient evidence to demonstrate links between the motive clause, the “chilling effect” and racially motivated policing. According to the Court of Appeal, the Superior Court incorrectly focused on non-terrorist suspects rather than those accused of terrorist crimes. Using a non-directly affected group as the unit of analysis lacked precedent given that a law’s broader impacts are typically considered under the s. 1 analysis. Following this error, the appellate court criticized the absence of any evidence establishing a “chilling effect” before the Superior Court. The lower court implied that judicial notice could be taken that the provision had deleterious consequences for Muslim minorities. The appellate court rejected Rutherford J.’s approach, noting the precedents were clear on when notice could be taken. At paragraph 119 of its decision, the Court of Appeal stated:

The problem with the trial judge’s view of the indirect effect of the impugned definition is that it is founded entirely on speculation, both as to the existence of the ‘chilling effect’ and the cause or source of that ‘chilling effect’, if indeed one exists. The trial judge simply declared that the ‘chilling effect’ on the rights of certain segments of our society to freely express themselves was ‘the inevitable impact’ of the inclusion of the motive clause in the definition of ‘terrorist activity.’

In 2012, the Supreme Court affirmed the lower appellate court’s finding that “it [was] impossible to infer, without evidence, that the motive clause [would] have a chilling effect on the exercise of s. 2 freedoms by people holding religious or ideological views similar to those held by some terrorists.”

148 Ibid.
149 Khawaja (2010), supra note 1 at para 118. According to the appellate court:
A finding of unconstitutionality based on a collateral effect on persons whose conduct is not within the terms of the statute is, to our knowledge, unique to this case. The impact of legislation on persons who are not directly ‘caught’ by the terms of the legislation is normally addressed in the context of the proportionality analysis required by s. 1 of the Charter.

150 Ibid at para 123. The court stated:
The trial judge did not suggest that he was taking judicial notice of the ‘chilling effect’ of the motive clause, although that is what he did. Accepting that the scope of judicial notice is broader in respect of non-adjudicative social facts, such as the potential ‘chilling effect’ of legislation, judicial notice still requires that the fact of which judicial notice is taken be one that is not open to reasonable dispute after due inquiry.

151 Ibid at para 119. The appellate court noted: “In doing so, he relied on similar declarations made by academic commentators.” See Khawaja (2006), supra note 11 at paras 55-58.
152 Khawaja (2012), supra note 2 at para 80.
Both levels of appeal court agreed that the “chilling effect” needed to be established empirically.\textsuperscript{153} The Court of Appeal found that even anecdotal evidence was absent, suggesting that qualitative studies might have been influential if the necessary link was established.\textsuperscript{154} The appellate court promoted a very exacting test where a negative climate was clearly linked to the operation of the motive itself, rather than the set of racialized policies, practices, and attitudes towards Arabs and Muslims that socio-legal studies link to the War Against Terrorism.\textsuperscript{155} The Attorney General of Canada stressed this point before the Supreme Court of Canada, stating in its factum:

The [Ontario Court of Appeal] was correct: Charter decisions cannot be made in a factual vacuum and there is no evidence that the motive requirement ‘chills’ freedom of expression.\textsuperscript{156}

In contrast to the findings by both appellate courts, I press for greater weight for socio-legal scholarship. At the Supreme Court of Canada hearing, Khawaja’s counsel maintained that the “chilling effect” could be inferred “on the basis of logic, common sense and the academic literature,” in keeping with the trial judge’s approach.\textsuperscript{157} As Pue and Russo have observed, Rutherford J.’s methodology was sound because he “approached the matter carefully and fully, engaging in a thorough survey of both scholarly literature and comparative anti-terrorism legislation.”\textsuperscript{158} The trial judge’s “frame of reference” was, appropriately, the “real world of police work, intelligence gathering, imperfect information, and human interactions.”\textsuperscript{159}

I argue that the Supreme Court was incorrect in ruling that no persuasive evidence was before the court establishing a causal relationship between the motive clause and the “chilling effect.”\textsuperscript{160} It incorrectly dismissed Khawaja’s claim that the motive clause bolsters improper police conduct in a hostile climate where inequities are more pronounced. Prior case law from the Supreme Court of Canada affirmed the use of social fact evidence or social science research to create “a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case.”\textsuperscript{161} The court defined social facts as ones that are general in nature and that “help to explain aspects of the evidence.”\textsuperscript{162} In \textit{R. v. Spence} (2005), the Supreme Court of Canada ruled against an accused who argued that anti-black bias could taint the jury’s views of a crime committed against an

\begin{itemize}
\item \textsuperscript{153} \textit{Ibid.}
\item \textsuperscript{154} Khawaja (2010), supra note 1 at para 122. The court stated “...one would have thought that the appellants would be able to produce, at the very least, some credible anecdotal evidence to that effect. One would also have thought that credible expert evidence would be available.”
\item \textsuperscript{155} Yasmin Jiwani, “Trapped in the Carceral Net: Race, Gender, and the ‘War on Terror’” (2011) 4 Global Media Journal 13.
\item \textsuperscript{156} “Respondent’s Factum,” supra note 53 at para 84.
\item \textsuperscript{157} Khawaja (2012), supra note 2 at para 78.
\item \textsuperscript{158} Pue & Russo supra note 46 at 62.
\item \textsuperscript{159} \textit{Ibid.}
\item \textsuperscript{160} Khawaja (2012), supra note 2 at paras 76-85.
\item \textsuperscript{161} \textit{R v Spence} (2005) 3 SCR 458, 2005 SCC 71 at para 57[Spence].
\item \textsuperscript{162} \textit{Ibid.}
\end{itemize}
East Indian male due to interracial conflict, leading to his request to challenge potential jurors for cause. Spence’s argument that the court could take judicial notice of the bias was rejected as an unwarranted extension of the law. While Spence’s reasoning failed, the Supreme Court listed cases where social science evidence was sufficient to justify judicial notice of social phenomena. These included R. v. Lavallee where the “battered wife syndrome” helped explain the commission of a homicide towards an abusive partner. The consequences of the “feminization of poverty” were recognized in Moge v. Moge. The “systemic or background factors that have contributed to the challenges faced by Aboriginal people in the criminal justice system and society at large were acknowledged in R. v. Wells and in R. v. Gladue. These decisions are precedents for Rutherford J.’s acceptance of academic studies as sufficient evidence to substantiate the “chilling effect” from the operation of the motive clause in a racially charged climate. In contrast, the Supreme Court held that Khawaja was not an appropriate case for the recognition of social facts based on academic findings. Given the extensive social science research and anecdotal accounts available on racialized profiling, this conclusion is disappointing.

Importantly, there is a well-established, if not incontrovertible, literature on the existence and operation of racial profiling. The positivistic, actuarial approach endorsed by the Court of Appeal and the Supreme Court of Canada that emphasizes quantitative findings is incompatible with racial profiling. Refuting the insistence on “hard” proof, Tator and Henry accept as presumptive or “a priori” that “police (and other institutions such as the courts, the media, and social services) do practise differential behaviour towards…people of colour …” Indeed, the Ontario appellate court acknowledged at paragraph 122 that proof is not required in every instance. While the onus of establishing a s. 2 breach rests with the applicant, evidence is “[u]sually, although not always” required to meet that onus. The Supreme Court of Canada recognized that a “chilling effect” could be inferred from “known facts and experience” in some instances even while refusing to reach this conclusion in Khawaja (2012). The highest court offered a glimmer of hope to future applicants by rejecting a position the Court of Appeal seemed to adopt “that a claimant under s. 2 of the Charter must always call evidence of a chilling effect.”

163 Ibid.
164 Ibid at para 67.
165 Ibid at para 57.
170 See e.g., Tator & Henry, supra note 132; and David Tanovich, The Colour of Justice: Policing Race in Canada (Toronto: Irwin Law, 2006)
171 Tator & Henry, ibid at 37.
172 Khawaja (2010), supra note 1 at 122 [emphasis added].
173 Khawaja (2012), supra note 2 at para 79.
174 Ibid.
The appellate courts’ insistence on precise evidence associated with positivistic methodologies undermines findings based on lived experience. Because racially based violence and profiling often operate in the shadows, these practices can be hard to document and difficult for courts to assess. Pue asserts that “only the tiniest sliver of state action is ever subjected to judicial review.” As a result, comments by the courts on phenomena like discriminatory policing have “a somewhat abstract, other-worldly character, grotesquely distanced from the quotidian routine in which subjects encounter state authority.” There is substantial research, some of it peer-reviewed, as well as anecdotal evidence that points to connections between laws and police behaviour. For example, a study by Deborah Wilkins Newman and Nikki-Qui D Brown demonstrates a link between American anti-terrorism law and racialized policing. Newman and Brown concluded that the USA Patriot Act was a factor in the suspicion that law enforcement officials directed towards Middle Eastern males. While no studies have replicated these conclusions specifically with respect to the motive clause, a number of studies validate an escalation in violence against Muslims since 9/11. The emphasis on the violence of terrorists embedded within both appellate decision masks the significant threats to Muslim bodies shown by the global statistics on war casualties and the Canadian figures on hate crime, cited earlier.

175 Kirk Miller, “Racial Profiling and Postmodern Society: Police Responsiveness, Image Maintenance, and the Left Flank of Police Legitimacy” (2007) 23 Journal of Contemporary Criminal Justice 248. See also Bahdi, supra note 3 at 297: “This is in part because racial profiling takes place ‘on the ground’ and is often the product of discretionary decision-making that is not well-documented.”


177 Ibid.

178 Gova & Kurd, supra note 41.


182 See e.g.: American Civil Liberties Union, “The Human Cost - Civilian Casualties in Iraq & Afghanistan” (13 November 2009), online: American Civil Liberties Union <http://www.aclu.org/print/human-cost-civilian-casualties-iraq-afghanistan>; See also James Laxer, Mission of Folly: Canada and Afghanistan (Toronto: Between the Lines, 2008) at 31-34
V. CONCLUSION

In this case comment, I argued that the appellate courts fail to send a strong message against racial profiling in their findings on the motive clause. My evaluation of the appeal decisions is not intended to deny that terrorist acts occur or suggest that fear of terrorism is without merit; rather, my intent is to provoke discussion about the differing responses to the constitutional issues arising from the motive clause. The Ontario Court of Appeal’s findings particularly may reproduce and even amplify the tropes of the radical Islamic terrorist “Other” thereby legitimizing divisions between the dominant society and the Muslim minority. This is worrisome given the rise in hate crimes against Muslims over the last several years. It is also unfortunate given that equality is more likely to be realized through policies that stress social inclusion than through provisions like the motive clause which may authorize unwarranted policing discretion and which may generate stigma towards Muslim communities.

On the basis of the social science evidence and the lived experiences of Muslims post 9/11, I have advanced a purposive interpretation of the Charter that emphasizes its equality promoting values and avoids a narrow legal test of social harm. In contrast, the appellate courts dismissed this social context and failed to effectively draw the interconnections between racialization and discriminatory law enforcement due to a narrow focus on the evidentiary challenges of proving targeted discrimination. The Supreme Court of Canada affirmed this finding even


This discourse which constructs the U.S. as ontologically civilized, humane, reasonable, and innocent in opposition to Iraqis who resist the U.S. as terrorists and insurgents – which can be read as barbaric, irrational, uncivilized, and a priori culpable – is used to justify the violence that is done to them. This power of construction allows us to deflect attention away from ourselves and towards the Other. Moreover, because we can construct victims as well, it gives us the ability to exclude from that status the vast majority of Iraqis who suffer violence.

Statistics Canada, supra note 37.

It is also argued that terrorism is socially constructed. See: Thomas J Butko, “Four Perspectives on Terrorism: Where They Stand Depends on Where You Sit” (2009) 7 Political Studies Review 185.


Bahdi, ibid at 294. Bahdi states that racial profiling “undermines national security while harming Arabs, Muslims, and other racialized groups by heightening their vulnerability and reinforcing their exclusion from Canadian society.”

Statistics Canada, supra note 37.

In “The War on Terror”, supra note 6, Wesley Pue concludes at 290:

We are left, then, with the unfortunate conclusion that Canada’s new laws violate the very constitutional values that render our society ‘civil,’ while simultaneously failing to protect us from terrorism.

while it recognized that evidence of a chilling effect was not always necessary under s. 2 of the *Charter.*

In 2003, Reem Bahdi reinforced the absence of an authentic “exit” or escape from complex justice-related problems with international ramifications when simplistic solutions, including profiling, are endorsed and utilized. Bahdi highlights our collective willingness to identify others as the perpetrators of human rights violations. I suggest that we need to face our own complicity through the quiet acceptance of discriminatory practices. The *Khawaja* appellate judgments are significant, yet troubling, retreats from equality-oriented values. By identifying and challenging the appellate courts’ conclusions on the motive clause, I hope to encourage concerted effort to address the impact of post-9/11 policies on the marginalized communities most affected by them.

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190 Bahdi, *supra* note 3 at 316.
191 Khalema & Wannas-Jones, *supra* note 181 at 25 outline objectives for their research that should guide overall policy changes. They state “Thus, the ultimate goal of the study was to provide a basis for engagement in action that challenges racism and bias, empowers those affected, and ultimately transforms their lives and those around them.”