

9-4-2018

Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada

Reem Bahdi

Faculty of Law, University of Windsor

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Civil Rights and Discrimination Commons](#)

Commentary



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Citation Information

Bahdi, Reem. "Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada." *Osgoode Hall Law Journal* 55.2 (2018) : 557-591.

DOI: <https://doi.org/10.60082/2817-5069.3293>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol55/iss2/6>

This Commentary is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada

Abstract

Captain Javed Latif, a Muslim Canadian pilot from Pakistan, was denied pilot refresher training by Bombardier Aerospace Training Center in Canada based on information received from US national security officials. Almost 12 years after Captain Javed Latif's ordeal began, the Supreme Court of Canada affirmed a decision by the Quebec Court of Appeal overturning a finding by a Quebec Human Rights Tribunal that Latif had been racially profiled. The Supreme Court of Canada's decision ultimately exposes and perpetuates a deep unwillingness to challenge the stereotyping of Muslims as terrorists in Canada. In response, this commentary seeks to excavate Captain Latif's fuller story largely through a reading of silences. It critically analyzes the Court's claim that the Tribunal had little or no evidence before it to ground its finding of discrimination.

Keywords

Discrimination in employment; Islamophobia; Racism; Canada

Creative Commons License



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Commentary

Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada

REEM BAHDI*

Captain Javed Latif, a Muslim Canadian pilot from Pakistan, was denied pilot refresher training by Bombardier Aerospace Training Center in Canada based on information received from US national security officials. Almost 12 years after Captain Javed Latif's ordeal began, the Supreme Court of Canada affirmed a decision by the Quebec Court of Appeal overturning a finding by a Quebec Human Rights Tribunal that Latif had been racially profiled. The Supreme Court of Canada's decision ultimately exposes and perpetuates a deep unwillingness to challenge the stereotyping of Muslims as terrorists in Canada. In response, this commentary seeks to excavate Captain Latif's fuller story largely through a reading of silences. It critically analyzes the Court's claim that the Tribunal had little or no evidence before it to ground its finding of discrimination.

I.	LATIF'S FALL FROM GRACE.....	561
II.	NARRATIVES AND COUNTER-NARRATIVES.....	564
	A. A Tale of Two Theories.....	569
	B. Profiling By Proxy.....	572
	C. Gignac Conduct Theory.....	579
III.	CONCLUSION	590

* Associate Professor, Faculty of Law, University of Windsor. I would like to thank my colleagues Sujith Xavier, Claire Mummé, and Jasminka Kalajdzic as well as two anonymous reviewers and the editors of the Osgoode Hall Law Journal for their helpful comments and advice. I appeared as the expert witness for the Commission des droits de la personne et des droits de la jeunesse before the Quebec Human Rights Tribunal in this case.

Silence . . .
 . . . is a presence
 it has a history a form
 Do not confuse it
 with any kind of absence¹

Law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium.²

INACCURATE OR INCOMPLETE FACTS can become reified truths through the legal process. Sometimes a court is presented with erroneous facts that nonetheless evolve into conventional wisdom once adopted into the court's reasons.³ At other times, a court's own characterization can fracture the facts.⁴ Either way, the judicial rendition becomes the dominant narrative read in law schools, cited by judges and other decision-makers, and analyzed by legal experts.

Given the construction and reconstruction of relevant facts and narratives throughout the naming, blaming, and claiming process,⁵ legal scholars of various methodological and political persuasions sometimes turn to "reading silences" to understand law and legal architecture. For their part, feminists and critical race scholars have long stressed the importance of reading "silence as language"⁶ because the unsaid can reveal as much about legal values, priorities, imaginations and possibilities as the stated word. Individual stories of marginalization can

-
1. Adrienne Rich, "The Cartographies of Silence" in Adrienne Rich, ed, *The Dream of a Common Language: Poems 1974–1977* (New York: WW Norton, 1978) 16 at 17.
 2. Robert Cover, "Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat, eds, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1993) 95 at 102.
 3. See Eric M Adams, "Errors of Fact and Law: Race, Space and Hockey in *Christie v York*" (2012) 62:4 UTLJ 463.
 4. See John T Noonan, *Persons and the Masks of Law* (New York: Farrar, Straus and Giroux, 1976).
 5. Peter Brooks & Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1998).
 6. Nthabiseng Motsemme, "The Mute Always Speak: On Women's Silences at the Truth and Reconciliation Commission" (2004) 52:5 Current Sociology 909. Motsemme locates ways of reading these silences present in the Truth and Reconciliation Commission testimonies through a discussion of the following themes: silence as resistance and courage, silence as illusion of stability, and silence as a site for coping and the reconstitution of self.

often be found in the unsaid.⁷ Individual stories, when recovered from obscurity and brought together with similar experiences—much as an archive or museum brings together memories or excavated artifacts—can help us further understand both the law’s role in affirming or rejecting racialized policies and practices as well as its role in national self-identification.

This commentary analyzes the Supreme Court of Canada’s decision in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*.⁸ Almost twelve years after Captain Javed Latif’s ordeal began, the Supreme Court of Canada affirmed a decision by the Quebec Court of Appeal overturning a finding by a Quebec Human Rights Tribunal (“the Tribunal”) that Bombardier had discriminated against him. While one can find some cause for celebration in the Court’s reasons,⁹ the decision ultimately exposes and perpetuates a deep unwillingness to challenge the stereotyping of Muslims as terrorists in Canada. In response, this commentary seeks to excavate Latif’s fuller story largely through a reading of silences. The Quebec Human Rights Tribunal advanced two discrete but intersecting theories in its finding of discrimination by Bombardier against Latif. The Court, however,

-
7. Various authors discuss and demonstrate the importance of narrative to law. For some of the classics, see bell hooks, “Theory as Liberatory Practice” (1991) 4:1 *Yale JL & Feminism* 1; Patricia J Williams, *The Alchemy of Race and Rights: Diary of A Law Professor* (Cambridge, Mass: Harvard University Press, 1991); Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43:6 *Stan L Rev* 1241; Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” (1989) 87:8 *Mich L Rev* 2411; Brooks & Gewirtz, *supra* note 5; Cover, *supra* note 2; Maya Angelou, *I Know Why the Caged Bird Sings* (New York: Random House, 1969). Angelou’s work does not speak to law directly but nonetheless offers a powerful example of narrative that reveals the impact of law. Constance Backhouse offers the best and broadest example of narrative style in the Canadian context. See for example Constance Backhouse, *Colour Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).
 8. 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier*].
 9. For example, The Canadian Muslim Lawyers’ Association issued a press release noting that the Court’s affirmation of the possibility of unconscious bias, confirms that Canadian companies cannot “blindly comply with discriminatory decisions by a foreign authority” and its prima facie discrimination test would help protect future victims of discrimination. See Canadian Muslim Lawyers’ Association, Press Release, “Supreme Court Unanimously Affirms Correct Test for Discrimination” (24 July 2015) online: CMLA <cmla-acam.ca/press-release-the-supreme-court-rules-in-latif-v-bombardier>.

focused artificially on one and found “no evidence” of discrimination.¹⁰ The Court thus not only ended Captain Latif’s quest for a remedy, it re-wrote his narrative by moving attention away from key facts regarding his interactions with Bombardier. The Court’s chosen narrative also relegated the collective fears and aspirations of Muslim communities in Canada to the realm of the unsaid.

At a time when Muslims are struggling to counter popular and official stereotypes that construct them as incorrigible barbarians and outsiders who are prone to terrorism and violence,¹¹ it is important to create spaces for

-
10. As Paul Daly points out, the Court used different language to express its disapproval of the Tribunal’s decision. Observing that the Court’s analysis looked like *de novo* review, Daly identifies the different expressions used by the Court in its analysis of the Tribunal’s reasons: “insufficient evidence” (at para 84), evidence not ‘tangibly related’ (para 89), evidence ‘not sufficiently related’ (at para 89), or simply ‘no evidence’ (at para 99) ... As usual, these are all faithful translations of the original French.” See Paul Daly, “Discrimination, Deference and Pluralism: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39” (24 July 2015), *Paul Daly: Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/07/24/discrimination-deference-and-pluralism-quebec-commission-des-droits-de-la-personne-et-des-droits-de-la-jeunesse-v-bombardier-inc-bombardier-aerospace-training-center-2015-scc-39>.
11. See e.g. John Geddes, “Canadian anti-Muslim sentiment is rising, disturbing new poll reveals,” *Maclean’s* (3 October 2013), online: <www.macleans.ca/politics/land-of-intolerance>; *Concluding Observations of the Committee on the Elimination of Racial Discrimination in Relation to Canada*, UNCERD, 17th Sess, UN Doc CERD/C/CAN/CO/18 (2007) at para 14, online: <www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.18.doc>; Chedly Belkhdja & Chantal Richard, “The Events of September 11 in the French-Canadian Press” (2006) 38:3 *Can Ethnic Studies J* 119; Helen R McClure, “Terrorist or Just a Piece of the Mosaic? Canada’s Discourse on ‘Arabs’” (Paper presented at the International Studies Association Annual Conference, Honolulu, Hawaii, 2 March 2005), online: <www.allacademic.com/meta/p69415_index.html>; Alnoor Gova & Rahat Kurd, *The Impact of Racial Profiling: A MARU Society / UBC Law Faculty Study*, Metropolis British Columbia Working Paper Series No 08-14 (Vancouver: Metropolis British Columbia, 2008); Daood Hamdani, *Triple Jeopardy: Muslim Women’s Experiences of Discrimination* (Toronto: Canadian Council of Muslim Women, 2005), online: <archive.ccmw.com/publications/triple_jeopardy.pdf>; Careenlee Barkdull et al, “Experiences of Muslims in Four Western Countries Post-9/11” (2011) 26:2 *Affilia: J Women & Soc Work* 139; Peter Gottschalk & Gabriel Greenberg, *Islamophobia: Making Muslims the Enemy* (Lanham: Rowman & Littlefield, 2007); Reem Bahdi, “No Exit: Racial Profiling and Canada’s War against Terrorism” (2003) 41:2&3 *Osgoode Hall LJ* 293; Reem Bahdi et al, *Racial Profiling* (Vancouver: BC Civil Liberties Association, 2010), online: <bccla.org/wp-content/uploads/2012/03/2007-BCCLA-Report-Racial-Profiling.pdf>; Ibrahim Kalin, “Islamophobia and the Limits of Multiculturalism” in John L Esposito & Ibrahim Kalin, eds, *Islamophobia: The Challenge of Pluralism in the 21st Century* (New York: Oxford University Press, 2011) 3; Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law*

counter-narratives to be heard and lived experiences to be validated. Moreover, litigants who dedicate years of their lives to advancing social justice causes deserve the dignity of being able to recognize their own stories when relayed back to them by the legal process.¹² The comparison of the Court's reasons with that of the Tribunal thus represents a political act of hearing counter-narratives while also critically analyzing the Supreme Court of Canada's claim that the Tribunal had little or no evidence before it to ground its finding of discrimination.

I. LATIF'S FALL FROM GRACE

With over twenty-five years' experience, Latif was licenced to fly jumbo jets in both Canada and the United States.¹³ He qualified to fly under an FAA licence on 6 December 2003 at an American training facility. A Canadian citizen born in Pakistan, Captain Latif adheres to the Muslim faith. In March 2004, he was offered an employment contract as a pilot under his American pilot's licence. Industry standards required him to refresh his training before the employment contract could be issued. Latif accordingly applied for training at Bombardier's

and Politics (Toronto: University of Toronto Press, 2008); Uzma Jamil, "Discrimination experienced by Muslims in Ontario" (2012) 9:3 OHRC Diversity Mag, online: <www.ohrc.on.ca/en/book/export/html/8782>; Yasmin Jiwani, "Barbarians in/of the Land: Representations of Muslim Youth in the Canadian Press" (2016) 11:1 J Contemp Issues in Education 36. The National Council of Canadian Muslims sued then Prime Minister Stephen Harper for libel and/or defamation for linking them to terrorism. See *National Council of Canadian Muslims v Harper*, 2015 ONSC 7185, 261 ACWS (3d) 51. Scholarly interest in the stereotyping of Arabs and/or Muslims in Canada has grown significantly over the last decade. See e.g. TY Ismael & John Measor, "Racism and the North American Media Following 11 September: The Canadian Setting" (2003) 25:1&2 Arab Studies Q 101; Denise Helly, "Are Muslims discriminated against in Canada since September 2001?" (2004) 36:1 Can Ethnic Stud J 24.

12. On the question of dignity and misrecognition more generally, see Zoë Morrison, "On Dignity: Social Inclusion and the Politics of Recognition," Centre for Public Policy Social Policy Working Paper No 12 (Melbourne: Brotherhood of St Laurence & Centre of Public Policy - University of Melbourne, 2010), online: <library.bsl.org.au/jspui/bitstream/1/1942/1/Morrison_On_dignity_2010.pdf>; Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 25 ("Due recognition is not just a courtesy we owe people. It is a vital human need" at 26); Nancy Fraser, "Rethinking Recognition" (2000) 3:3, *New Left Rev* 107 (demonstrating different analysis that links misrecognition to "social subordination" and justice but without using the term "dignity").
13. *Commission des droits de la personne et des droits de la jeunesse c Bombardier inc (Bombardier Aerospace Training Center)*, 2010 QCTDP 16 at para 7, [2011] RJQ 225 (CanLII) [*Bombardier QCTDP*].

facility in Texas under his American licence. He needed security clearance from American national security officials in order to secure a place in the pilot training program. Even though he had received a clearance earlier, Latif's 2004 clearance request received no reply. American law required that Bombardier not approve Latif's training request at its Texas facility absent American security clearance, and Bombardier, rightly, refused to train Captain Latif at its Texas facility.

Still not approved for training in the United States, and unable to determine why his request for a clearance had been delayed, Latif decided to try to seek training through Bombardier's training facility in Montreal. While he waited, he earned his Canadian pilot's licence on 19 April 2004 from Transport Canada. He subsequently submitted a separate application for training in Montreal under his Canadian licence. Four days after receiving his Canadian licence, Latif heard from American officials about his request for training under his American licence: The US Department of Justice (DOJ) had refused his request for security clearance submitted under his American pilot's licence. Though surprised, Captain Latif was not overly concerned. He had, after all, submitted an application for training in Canada under his Canadian licence. American officials had no jurisdiction over his request to obtain training in Canada under his Canadian licence.¹⁴ But he would soon face disappointment again. Bombardier refused to train him under his Canadian licence in Canada.¹⁵ Neither Canadian nor American laws required Bombardier to refuse Latif's request. Bombardier's sole reason for refusing to train Latif in Canada was that American officials had refused Latif a security clearance in the United States.¹⁶ In refusing Latif training under his Canadian licence in Canada, Bombardier did not seek guidance from Canadian national security officials.¹⁷ As is generally the case in the national security context, secrecy shrouded the decision making and protected the decision makers. Neither Captain Latif nor Bombardier were told the reasons why American officials had refused Captain Latif training clearance. They were only told that he had been deemed a risk to national security.¹⁸ In other words, Captain Latif was presumed to be a potential terrorist.

By 2008, American officials cleared Latif.¹⁹ He was never a threat to American or Canadian national security. Although he had been provided with no

14. *Ibid* at para 85.

15. *Ibid* at paras 83-87.

16. *Ibid* at para 287.

17. *Ibid* at para 336.

18. *Ibid* at para 88.

19. *Ibid* at para 126.

official explanation for why he had been flagged as a national security threat, Latif speculated that American officials may have mistaken him for someone with a similar name. Both “Javed” and “Latif” are exceptionally common names. Since the decision to flag Latif and the decision to clear him were both made in secret, Captain Latif could not know who had made the decision to flag or to clear him, or when, how, or why those decisions were made.

Listed as a potential terrorist by American officials and denied training by Bombardier in Canada, Captain Latif lost several employment contracts. His lawyer calculated his lost earnings at \$905,155, which was the difference between the estimated worth of contracts lost and the actual salary he earned, most of which was outside of his profession of choice.²⁰ Latif was also stigmatized and humiliated. News of his listing by American officials and Bombardier’s refusal to train him spread quickly and Captain Latif’s solid reputation within the airline industry quickly fell apart. He had been tarred with the terrorist brush. People who had previously been his friends and colleagues shunned him. As he put it, he became *persona non grata*:

Subsequent to 2004, 2005, I stopped getting any job offers because by now, in the industry, it was known that Javed Latif is a *persona non grata*, has not been given clearance, maybe he’s undesirable and not to be given any job offers. Because this is a very small industry and unfortunately, the word travels very fast and it had been a long time that I had been denied in many denials and so, it was known around in the industry that I was not cleared. In fact, I had a job offer in between which I wasn’t able to take only for this reason, because recently, I had been given a refusal.²¹

Captain Latif’s reputation now made it difficult to secure employment. He had to borrow money from his son and mortgage his house to make ends meet. His physical, emotional and mental health suffered:

I felt humiliated because people that I had known, worked with, was associated with, had interacted with, they washed their hands off [*sic*] me. They won’t recognize me or say they didn’t have time for me.

This was a humiliation. There were other factors. When there was no response from many agencies, many other people, I was humiliated because it became common knowledge that I had been probably as people understood it, a suspect, maybe a terrorist, maybe links with something [*sic*].²²

20. *Ibid* at para 365.

21. *Ibid* at para 110.

22. *Ibid* at para 410.

American officials advised Latif that there was little he could do to correct the predicament in which he found himself. There was no appeals process for non-US citizens.²³

He sought recognition and remedy for the harm done to him by filing a complaint with the Commission des droits de la personne et des droits de la jeunesse. Unlike some of its counterparts (for example, in Ontario) the Quebec Human Rights Commission (“the Commission”) assumes carriage of complaints.²⁴ The Commission, acting on behalf of Latif and in the public interest, took his claim to a hearing before a Human Rights Tribunal. It alleged that Bombardier Inc (the Bombardier Aerospace Training Center) had interfered with Latif’s right to be free from discrimination by refusing him training at its Canadian facility. The Commission argued that by refusing training to Latif, Bombardier interfered with his “right to the safeguard of his dignity and reputation, without distinction or exclusion based on ethnic or national origin, contrary to sections 4 and 10 of the Charter.”²⁵

II. NARRATIVES AND COUNTER-NARRATIVES

On 29 November 2010, after seven days of hearing, eight witnesses, and two expert reports, the Tribunal found that Bombardier had discriminated against Latif.²⁶ In a decision that spanned 120 pages, the Tribunal ordered \$25,000 in moral damages, \$309,798.72 USD for material prejudice (less \$66,639 Canadian dollars), and \$50,000 in punitive damages. The Tribunal also issued an order requiring Bombardier to “cease applying or considering the standards and decisions of the US authorities in ‘national security’ matters when dealing with applications for the training of pilots under Canadian pilot’s licences.”²⁷

The Tribunal’s decision set a precedent in many respects. Latif became one of the first successful, high profile Muslim human rights claimants. His story

23. *Ibid* at para 93; *Vision 100—Century of Aviation Reauthorization Act*, Pub L No 108-176, § 612(a), (c), 117 Stat 2490 (2003) [*Vision 100*].

24. See Commission des droits de la personne et des droits de la jeunesse, “The Commission: Services and Activities,” online: <www.cdpcj.qc.ca/en/commission/services/Pages/default.aspx>.

25. *Bombardier QCTDP*, *supra* note 13 at para 2.

26. In addition to my own expert report, the Tribunal considered an expert report by Mr. Bernard Siskin who testified on behalf of Bombardier. See *ibid* at paras 209-216.

27. *Ibid* at para 450. For the other elements of the judgment, see *ibid* at paras 399, 405, 415, 442.

was carried by national papers²⁸ and signalled that Canada continued to care about injustices perpetrated in the name of national security. Maher Arar's story had already sent a similar signal. Justice Dennis O'Connor's 2006 report implicating Canadian officials in Arar's detention and torture²⁹ preceded Arar's multi-million dollar settlement with the Canadian government.³⁰ Arar's story assured Canadians that, after the events of September 11, 2001 ("9/11"), Canada remained committed to human rights.

Shortly after 9/11, Canada rejected the official American strategy of explicitly exempting national security targets from human rights norms and due process. Rather than invoking the *War Measures Act* to suspend rights, Canadian officials responded to al-Qaeda's attacks with Bill C-36, the *Anti-terrorism Act*, which was "carefully developed to combat terrorism, while ensuring that fundamental interests, such as privacy and other human rights, are respected."³¹ In contrast, the United States, under the administration of George W Bush, carved out legal "black holes" or spaces in which human rights and due process were suspended. It sought to redefine the legal meaning of torture, facilitated the torture of detainees in Guantanamo Bay and beyond, created the concept of "unlawful enemy combatants" to defeat the application of the Geneva Conventions, approved of racial profiling, and limited access to information under the *Presidential Records Act*.³²

-
28. "Bombardier fined for discrimination: Company to pay highest punitive penalty ever awarded by Quebec tribunal," *CBC News* (8 December 2010), online: <www.cbc.ca/news/business/bombardier-fined-for-discrimination-1.932063>; Ari Altstedter, "Blacklisted pilot wins rights case against Bombardier," *The Globe and Mail* (8 December 2010), online: <www.theglobeandmail.com/news/national/blacklisted-pilot-wins-rights-case-against-bombardier/article1318877>. The Tribunal awarded Latif the largest punitive damage award in its history.
29. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background*, vol 1 & vol 2 (Ottawa: Public Works and Government Services Canada, 2006); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006 [*Arar Report Recommendations*]).
30. "Ottawa reaches \$10M settlement with Arar," *CBC News* (25 January 2007), online: <www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875>.
31. Department of Justice Canada et al, *The Anti-Terrorism Act: an act of prevention* (Ottawa: Department of Justice Canada, 2002) at "Summary," online: Public Safety Canada <www.securitepublique.gc.ca/cnt/rsrcls/lbrt/ctlg/dtls-en.aspx?d=PS&i=14309286>. See also *Anti-terrorism Act*, SC 2001, c 41.
32. This paragraph is based on Reem Bahdi, "Before The Law: Creeping Lawlessness in Canadian Anti-Terrorism Law and Policy" in Vida Bajc & Willem de Lindt, eds, *Security and Everyday Life* (New York: Routledge, 2011) 143 at 144 [Bahdi, "Before the Law"]. See *Presidential Records Act*, 44 USC §§ 2201–2207 (1978).

By contrast, Canadian officials insisted that Canada would strike a balance between human rights and national security; “while Americans derogated, Canadians balance.”³³ But, signals between Canada’s official policy and Canadian reality became mixed at best after the release of the O’Connor Report in 2006. The official balancing rhetoric continued to be offered by Canadian officials even as people’s lives told a different story about the demise of human rights in the name of national security. Canada’s refolement or “extraordinary rendition” of Benamar Benatta, an innocent Algerian refugee, to the United States broke in 2007.³⁴

Canadian Muslims had other reasons to ask whether violations of their rights and their experiences of discrimination would be recognized and remedied through law and legal processes. On 18 June 2009, The Standing Committee on National Security and Public Safety presented its report to the House of Commons which observed that Canada needed to recognize the harm done to Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin by the involvement of Canadian officials in the men’s overseas torture and detention.³⁵ The report recommended, among other things, that the men receive an apology and compensation, and that Canadian officials make efforts to correct the misinformation that had been circulated about the men between national security agencies in Canada and abroad. But the government took no action and, citing ongoing civil litigation, refused to comment on the recommendations.³⁶

In this context, Latif’s victory before the Tribunal in 2010 rekindled the hope that Islamophobia and stereotyping of Muslims would not be tolerated by Canadian society, that the havoc wreaked upon people’s lives by stereotypes would be recognized, and that the legal process would help make victims whole again, allowing people to start to reconstruct their shattered lives. The optimism

33. Bahdi, “Before the Law,” *supra* note 32 at 155.

34. *Ibid* at 145-46.

35. House of Commons, Report of the Standing Committee on Public Safety and National Security, *Review of the Findings and Recommendations arising from the Iacobucci and O’Connor Inquiries* (June 2009), online: <www.ourcommons.ca/Content/Committee/402/SECU/Reports/RP4004074/securp03/securp03-e.pdf>.

36. House of Commons, Government Response to the Report of the Standing Committee on Public Safety and National Security: *Review of the Findings and Recommendations arising from the Iacobucci and O’Connor Inquiries* (October 2009) at 14-15, online: <www.ourcommons.ca/DocumentViewer/en/40-2/SECU/report-3/response-8512-402-123>. In March 2017, the Canadian Government apologized and compensated Almalki, El Maati, and Nureddin. See Jim Bronskill, “Ottawa compensates and apologizes to three Canadians tortured in Syria,” *Toronto Star* (17 March 2017), online: <www.thestar.com/news/canada/2017/03/17/ottawa-compensates-and-apologizes-to-three-canadians-tortured-in-syria.html>.

generated by Latif's story proved short lived, however. The Court of Appeal of Quebec overturned the Tribunal's findings in 2013.³⁷ Then, in 2015, the Supreme Court of Canada upheld the Court of Appeal's decision, finding that the Tribunal had little or no evidence of discrimination.³⁸

Though he hired his own lawyer to represent him, Latif was not at the Supreme Court of Canada hearing. One can reasonably surmise that the decision was emotionally and financially devastating, perhaps contributing to a sense of alienation from and mistrust towards the legal system—a mistrust shared by other members of marginalized groups who have found that the legal system's relative inability to understand their lived realities has a “spiralling and multiplying” effect, worsening their lives significantly.³⁹ Captain Latif had dedicated over a decade to regaining his reputation and lost income, only to lose before the Supreme Court of Canada.

But losing a court case is one thing; losing through a decision that misunderstands your experiences seems quite another. The Court narrowed the facts and issues relied upon by the Tribunal to the point of redefining them. How is it that the highest court in the land can re-shape the facts so strictly that it amounts to a re-framing of the narrative and a re-casting of the issues? In part, the answer lies in the nature of appellate review.⁴⁰ The Court, of course, does not and cannot reconsider all the facts that were put before the Tribunal, nor can it have regard for all the Tribunal's reasons.⁴¹ By necessity, the facts and issues raised in any case will be selected and edited. Nonetheless, courts, including the Supreme Court of Canada, generally defer to human rights tribunals, particularly on findings of fact, because tribunals have the benefit of directly examining the

37. *Bombardier inc (Bombardier Aerospace Training Center) c Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 1650 at para 162, 237 ACWS (3d) 181.

38. *Bombardier*, *supra* note 8 at para 98.

39. Amanda Dodge, “Access to Justice Metrics Informed by the Voices of Marginalized Community Members: Themes, Definitions and Recommendations Arising from Community Consultations” (prepared for the Canadian Bar Association's Access to Justice Committee, March 2013) at 8, online: Canadian Bar Association <www.cba.org/CBA/cle/PDF/JUST13_Paper_Dodge.pdf> citing Leonard T Doust, Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia (Vancouver: Public Commission of Legal Aid, 2011) at 21, online: Public Commission of Legal Aid <www.publiccommission.org/media/pdf/pcla_report_03_08_11.pdf>.

40. See generally Paul Daly, “The Struggle for Deference in Canada” in Mark Elliott & Hanna Wilberg, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart, 2015) 297.

41. See *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, [2016] 2 SCR 23.

evidence. In *Bombardier*, however, the Court appeared unwilling to defer to even the Tribunal's findings on key facts. At one point, for example, the Court referred to one of the Tribunal's main findings of fact as an "allegation."⁴² By reading the Supreme Court of Canada's silences, I aim to demonstrate that the Court edited too much out of the Tribunal decision, and that these edits raise questions about the nature and scope of the Court's review of this case. Indeed, some human rights, judicial review and administrative law scholars, and commentators have been troubled by the Court's finding that there was "no evidence" to justify the Tribunal's conclusions.⁴³

My primary interest in *Bombardier* lies beyond doctrinal analysis. *Bombardier* reveals the extent to which Canadian courts prove unwilling to reject the narrative that Muslims represent a threat to Canada and national security. *Bombardier* allows us to remain content that we continue to strike a balance between national security and human rights while our American neighbours call for increasingly restrictive and retrograde national security measures at the expense of equality and human rights values. After all, even as Captain Latif lost, the Supreme Court of Canada in *Bombardier* affirmed the central role that human rights must play in Canada's social and political order, even in the face of national security. He purportedly lost simply because the Court was not presented with sufficient evidence.

But, a reading of the Supreme Court of Canada's silences in *Bombardier* demonstrates that while American rights derogations operate explicitly, our post 9/11 derogations can be constructed through silence and silencing. National security exceptionalism can operate implicitly or covertly within the law rather than outside of it. *Bombardier* illustrates that silence can contribute to our national narrative of a country that post-9/11 continues to respect rights, while simultaneously denying the ongoing stereotyping of Muslims and their inability to seek protection before the law.

My reading of the silences in the Court's *Bombardier* decision proceeds by comparing the frames given to Captain Latif's story by the Supreme Court of Canada and the Quebec Human Rights Tribunal respectively and pointing to the ways in which the Court edited out the Tribunal's findings of fact and reasoning.

42. See *Bombardier QCTDP*, *supra* note 13 at para 138, 160; *Bombardier*, *supra* note 8 at paras 95-97.

43. See *e.g.* David Dias, "SCC sets high burden of proof for racial profiling" (23 July 2015), *Legal Feeds* (blog), online: <www.canadianlawyermag.com/legalfeeds/2810/scc-sets-high-burden-of-proof-for-racial-profiling.html>; Daly, *supra* note 10.

A. A TALE OF TWO THEORIES

Quebec's Human Rights Tribunal understood Latif's case as an opportunity to recognize Islamophobia in Canada and to affirm that Canadian law, unlike its American counterpart, should not further national security exceptionalism. Its reasons for finding against Bombardier rested on two intersecting but discrete theories. The first can be called profiling by proxy: Bombardier served as a conduit for American profiling practices. The second can be called the Gignac Conduct Theory: Bombardier's Head of Standards and Regulatory Compliance, Stephen Gignac, stereotyped Captain Latif as a terrorist and failed to make reasonable inquiries regarding Latif with Canadian officials because he had already concluded that Latif posed a threat to national security.

In its appearance before the Supreme Court of Canada, the Commission argued that the record contained sufficient evidence of Bombardier's discrimination even without considering American profiling practices. In short, one could simply focus on Latif's treatment by Bombardier officials in Canada to make a finding of discrimination.⁴⁴ Acting as interveners, the National Council of Canadian Muslims ("NCCM") and the Canadian Muslims Lawyers Association ("CMLA") also focused on the actions of Canadian officials and Bombardier's decision-making, not that of American officials. The groups urged the Court to take the opportunity to denounce the stereotyping of Muslims as terrorists in Canada. They pointed out, for example, the ways in which Mr. Gignac easily and fluidly equated Captain Latif with the 9/11 hijackers.⁴⁵

The NCCM/CMLA factum told the narrative of a community harmed by bias and the "reproduction of stereotypes:"

The cascading effects of stereotyping and discriminatory stigma easily become routinized in society and embedded in common assumptions. This has been the experience of North American Muslims in the post-9/11 era. Canadian Muslims have experienced heightened vulnerability as a result of the reproduction of stereotypes linking Muslims to radical ideology and national security threats. These stereotypes have persisted despite the fact that the overwhelming majority of Canadian Muslims

44. *Bombardier*, *supra* note 8 (Factum of the Appellant, Commission des droits de la personne et des droits de la jeunesse at para 97), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/35625/FM010_Appelante_Commission-des-droits-de-la-personne-et-des-droits-de-la-jeunesse.pdf> [Commission Factum].

45. *Bombardier*, *supra* note 8 (Factum of the Intervenors, National Council of Canadian Muslims (NCCM) and Canadian Muslim Lawyers Association (CMLA) at para 20), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/35625/FM040_Intervener_National-Council-of-Canadian-Muslims-and-Canadian-Muslim-Lawyers-Association.PDF> [NCCM & CMLA Factum].

are peaceful, law-abiding citizens and residents, who pose no greater risk of harm to the public than members of any other group.⁴⁶

Given such community experiences, it is not surprising that the NCCM and CMLA regarded *Bombardier* as an opportunity to seek judicial recognition of Islamophobia within Canada. Presenting from a community perspective, the groups stressed that “Islamophobia has, like anti-Black racism and anti-Semitism, gained widespread recognition as a social fact in contemporary Canadian society.”⁴⁷

Captain Latif’s story understandably resonated in Muslim communities for several reasons. Yet another innocent Muslim Canadian found himself the victim of the “war against terrorism” because he had been wrongly labeled. The fear of being “Arar’ed” had already left its mark on Muslim (and Arab) communities in Canada.⁴⁸ Moreover, stereotyping sends a distinct message to whole communities: Racialized and other equality-seeking groups experience stereotyping as control-acts that, in the words of Patricia Williams, lead to “spirit murder.”⁴⁹ Stereotyping also reveals and reinforces patterns of exclusion that construct members of equality-seeking groups as “non-citizens” or “outsiders” regardless of their socio-economic status, their contributions to Canada, or the strength and duration of their relationships with Canada.⁵⁰ These discriminatory moments are not, in short, simply isolated moments of discomfort or even markers of deeper hurt. These moments go to the heart of social being and belonging. Judicial recognition of stereotypes by courts and tribunals can help counter group marginalization by naming and renouncing the stereotype. Naming and renouncing represent acts of counter-narration.

However, the Supreme Court of Canada did not see *Bombardier* as an opportunity to denounce the stereotyping of Muslims in Canada. The stereotyping of Muslims as terrorists in Canada remained outside the Court’s field

46. *Ibid* at para 3.

47. *Ibid* at para 14.

48. The term “Arar’ed” was coined by Faisal Joseph and refers to the interpretation of innocent actions through the lens of stereotyping and Islamophobia. I adopted Joseph’s term in my testimony before the Arar Inquiry. See *e.g.* Neco Cockburn, “Muslims, Arabs fear being ‘Arar’ed, inquiry told,” *The Ottawa Citizen* (10 June 2005) A7.

49. Williams, *supra* note 7 at 73.

50. See Reem Bahdi, “Constructing non-citizens: the living law of anti-terrorism in Canada” in Jenny Hocking & Colleen Lewis, eds, *Counter-Terrorism and the Post-Democratic State* (Cheltenham: Edward Elgar, 2007) 81.

of vision.⁵¹ The Court had agreed to hear *Bombardier* because the case offered “its first opportunity to consider a form of discrimination allegedly arising out of a decision of a foreign authority.”⁵² By choosing to focus on Americans and American decision-making, the Court demonstrated its desire to have a different conversation than the one presented by the Tribunal, the Commission, or the interveners. In the process, the Court ultimately reframed the facts and issues presented by *Bombardier*.

The story of the Court’s reframing of the facts and issues in Latif’s case has multiple potential starting points. One might start with the Court’s own emphasis on a single word, “solely.” The Court indicated that it would focus on American decision-making because the parties agreed that “Bombardier’s decision to deny Mr. Latif’s request for training was based *solely* on DOJ’s refusal to issue him a security clearance.”⁵³ Curiously, the Court employs the term “solely” four times, italicizing it twice for emphasis, when referencing Bombardier’s actions.⁵⁴ With its sight narrowed on “solely,” the Supreme Court of Canada restricted the issues before it to whether Bombardier had profiled Captain Latif by proxy, serving as a conduit for American discriminatory practices. The Court thus focused its decision, artificially, on whether American profiling practices had been proven and, if so, whether a link had been established between those practices and Latif’s predicament.

But, read in light of the Commission’s arguments as a whole, the Tribunal’s decision, and the intervener arguments, the statement “Mr. Latif’s request for

51. See *Bombardier*, *supra* note 8 at paras 95-96. Indeed, rather than denouncing Muslim stereotypes, the Court itself drew close to invoking the “sleeper cell” trope, at paragraphs 95 and 96:

[95] The Commission adds that Mr. Latif’s spotless record is incompatible with the conclusion that he posed a threat to aviation or national security in the United States. In its view, this, combined with the rest of the evidence, shows that his ethnic or national origin was a factor in DOJ’s refusal of his request.

[96] We cannot accept this argument. The refusal by the U.S. authorities was intended to protect the national security of the United States. Mr. Latif’s career record up to that time was not determinative of the threat he might pose to national security any more than were the many FAA-approved training courses he had taken in the past.

It is worth noting that the Commission did not indicate that Captain Latif’s spotless record should be “determinative” but rather should have signalled, “combined with the rest of the evidence,” that American decision-making was suspect. See also NCCM & CMLA Factum, *supra* note 45 at para 13.

52. *Bombardier*, *supra* note 8 at para 2.

53. *Ibid* at para 80 [emphasis in original].

54. *Ibid* at paras 15, 27, 74, 80. The Court italicized the term “solely” at paras 74 and 80.

training was based *solely* on DOJ's refusal to issue him a security clearance,"⁵⁵ should have been understood simply as a factual statement: Bombardier refused Latif training because American authorities had refused him a clearance. Bombardier provided no other explanation or justification for refusing Latif training. Within the context of the Tribunal's reasons, the word "solely" indicates that American decision-making triggered Bombardier's decisions. Bombardier, in short, profiled by proxy. By implication, if Americans did not profile Latif, neither did Bombardier. But the Tribunal made clear that American decision-making was not the only decision-making process under scrutiny. Bombardier's discriminatory actions merited scrutiny in and of themselves, independent of American profiling practices. Much of the Tribunal's analysis therefore focused on the assumptions and the conduct of Gignac towards Latif. The Tribunal understood Latif's predicament as a function of Gignac's conduct and expounded a set of reasons, or theory of discrimination, rooted in its factual findings of Gignac's actions and inaction. In essence, it found that Latif was discriminated against through Gignac's conduct. Yet the Court, by relegating the Tribunal's Gignac Conduct Theory to the realm of the unsaid, took "solely" to mean that only the "profiling by proxy" theory was relevant to Latif's claim. Even so, the Court did not consider much of the evidence that had convinced the Tribunal that Latif had indeed been profiled by proxy.

B. PROFILING BY PROXY

Profiling by proxy centres the discrimination analysis on the United States. It imagines Bombardier as a neutral medium that simply gave effect to American decision-making.

The Court held that there was no evidence suggesting that American officials had profiled Latif based on his identity.⁵⁶ It rejected the notion that evidence of social context could be used to form the link between the impugned decision and Captain Latif's identity because it did not want to undermine the principle that complainants must establish a *prima facie* case. Specifically, the Court worried that a finding of discrimination in the instant case based on a pattern of behaviour exhibited by others in similar circumstances would, in effect, reverse the burden of proof by requiring respondents to demonstrate that their behaviour did not conform to a pattern established through social context evidence.⁵⁷

55. *Ibid* at para 80 [emphasis in original].

56. *Ibid* at para 99.

57. *Ibid* at para 88.

The Court wanted more information about the regulation of pilot training by American authorities.⁵⁸ Clarity was needed, for example, about the relevance of *Vision 100* to Latif's case. Though it did not explicitly say so, presumably the Court wanted more information about the mechanics of decision-making under *Vision 100* and predecessor programs. Signed into law by George W Bush on 12 December 2003, *Vision 100* addressed a significant number of aviation-related issues, including matters such as procurement and employment.⁵⁹ Section 612, as the Tribunal noted, "aimed at the adoption of new security standards."⁶⁰ But, the Court wanted information that pilot training programs discriminated against Muslims or evidence that Latif himself had been discriminated against when decisions were made about his particular case.

However the Court did not address the fact that decisions in the national security context are made in secret and that details about programs are not publicly available. Thus, proof of discrimination, particularly direct proof, is almost impossible to obtain. Nor did the Court address the significant power imbalance between American national security agencies and the Commission. Put simply, American officials held all the cards. They had virtually unfettered access to information about Captain Latif, while the Commission and Latif had no access to any information about his case—including the reasons why American officials decided to name him a threat to national security. As we already know from Maher Arar's case, American officials will not cooperate with Canadian requests for national security related information, even in legal proceedings.

Latif was never told why he was denied training. Ironically, the unsaid in the Commission's case, independent of the ability to say it, erased the efficacy of the evidence that was put before the Court. Unlike the Supreme Court of Canada, the Tribunal did not require the Commission or Captain Latif to pull back the curtain on American decision-making. The Tribunal recognized that the evidence available about Captain Latif's experience would be limited by national security confidentiality and power differences.⁶¹ The Tribunal concluded that it had sufficient information about national security decision-making to make a reasonable inference that Captain Latif, more likely than not, had been profiled when he was identified as a threat to American national security.

58. *Ibid* at para 87.

59. George W Bush, "Statement on Signing the Vision 100—Century of Aviation Reauthorization Act" (Statement delivered at The White House, 12 December 2003), online: The American Presidency Project <www.presidency.ucsb.edu/ws/?pid=64197>.

60. *Bombardier QCTDP*, *supra* note 13 at para 149.

61. *Ibid* at para 207.

In considering the nature and dynamics of stereotyping of Muslims in the American national security context, the Tribunal acknowledged that profiling of Muslims takes various forms. After 9/11, several programs directly targeted Muslims. For example,

One of the largest programs adopted, the National Security Exit and Entry Registration System (NSEERS), requires non-US citizens from specific countries identified as Arab or Muslim to register with the US Department of Immigration when they enter the country and periodically after that. The constraints of the program require, in particular, that photographs and fingerprints be taken, interviews be conducted on departure and arrival, and checks be made in several databanks.⁶²

Canadian officials were sufficiently concerned about NSEERS that they took the highly unusual step of issuing a travel warning to Canadian traveling to the United States. They warned:

Canadians who were born in [Arab or Muslim] ... countries or who may be citizens of these countries to consider carefully whether they should attempt to enter the United States for any reason, including transit to or from third countries.⁶³

In addition, a Canadian Department of Foreign Affairs spokesperson, commenting on NSEERS, noted that the program unfairly targets individuals because of their identity: “If the United States does not have a reasonable doubt about someone’s activities, country of birth should not be taken into account.”⁶⁴

However, the Tribunal acknowledged that the profiling of Muslims in the United States did not end there; it took other forms outside of specific programs that openly targeted Arabs and Muslims.⁶⁵ When programs such as NSEERS were eventually formally revoked, profiling practices continued because Americans accepted profiling as a law enforcement method and terrorism prevention tool. Profiling thus became more diffuse and difficult to locate—but easier to deny—precisely because it took place in the context of seemingly neutral programs that did not explicitly target specific identities. Driven by stereotypes, profiling manifested itself at the operational level where decision-making, though difficult to document at the best of times, remained shrouded behind secrecy.

The Tribunal acknowledged that Muslims are stereotyped as terrorists in the United States and that this stereotyping is evident in both the public and private spheres and colours decision-making. Citing Supreme Court of Canada

62. *Ibid* at para 192.

63. *Ibid* at para 194 citing Elise Labott, “Canada Issues US Travel Warning,” *CNN* (30 October 2002), online: <www.cnn.com/2002/TRAVEL/10/30/canada.us.travel>.

64. *Bombardier QCTDB*, *supra* note 13 at para 79.

65. See *ibid* at paras 182-208.

jurisprudence, the Tribunal emphasized that “[r]acial prejudice and its effects are as invasive and elusive as they are corrosive” and that “one must not ‘underestimate the insidious nature of racial prejudice and the stereotyping that underlies it.’”⁶⁶

The Tribunal also found that American legislators themselves worried that law enforcement agencies were targeting Muslims after 9/11 and made note of anti-profiling legislative efforts:

Recognizing the problems created by racial profiling after the attacks of 2001, 14 Democratic senators tabled a bill aimed at countering that phenomenon. Paragraph 16 of Bill 2481, *The End of Racial Profiling Act of 2007*, provides for the following:

In the wake of the September 11, 2001, terrorist attacks, many Arabs, Muslims, Central and South Asians, and Sikhs, as well as other immigrants and Americans of foreign descent, were treated with generalized suspicion and subjected to searches and seizures based upon religion and national origin without trustworthy information linking specific individuals to criminal conduct. Such profiling has failed to produce tangible benefits, yet has created a fear and mistrust of law enforcement agencies in these communities.⁶⁷

The Tribunal also noted that the US Senators proved unsuccessful in their bid to legislate against the profiling of Muslims and others whose identities were, rightly or wrongly, linked to 9/11 in the public imagination.⁶⁸

Similarly, a Policy Guidance issued by the DOJ that sought to prohibit racial profiling *with the exception of profiling in the national security context* proved particularly troubling for the Tribunal:

Paradoxically, the emergence of a new tolerance for stereotypes and the racial profiling of Arabs and Muslims is obvious in the policies adopted in June 2003 by the DOJ. For example, despite the fact that the objective of the Policy Guidance to Ban Racial Profiling is to prohibit public decision makers from engaging in racial profiling, the policy also provides for an explicit exception in matters of national security, whereas it is acknowledged that the racial profiling of Arabs and Muslims mainly involves matters of national security ...⁶⁹

The Tribunal found the timing of the Policy Guidance important because it was produced precisely as Latif’s ordeal began, thereby reinforcing the idea that

66. *Ibid* at para 247 citing *R v Williams*, [1998] 1 SCR 1128, 159 CLR (4th) 493 at paras 21-22.

67. *Bombardier QCTDB*, *supra* note 13 at para 204.

68. *Ibid* at para 205.

69. *Ibid* at para 203.

profiling did not disappear as 9/11 moved further into history.⁷⁰ The Tribunal accepted that even if decision-makers are not directed to profile Muslims, they have permission to do so. “Hence,” it concluded, “the final result is that this category of people is excluded from the protection of the law.”⁷¹

The Tribunal also made note of the extensive reliance on watch lists within American national security programming. These lists raised concerns for the Tribunal in part because the listing practices were fraught with inconsistencies and irrationalities which resulted in under-inclusion of those who might be dangerous and over-inclusion of those who posed no threat. For example, the Tribunal discussed miscommunications between the FBI and the US National Counterterrorism Center:

In addition to its watch list nomination activities, the FBI prepares terrorist-related intelligence reports that it disseminates throughout the Intelligence Community. Although the FBI did not intend for these reports to be official nominations, NCTC [National Counterterrorism Center] officials informed us that they considered this information from the FBI to constitute official watchlist records from these reports and sourced them to the FBI. However, because the FBI was not aware of this NCTC practice, the FBI was not monitoring the records to ensure that they were updated or removed when necessary.⁷²

Moreover, the Tribunal noted that there was no appeal procedure for non-US citizens.⁷³

Ultimately, the Tribunal found a number of reasons that explained why Latif, an innocent man, found himself on a terrorist watch list, unable to set the record straight with American officials for years. These reasons include: approval for racial profiling either directly in the US DOJ’s Policy Guidance or indirectly through the failed bid to end racial profiling as a tool of national security law enforcement and prevention; irrational policies and practices that produced overly broad terrorist watch lists; lack of meaningful quality assurance or oversight of terrorist watch lists; and stereotyping. These factors also explained the inconsistent decision-making experienced by Latif at the hands of American authorities between 2003 and 2004. Given the facts before it, the Tribunal drew an inference that Latif had been profiled by American decision-makers.

70. Whereas Mr. Latif had been cleared by the US Department of Justice in October 2003, he was refused in March 2004 when aviation security measures became stricter with the coming into force of *Vision 100*, *supra* note 23. This statute was aimed at preventing terrorist attacks. See *Bombardier QCTDB*, *supra* note 13 at para 304.

71. *Ibid* at para 203.

72. *Ibid* at para 198, n 82.

73. *Ibid* at para 93.

The Tribunal's concerns about the profiling of Muslims in the national security context should hardly be surprising in a post-Arar world. Justice O'Connor had cautioned against profiling in his highly publicized report, which found that Canadian officials played a role in Arar's detention and torture in Syria:

Although this may change in the future, anti-terrorism investigations at present focus largely on members of the Muslim and Arab communities. There is therefore an increased risk of racial, religious or ethnic profiling, in the sense that the race, religion or ethnicity of individuals may expose them to investigation. Profiling in this sense would be at odds with the need for equal application of the law without discrimination and with Canada's embrace of multiculturalism. Profiling that relies on stereotypes is also contrary to the need discussed above for relevant, reliable, accurate and precise information in national security investigations. Profiling based on race, religion or ethnicity is the antithesis of good policing or security intelligence work.⁷⁴

Like Justice O'Connor, the Tribunal sent the message that, while profiling may be an acceptable practice in the United States, it is not in Canada.

Significantly, the Tribunal did not revert to a reverse onus to reach its discrimination finding.⁷⁵ It drew inferences about American decision-making based on the testimony of Captain Latif, Bombardier officials, and expert reports. It concluded that in all the circumstances of the case, Latif's failure to secure a clearance was more likely than not linked to American profiling practices. Bombardier tried to raise doubt about whether profiling of Muslims is widespread in the United States. It argued that since Latif had been issued a certificate in 2003, his Muslim identity could not have been the reason for his being refused in 2004. Bombardier's expert, a statistician, urged the Tribunal to base its conclusions on established statistics and argued there was insufficient statistical evidence to conclude that profiling exists or that Latif was profiled.⁷⁶

Rejecting Bombardier's arguments, the Tribunal pointed out that discrimination in Canada, unlike the United States, does not depend on the intent to discriminate.⁷⁷ The fact that Captain Latif (and other Muslims) had at one point been granted training does not exclude the possibility that a denial of training at another point can be discriminatory. The decision to deny at any point can be influenced by stereotyping, and stereotyping constitutes a form of

74. *Arar Report Recommendations*, *supra* note 29 at 356.

75. A good argument can be made that a reverse onus would in fact be appropriate in the national security context given that information is not readily available to complainants but remains in the hands of national security agencies.

76. *Bombardier QCTDP*, *supra* note 13 at paras 214-15.

77. *Ibid* at para 234.

discrimination. Similarly, the Tribunal rejected the suggestion that statistical evidence was necessary to establish discrimination. Had the Tribunal accepted that the case should be driven by statistics, it would have placed another access to justice barrier before marginalized communities in Canada. A reliance on statistics in the human rights contexts obscures the question of whose experiences count and raises further cost barriers for the most marginalized. In any event, even if statistics might be demanded of human rights claimants, the national security context does not easily yield to statistical analysis. One cannot tally those things that are hidden from view.

In reviewing the Tribunal's reasons and remedy, the Court made some welcome observations, in the abstract, about the nature of stereotyping as a general matter. In particular, it reinforced that implicit or unconscious biases can produce discrimination. The Court's analysis begins with an acknowledgement of the complexity of discrimination: "Discrimination can take a variety of forms. Although some of them are easy to identify, others are less obvious, such as those that result from unconscious prejudices and stereotypes or from standards that are neutral on their face but have adverse effects on certain persons."⁷⁸ However, the Court did not develop the concept of "unconscious prejudices or stereotypes" further or consider the ways in which "unconscious prejudices or stereotypes" arose in the case before it. Without engaging in an inquiry about stereotypes and stereotyping, the Court concluded that there was "no evidence" that Latif had been denied training for discriminatory reasons.⁷⁹

In setting out its reasons, the Court gave significant space to Bombardier's argument that Captain Latif had simply been the victim of mistaken identity—or, to use the Court's distancing language, an "identification error"—even though Latif's *factum* on appeal stressed that he never knew the reasons why he was denied or granted clearances in 2003, 2004, or 2008.⁸⁰ The Court ignored the Tribunal's observation that mistaken identities in the national security context are

78. *Bombardier*, *supra* note 8 at para 1.

79. With respect to my report, the Court noted that "[a]t best, the report showed that, at the time, there was a social climate in which racial profiling was generalized for national security purposes as a result of the terrorist attacks on September 11, 2001, and that racial profiling was practised in certain U.S. government programs." *Ibid* at para 87. The significance of the words "social climate," as opposed to "social context" is not clear; perhaps it delineates this case from other cases in which "social context" proved a persuasive, albeit not dispositive, source of evidence. The Court does not mention that American law approves of racial profiling in the national security context.

80. *Bombardier*, *supra* note 8 (Factum of the Appellant, Javed Latif at para 20), online: <www.scc-csc.ca/WebDocuments-DocumentsWeb/35625/FM020_Appelante_Javed-Latif.pdf> [Javed Latif Factum].

themselves racially charged given the undeniable problem of over inclusiveness in the identification and listing of potential terrorists in the United States.⁸¹ Having declared that the discrimination arose “solely” out of Latif’s treatment by American officials and unconvinced that the Americans had profiled Latif, the Court could not hold Bombardier liable for profiling by proxy. It denied Latif a remedy.

But the profiling by proxy narrative does not tell the full story as heard, understood, and conveyed by the Quebec Human Rights Tribunal. Indeed, the Commission explained to the Supreme Court of Canada that there was sufficient evidence of discrimination in Captain Latif’s case as recognized by the Tribunal even without regard for stereotyping and profiling of Muslims in the United States.

C. GIGNAC CONDUCT THEORY

Much of the Tribunal’s decision rested on a finding that Gignac, Bombardier’s Head of Standards and Regulatory Compliance in Montreal, held stereotypical views of Captain Latif that were rooted in a preconception that Muslims are prone to violence and terrorism. While an American decision triggered Gignac’s decision to refuse Latif application for training, American profiling practices were not the only source of stereotyping in Latif’s story.

Gignac testified to the actions he had taken to prevent Latif from receiving training and how he had informed Latif’s prospective employers of the American decision to deny Latif training. For example, on 12 May 2004, Gignac advised Latif’s potential employer in writing that training would be refused:

Reference: Javed Latif

To Whom It May Concern,

It is with regret that we have to inform you that Mr. Javed Latif has been denied pilot training by the US Department of Justice (US DOJ). Reasons for denial have not been divulged to us. Due to our US Certificate of operation, the Bombardier Aerospace Training Centre must comply with the US DOJ request for any type of pilot training.

We will continue to monitor Mr. Latif’s situation and will advise him of any change in this status. Please feel free to contact the undersigned should you have any questions.

Yours sincerely,

81. *Bombardier, supra* note 8 at paras 83, 84.

Steven Gignac

Head of Standards & Regulatory Compliance

Copies to: Mr. Javed Latif

Serge Boudreault, Business Aircraft Pilot Training Manager

Hank Blasiak, General Manager Bombardier Aerospace Training⁸²

In his testimony, Gignac explained that no laws or policies in Canada or the United States required Bombardier to deny Latif training in Canada under his Canadian licence.⁸³ American law prohibited Captain Latif from taking training in the United States and Americans had jurisdiction over Latif's American licence, but Americans had no jurisdiction in Canadian licences in Canada. Canadian law did not prohibit Latif from training in Canada notwithstanding the decisions of American officials. Neither American nor Canadian law, in other words, extended American decision-making to Canada. Nonetheless, Gignac took it upon himself to deny the training. When asked to point to a policy to justify acting the way that he did, Gignac replied "I'm the policy."⁸⁴

Gignac explained that he took his position vis-à-vis Latif for two reasons. First, he was concerned that Bombardier would lose its licence to operate in the United States if American officials lacked confidence in Bombardier.⁸⁵ Second, Gignac indicated that he had a moral responsibility "as a 'citizen'" to prevent Captain Latif from receiving training to prevent another 9/11-style attack.⁸⁶

Gignac explained that he corresponded or met regularly with American officials and made particular note of a meeting on 30 September 2004 organized by the US Transport Security Agency and the US Department of Homeland Security:

[TRANSLATION]

They wanted to know precisely whether, *how we were going to stop those people*, what were [IN ENGLISH] the requirements, why this is happening. [TRANSLATION] *And they responded that it was the law, it was the new law*; the administration did not want another September 11 to occur.⁸⁷

82. *Bombardier QCTDP*, *supra* note 13 at para 88 [emphasis omitted].

83. *Ibid* at para 132.

84. *Ibid*.

85. *Ibid* at para 158.

86. *Ibid* at para 161-62.

87. *Ibid* at para 153 [emphasis in original].

“Those people” were not defined but presumably the term meant potential terrorists in the vein of the 9/11 hijackers who—as is well known—were Muslims.

Gignac also testified that he had developed his own suspicions about Captain Latif, and that he specifically suspected that Latif was a terrorist in waiting. The Tribunal paid particular attention to Gignac’s testimony concerning his attitudes and views of Captain Latif, citing the hearing transcript at various points directly in its decision. For example, the Tribunal referenced the following transcript excerpts to illustrate that Gignac had reached the conclusion that Latif was dangerous:

Q. Okay. To your mind, when the TSA refused Mr. Latif’s application,

A. Hmm, hmm.

Q. ... that meant Mr. Latif was considered a potential terrorist?

A. Yes, a potential terrorist, I could not—he’s refused—yes, a potential terrorist.

Q. When you received the TSA’s response . . .

A. Yes, yes.

Q. ... that’s what you thought?

A. Yes.

Q. And your decision not to train him under a Canadian licence was based on that idea you had?

A. Absolutely.⁸⁸

Ironically, given the Supreme Court of Canada’s later concern about creating a reverse onus, in this instance Gignac required Latif to prove his innocence. Further, Gignac’s testimony demonstrated that he considered himself a private national security agent and an ally of American authorities:

In that regard, Mr. Gignac said he went to Washington two or three times a year to meet with the US authorities. He indicated that, without [TRANSLATION] “putting himself on a pedestal”, few people in Canada [TRANSLATION] “meet with the [US] authorities” about statutes ...⁸⁹

Given that he was acting without legal authority, the tribunal reasoned that Gignac should not have accepted the American decision-making *without some inquiries*.⁹⁰ It would have been reasonable, given American concerns, for Gignac

88. *Ibid* at para 299.

89. *Ibid* at para 145.

90. *Ibid* at para 335.

to ask further questions about Captain Latif. However, it was not reasonable for Gignac to extend American authority to Latif's Canadian licence nor for Gignac to conclude that Latif was a potential terrorist. In particular, the Tribunal wondered why Gignac failed to consult with Canadian national security officials about whether Latif could train under his Canadian licence in Canada.⁹¹ The Tribunal noted that Gignac was in regular contact with Canadian national security agencies and that he could have easily made formal inquiries about Latif.⁹²

If he had consulted with Canadian officials who were readily available to him, Gignac might have been disabused of his concerns about Captain Latif—or at least disabused of his view that he had the authority to deny Latif training. Even though he testified that he considered Captain Latif to be “like a brother,” Gignac's conduct betrayed a wanton disregard for Captain Latif's interests and a fear of his identity: “I know Mr. Latif like a brother, but what happened in 48 hours, I couldn't do anything. I wasn't with him. So I couldn't go so far as to say that he was not a terrorist.”⁹³

The Tribunal concluded that Gignac enthusiastically accepted the American decision and failed to consult with Canadian authorities because he assumed that Muslims have a propensity for terrorism. In short, he required Captain Latif to demonstrate that he was not a terrorist and refused to accept any responsibility for Latif's predicament. Gignac's testimony revealed not only the views and attitudes expressed by American officials at their meeting,⁹⁴ his testimony also revealed that he welcomed the American approach because of his own beliefs. Accordingly, the Tribunal found that Gignac was not simply the passive conduit of American decision-making. He was actively operating under the stereotypes that Muslims are prone to violence and shared the same generalized fears and misapprehension about Muslim propensity for terrorism as revealed in American laws, policies, and practices.⁹⁵

The Tribunal found that Gignac adopted an “absolute security” approach, wherein security fears overshadow and override individual rights without question.⁹⁶ The Tribunal contrasted the absolute security approach with the Canadian model of balancing rights and security. It stressed that Gignac,

91. *Ibid* at para 336.

92. *Ibid* at para 160.

93. *Ibid* at para 140.

94. *Ibid* at para 145.

95. *Ibid* at para 301.

96. *Ibid* at para 334.

[N]ever tried to know whether Mr. Latif objectively constituted a risk to the security [TRANSLATION] “of Canadians or aviation”. He had no idea of the objective reasons that Mr. Latif was considered a threat to the national security of the United States. What is more, he never showed any interest in finding out those reasons.⁹⁷

While the Tribunal did not make this claim, the image that emerges from their assessment of Gignac’s conduct is of someone who is too American, and insufficiently Canadian, in his approach towards security issues.

Moreover, the Tribunal remained unconvinced by Gignac’s concerns over the effect on Bombardier’s operations should they permit the re-training of Captain Latif. The Tribunal found that Bombardier had not established how or even whether its training centres would be affected if they trained Latif.⁹⁸ Indeed, the Tribunal emphasized that Latif had been hired by Flight Safety International in Toronto to train pilots on their flight simulators under his Canadian licence.⁹⁹ In 2006, like Bombardier, Flight Safety International asked Latif to train under his American pilot licence and obtain a security clearance from the United States. He once again sought and was once again denied a clearance under his American licence by American officials. Unlike Bombardier, however, Flight Safety International continued to employ Latif and he continued to train pilots under his Canadian licence. American officials did not object to Flight Safety International’s decision to continue to employ Latif under his Canadian licence.¹⁰⁰ They had no jurisdiction to do so. Flight Safety International faced no repercussions from American authorities for continuing to employ Captain Latif to train other pilots. Captain Latif testified that he also contacted Transport Canada, who did not object to his training under a Canadian licence.¹⁰¹ Despite these facts, Gignac simply assumed there would be “an incredible impact” on Bombardier if it trained Latif under his Canadian licence.¹⁰² In the process, possessing an “absolute security” approach, Gignac ignored the impact that his decision-making would have on Latif.

After analyzing Gignac’s decision-making, the Tribunal defined the remedy and explained the relationship between the remedy ordered and his conduct. The Supreme Court of Canada, however, did not reference Gignac’s testimony or the Tribunal’s findings regarding Gignac. Nor did it consider Gignac’s comments and conduct as evidence of discrimination. Gignac clearly indicated that there

97. *Ibid* at para 335.

98. *Ibid* at para 357.

99. *Ibid* at paras 113-18.

100. *Ibid* at para 356.

101. *Ibid* at para 91.

102. *Ibid* at para 143.

was no doubt in his mind that Captain Latif was a potential terrorist; one is hard pressed to think of a statement that more clearly conveys a stereotypical notion of another.

Both the Commission and Latif pointed the Court to the problematic aspects of Gignac's conduct in their arguments before the Court. For example, the Commission's written submissions highlighted the prejudicial effect of Gignac's labelling Latif as a potential terrorist:

The label "potential terrorist" affixed to Mr. Latif by Mr. Gignac without any solid reason and without consulting Canadian authorities illustrates the "detrimental and corrosive" effect of prejudice and underscores the dangers of adopting the *prima facie* test set out by the Court of Appeal ...

"At a time when stereotypes have intensified towards Arabs, Muslims and individuals from Muslim countries because of 9/11, it is equally crucial that standards aimed at controlling the use of stereotypes in the decision-making process be properly addressed."¹⁰³

Captain Latif's written submissions to the Court also stressed that Bombardier had acted rashly without properly considering the nature or consequences of its treatment of him:

Although Bombardier was not required either by statute or by contract to heed the results of [the American] ... security screening when evaluating a request for training under a Canadian pilot's licence, it did so without further investigation, thereby seriously curtailing Mr. Latif's ability to work as a pilot for more than four years.¹⁰⁴

Similarly, the joint submissions of the National Council of Canadian Muslims and the Canadian Muslim Association directly linked unconscious bias and stereotyping of Muslims in Canadian society with Gignac's decision-making:

In his testimony before the tribunal in the instant case, the Bombardier employee, Mr. Gignac, described his decision with respect to the appellant's application as "nothing against him personally." The witness then segued to the story of an operator he knew personally who worked at the training school of one of the 9/11 attackers: "... [the attackers] learned how to take off, not even to land, and they flew into the tower. It was shocking. That couldn't happen. It was inconceivable. Those things just can't happen. But they did." Such testimony illustrates the unconscious cognitive associations that can and often do lead to discriminatory decision-making.¹⁰⁵

103. Commission Factum, *supra* note 44 at para 97 [author's translation].

104. Javed Latif Factum, *supra* note 80 at para 6.

105. NCCM & CMLA Factum, *supra* note 45 at para 20.

However, Gignac's behaviour was almost irrelevant to the Supreme Court of Canada. Though much of the Tribunal's 120-page decision focused significantly on Gignac's decision-making, the Court mentioned him only three times in its reasons. Referencing Gignac three times at paragraph fourteen, the Court proceeds as though his primary role was to simply convey information to Latif about the availability of training.¹⁰⁶ The Court later referenced Gignac to simply describe the Tribunal's remedy.¹⁰⁷ Gignac's comments and conduct in relation to Latif, his failure to inquire with Canadian officials, and his remarkable decision to unilaterally apply American laws in a Canadian space were relegated to the realm of the unsaid in the Court's reasons.

Gignac's departure from the Court's narrative of events contrasts with other Supreme Court of Canada decisions involving duties to investigate. In *Young v Bella*, for example, the Court found that the defendant Memorial University had acted negligently by failing to conduct its own inquiry into its suspicions that a student, Wanda Young, was a child sex offender.¹⁰⁸ Young had handed in an un-sourced first person biographical statement for grading in a course. The instructor understood the statement as Young's confession to the crime. Memorial University subsequently asked the RCMP to investigate. The Court held the University liable in tort law for reaching hasty conclusions about Young that would have disastrous consequences for her future. The Court also faulted the University for abdicating its responsibility to conduct its own inquiries, given its concerns about Young.¹⁰⁹

In that vein, the Tribunal had faulted Bombardier for failing to inquire with Canadian officials about Latif for essentially the same troubling reasons evident in Wanda Young's case: Bombardier had abdicated its responsibility to Latif and had set off a chain of events that affected his future, reputation, and earning capacity. But, unlike the staff of Memorial University, Gignac was spared scrutiny by the Court, which held that his conduct was not relevant to determining prima facie discrimination:

Finally, the Commission faults Bombardier for failing to check with the Canadian authorities or to ask the U.S. authorities to explain the reasons for their refusal. In this regard, it should be noted that Mr. Latif himself did not receive any explanation. In any event, even if these allegations might be of some relevance at the second step of the analysis (that of justification), it is our opinion that they do not show a

106. *Bombardier*, *supra* note 8 at para 14.

107. *Ibid* at para 25.

108. *Young v Bella*, 2006 SCC 3, [2006] 1 SCR 108 [*Young*].

109. *Ibid* at para 34.

connection between the prohibited ground and the exclusion of Mr. Latif, and that they are of no assistance.¹¹⁰

This part of the Court's analysis proves particularly puzzling for several reasons. First, the Tribunal placed significant weight on Bombardier's failure to inquire with Canadian authorities. The Tribunal found that Gignac failed to check with Canadian officials about Captain Latif precisely because Gignac had already concluded that Latif was a potential terrorist. Having drawn the conclusion that Latif represented a heightened risk to national security based on his identity, Gignac felt no need to check with Canadian officials. The Court, however, did not see the link between, on the one hand, Gignac's failure to investigate properly and, on the other, the stereotypes that he espoused about Latif. Discrimination, the Court affirmed, involves two stages. First, the complainant bears the burden of proving a *prima facie* case of discrimination. To meet this burden, complainants must demonstrate that "that they have a characteristic protected from discrimination ... that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact."¹¹¹ The respondent then bears the burden of justifying its conduct. The Tribunal had found that Bombardier's failure to act justified a finding of discrimination. Adopting language more appropriate to a *de novo* hearing than judicial review, the Court dismissed the significance of Bombardier's failure to act on the basis that "it is our opinion that they do not show a connection between the prohibited ground and the exclusion of Mr. Latif."¹¹² The Court thus ushered Gignac's failure to investigate out of the first stage of analysis, rendering it irrelevant to Captain Latif's *prima facie* case and ultimately deeming Bombardier's failure to inquire "of no assistance" to Latif.¹¹³

Equally surprisingly, the Court characterized the fact that Bombardier had failed to check with Canadian authorities as an "allegation" when the Tribunal had found that Bombardier had failed to inquire. Indeed, the failure to inquire was noted in the Tribunal's decision under the title "The Facts as Adduced" and the Tribunal emphasized the failure in its decision, specifically noting that Gignac had made clear under cross-examination that he had not inquired about Latif with Canadian authorities:

110. *Bombardier*, *supra* note 8 at para 97.

111. *Ibid* at para 63 citing *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33, [2012] 3 SCR 360.

112. *Bombardier*, *supra* note 8 at para 97.

113. *Ibid*.

Cross-examined by the Commission about whether he had contacted the Canadian authorities in order to check whether Bombardier could train Mr. Latif under a Canadian licence, Mr. Gignac said he had not.¹¹⁴

In its decision, the Tribunal cited Gignac's testimony at length. It is worth reproducing that testimony to make abundantly clear the basis on which the Tribunal reached its finding about Gignac's failure to inquire.

Mr. Gignac added that he never sought information or advice from Transport Canada in dealing with the matter, or of the Canadian security authorities, except [TRANSLATION] "perhaps" when [TRANSLATION] "chatting confidentially" with the RCMP in his office. Mr. Gignac's testimony regarding that fact should be cited here:

[TRANSLATION]

Q. At that point, did you contact a Canadian authority to inform it of the conclusions of the Americans?

A. No, I didn't talk about it. Let me think. Let me cast my mind back. No, that did not concern Transport Canada inspectors.

Q. Did you contact the Canadian Security Intelligence Service?

A. No. I contacted CSIS several times outside of ... Mr. Latif's case. What is CSIS in French; it's the Security Intelligence Service and the RCMP for cases and, yes, we communicated.

Q. But we're talking about Mr. Latif's case.

A. Mr. Latif, *I didn't talk at all about Mr. Latif with CSIS.*

Q. Transport Canada?

A. *Transport Canada, no.*

Q. The RCMP?

A. *Maybe the RCMP. I say maybe because I ... we had another case and Mr. Latif's name may have come up, but it was while chatting in my office, confidentially.*

Q. And you ...

A. *I didn't hear anything.*

Q. First you said you contacted no one?

A. *Because I don't want to say no, I never said anything, because, with the RCMP, we talked about other cases and, sometimes, they asked me whether I had cases involving confidential information, and they ..., I said ... I may have said something because it*

114. *Bombardier QCTDP, supra* note 13 at para 159.

was during the same period that Mr. Latif, that I told the RCMP that we had a case and I don't even know whether I mentioned the name. I said we had a case in which training was denied and he said "Really," he in fact said that did not concern them for the time being, and we talked about other things ...

Q. First you said you did not contact any Canadian authority ...

A. Yes, I know, but I did not contact any officially about ... at no ...

Q. To make your decision?

A. No. To make my decision, so I maintain that position.

Q. So no authority then ...

A. No authority.^f

Q. ... including the Canadian Department of Defence, too, I guess?

A. Yes, yes.

Q. Is that it?

A. Yes.¹¹⁵

It is not clear how or why the Court reduced the Tribunal's clear and important finding of fact about Gignac's failure to meaningfully inquire about Latif with Canadian officials to a less significant "allegation."

Captain Latif remained out of the public eye when the story of Bombardier's victory at the Supreme Court of Canada broke. While finding against Captain Latif, the Court nonetheless affirmed that the law will guard against implicit biases; complainants need only establish a prima facie case, and foreign companies cannot ignore Canadian human rights law. The Commission scored a partial victory, and the judges and lawyers moved on to the next contest. But, the significance of the Tribunal and the Court's narrative struggle in *Bombardier* surpasses the interests of the parties and the development of precedent. *Bombardier* represents a lost opportunity to counter the narrative that Muslims as a group present a threat to Canada and suggests the need for better understanding of Islamophobia on the part of Canada's legal system.

In assessing the suffering imposed by Memorial University on Young, a white woman, the Court found that Young was entitled to compensation. A jury had awarded Young damages because of Memorial University's "termination of her hope of becoming a social worker" and the Court refused to interfere

115. *Ibid* at para 160 [emphasis in original].

with the jury's decision.¹¹⁶ In their fascinating article "Law in the Cultivation of Hope," Karen Abrams and Hila Keren reflect on the power of law to encourage or discourage hope in individuals, particularly those on the social or political margins.¹¹⁷ They argue that paying more attention to the law's capacity to inspire hope might give us a better sense of how social change can be pursued through the law. In this view, hope is not simply an emotion; it is both site and symbol of the relationship between litigants, the legal system, and society's goals. The law's ability to cultivate hope, moreover, is not limited to the individual; the law engenders hope or hopelessness for individuals who share a particular predicament with a litigant, or who imagine that the predicament is sharable in the sense that it can be visited upon them or someone they know specifically because they share social markers with a litigant. The willingness or ability of the legal system to care about and cultivate hope thus says as much about the system's attentiveness to communities as it does about the subjective desires of the litigants.

What hope did Captain Latif have when he first learned that he had been listed as a potential terrorist by American authorities without explanation or recourse? How much more hope did he lose when he saw employment contract after employment contract vanish? What did hope feel like to him when he had to borrow money from his son to pay his mortgage? What happened to his hope when the Court of Appeal of Quebec overturned the Tribunal's decision? Did he envision the possibility of a secure economic future after the Supreme Court of Canada dashed what little hope that he might have had left over a decade into his battle with Quebec's economic and cultural giant, Bombardier Aerospace? What happened to hope when the Court ordered costs against the Commission and Captain Latif "on a solidary basis, in this Court."¹¹⁸ Does Captain Latif retain any hope that Canada's legal system can produce a just outcome? Surely Captain Latif felt a "loss of hope" after being falsely labelled and losing his reputation and livelihood in the same way that Young must have experienced it.

Suzanne McMurphy observes that trust is "a human phenomenon that plays a critical role in our personal lives ... in the fabric of society ... in the stability of financial markets ... and the strength of governments."¹¹⁹ McMurphy urges

116. *Young, supra* note 108 at para 22.

117. Kathryn Abrams & Hila Keren, "Law in the Cultivation of Hope" (2007) 95:2 Cal L Rev 319.

118. *Bombardier, supra* note 8 at para 107.

119. Suzanne McMurphy, "Trust, Distrust and Trustworthiness in Argumentation: Virtues and Fallacies" (delivered at the Tenth International Conference of the Ontario Society for the Study of Argumentation, 22-26 May, 2013) at 1, online: <scholar.uwindsor.ca/cgi/viewcontent.cgi?article=2083&context=ossaarchive>.

institutions to move away from questions like “how do I gain the trust of a client, of a constituent, of a voter or a consumer” and argues for a focus on how institutions can cultivate their own trustworthiness.¹²⁰ McMurphy’s work has important implications for access to justice. Although we do not yet have a framework for thinking about trust and trustworthiness as an aspect of access to justice, we can begin to reflect on their importance by acknowledging that individuals decide whether to engage in naming, blaming, and claiming¹²¹ partly by considering the extent to which public institutions understand their lived experiences.¹²² Understanding lived experience comprises a component of trustworthiness for the simple reason that institutions cannot judge without understanding.

Ultimately, the story of Captain Latif’s quest for justice reveals as much about Canadian law and legal institutions as it does about American law and legal institutions. In the process of denying a remedy to Latif, the Court re-wrote his narrative by moving attention away from key facts involving his interactions with Bombardier. The Court’s chosen narrative also regulated the collective fears and aspirations of Muslim communities in Canada to the realm of the unsaid. It further denied, through silence, the nature and impact of national security profiling as community experience. In the context of this case, the plea for attention to narratives amounts to little more than a plea for the Court to name and render visible a stereotype that attached itself to Latif and that has plagued the Muslim community in Canada at least since 9/11.

III. CONCLUSION

Gignac unwittingly pointed to the divergent narratives that would be told by Quebec Human Rights Tribunal and the Supreme Court of Canada when he testified to the sensations he experiences flying over the un-bordered geography of Canada and the United States:

120. *Ibid* at 7.

121. See William LF Felstiner, Richard L Abel & Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...” (1981) 15:3 Law & Soc’y Rev 631.

122. Women, for example, did not pursue sexual harassment litigation at a time when society tended to regard sexualized conduct in the workplace as “flirting.” See e.g. Constance Backhouse, “Sexual Harassment: A Feminist Phrase that Transformed the Workplace” (2012) 24:2 CJWL 275; Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford: Oxford University Press, 2009) at 151.

When I take off with my plane, I'm free. It's phenomenal. I take off over Montréal. I see Albany, New York ... I can see that it's ... me ... I'm passionate about aviation. There are no borders.¹²³

Gignac offered this image of North American geography as justification for his refusal to permit Captain Latif training in either Texas or Quebec, and to explain his enthusiasm for American national security decision-making. But his description of flying over a borderless Canada–United States held more significance than he likely imagined. The Quebec Human Rights Tribunal responded to Gignac's geographic erasure by re-asserting the legal boundaries between Canada and the United States, disapproving of Gignac's preference for American norms over Canadian ones, and finding in favour of the Commission and Captain Latif. It heard Latif's story against the backdrop of profiling and other stereotyping practices in both the United States and Canada, and it rejected the possibility that Canada should condone profiling and stereotyping as they had been condoned in the United States. The Supreme Court of Canada, for its part, after erasing Gignac, cast its vision beyond the border, focusing *solely* on the United States while declining to cast judgment on the part of Captain Latif's story that took place in Canada and most directly implicated Bombardier Aerospace. The Court sheltered Gignac from scrutiny and, in its reasons, silenced the Tribunal's analysis of Bombardier's conduct in Canada. The Court's silence denied, once again, the collective experiences of Muslims who have faced heightened profiling, stereotyping, and other forms of discrimination in Canada since 9/11.

Perhaps these collective experiences, metonymized by Latif's case, will eventually become impervious to denial as advocates continue to insist on counter narratives and continue to seek equal access to justice for Muslims and other equality-seeking groups. We might then revisit the decision-making in *Bombardier* and read it as a story of law's troubled relationship with Arab and Muslim communities as much as the individual tale of Captain Javed Latif's quest for compensation for his treatment at the hands of Bombardier Aerospace.

123. *Bombardier QCTDP*, *supra* note 13 at para 142.