

# An Empirical and Qualitative Study of Expert Opinion Evidence in Canadian Terrorism Cases: November 2001 to December 2019

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## I. INTRODUCTION

Between late 2001, when the *Criminal Code*'s terrorism offences<sup>1</sup> were first introduced, and December 2019, Canada charged 56 individuals for terrorism offences, 44 of whom have been prosecuted to completion (whether that be a finding of guilt, innocence, or a stay of proceedings).<sup>2</sup> To date, expert opinion evidence has been called in at least

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<sup>1</sup> See *Criminal Code*, RSC 1985, c C-46, ss 83.01(1)-83.33(2) [*Criminal Code*].

<sup>2</sup> See Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) 67:1/2 *Crim LQ* 96. Separate terrorism charges against two individuals have been laid since this study was published: a Kingston Youth is facing terrorism charges and, on 6 December 2019, the

50% (22 out of 44) of the cases where individuals were charged with terrorism offences, and more than one expert has often been called in those trials. More strikingly, if one excludes trials that ended in stays of proceedings as well as guilty pleas – where the only opportunity for an expert reasonably to appear is at sentencing – then experts have appeared in cases against 15 of 18 individuals (83%).<sup>3</sup> These experts have been called by Crown prosecutors, the defence, and the courts alike; they have provided evidence on a variety of social science, technical, and psycho-social topics. They have also offered perspectives on an accused’s mental health or prospects for rehabilitation, the meaning of religious texts, translations of words from a foreign language into English or French, technical explanations on the collection of online evidence, or how bombs (Improvised Explosive Devices) are made. In short, expert witnesses have been, should be, and will continue to be incredibly important to the successful completion – and fair (or unfair) rendering – of justice in terrorism trials in Canada.

In theory, there are at least three good reasons why expert evidence should play, and will continue to play, a particularly crucial role in terrorism prosecutions in Canada. First, terrorism offences in Canada are uniquely,

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RCMP’s Integrated National Security Enforcement Team (INSET) arrested Ikar Mao for participation in a terrorist group (*Criminal Code*, *supra* note 1, s 83.18) and leaving Canada to participate in activity of terrorist group (*Criminal Code*, *supra* note 1, s 83.181). See Philip Ling et al, “RCMP Charge Kingston, Ont., Youth with Terror-Related Offence After Security Probe”, *CBC News* (25 January 2019), online: <[www.cbc.ca/news/politics/rcmp-arrests-security-kingston-1.4992518](http://www.cbc.ca/news/politics/rcmp-arrests-security-kingston-1.4992518)> [perma.cc/7UKL-FCFF]; Royal Canadian Mounted Police, *RCMP Integrated National Security Enforcement Team Lays Terrorism Charges in Ontario* (News Release) (Milton, ON: RCMP, 6 December 2019), online: <[www.rcmp-grc.gc.ca/en/news/2019/rcmp-integrated-national-security-enforcement-team-lays](http://www.rcmp-grc.gc.ca/en/news/2019/rcmp-integrated-national-security-enforcement-team-lays)> [perma.cc/LR4P-CQZ5] [RCMP, *Terrorism Charges in Ontario*]. This total includes Chiheb Esseghaier and Raed Jaser, whose convictions were recently overturned before the Ontario Court of Appeal: *R v Esseghaier*, 2019 ONCA 672 [Esseghaier ONCA]. As of writing, the Crown was seeking leave to appeal this decision: Jim Brownskill, “Crown seeks Supreme Court of Canada Hearing in Via Rail Terror Case”, *CBC News* (19 November 2019), online: <[www.cbc.ca/news/politics/supreme-court-railway-terror-1.5364513](http://www.cbc.ca/news/politics/supreme-court-railway-terror-1.5364513)> [perma.cc/XFY8-ST4B].

<sup>3</sup> Four of the acquittals to date have included the use of expert evidence: Sabine Djermane, El Mahdi Jamali, Othman Hamdan, Ayanle Hassan Ali. 11 of the convicted individuals to date have seen experts at their trials: Abdelhaleem, Misbahuddin Ahmed, Steven Chand, Rehab Dughmush, Chiheb Esseghaier, Mohamed Hersi, Raed Jaser, Momin Khawaja, Said Namouh, a Quebec Youth and Nishanthan Yogakrishnan. For citations and more information on the accused whose trials featured expert evidence, see Appendix A below.

definitionally complicated and thus, they are uniquely constructed to require expert input.<sup>4</sup> Two “elusive phrases”,<sup>5</sup> those being “terrorist activity” and “terrorist group”, form the predicates for all terrorism offences in Canada. As such, to prove any terrorism offence, the Crown must first prove either that the accused’s activity was in furtherance of a “terrorist activity” (e.g. facilitating a terrorist activity under section 83.19 of the *Criminal Code*) or that the individual contributed to a “terrorist group” (e.g. participating in the activities of a terrorist group under section 83.18).<sup>6</sup> “Terrorist activity”, which itself forms the backbone of the definition of “terrorist group”, then incorporates what has been called a “motive clause”<sup>7</sup> (the activity must be committed or planned “for a political, religious or ideological purpose, objective or cause”), a “purpose clause” (it must be committed “with the intention of intimidating the public...as regards its security, or to compel a person, government or organization...to do or refrain from doing any act”),<sup>8</sup> as well as a “consequence clause” (“causing death or serious bodily harm”, endangering a life, etc.).<sup>9</sup>

Thus, in contrast to the vast majority of *Criminal Code* offences where the Crown must prove only the wrongful act (*actus reus*) and attendant mental element (*mens rea*) of the offence, in terrorism trials we see the Crown usually having to prove that preparatory activities<sup>10</sup> were driven by a religious or ideological motive,<sup>11</sup> that the individual or group had a goal or

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<sup>4</sup> As the Ontario Court of Appeal stated in Canada’s first terrorism case, *R v Khawaja*, 2010 ONCA 862 at para 231 [*Khawaja ONCA*]: “To be sure, terrorism is a crime unto itself. It has no equal”. For a review of the unique complexity of the structure of the offences themselves, see Michael Nesbitt & Dana Hagg, “An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offences” (2020) 57:3 *Alta L Rev* 595.

<sup>5</sup> Michael Nesbitt, Robert Oxoby & Meagan Potier, “Terrorism Sentencing Decisions in Canada since 2001: Shifting Away from the Fundamental Principle and Towards Cognitive Biases” (2019) 52:2 *UBC L Rev* 553.

<sup>6</sup> *Criminal Code*, *supra* note 1, ss 83.01(1), 83.18(1)–(4), 83.19(1)–(2).

<sup>7</sup> The “motive”, “purpose”, and “consequence” clauses have been named, broken down, and explained in Nesbitt & Hagg, *supra* note 4 at 609–18.

<sup>8</sup> *Criminal Code*, *supra* note 1, ss 83.01(1)(b)(i)(A)–(B).

<sup>9</sup> *Ibid*, s 83.01(1)(b)(ii).

<sup>10</sup> In Canada, the vast majority of cases to date have been for preparatory or inchoate conduct. This result is consistent with the original intention of Parliament to get at—primarily though not exclusively—preparatory conduct. See Nesbitt, *supra* note 2 at 124–25.

<sup>11</sup> All trials to date have concerned a religious motive; the sole exception was a guilty plea in the case of *R v Thambaiturai*, 2010 BCSC 1949 [*Thambaiturai*]. This concerned the

purpose in mind (e.g. intimidating the public), and that the planned activity would result in pre-defined and specific consequences. Proving these additional elements brings religion, ideology, and the future goals of a group – maybe even a foreign, organized group – to the fore, which in turn requires that the Crown, the defence, and the court understand sufficiently these groups of individuals and the two predicates for terrorism offences – something for which social scientists that study terrorist groups, religion, radicalization to violence, or other such fields can assist.

This brings us to the second reason why terrorism offences are likely to require expert evidence, and that is because the type of information required to prove motive, purposes, and intended consequences usually requires understanding the goals of the individuals. This, in turn, requires an understanding of what they were building (e.g., the fertilizer may not have been for gardening in those quantities), how terrorist financing works, or how data used to prove “motive” and “purpose” is scraped from social media accounts or computers. In practice, prosecuting the offences means leading evidence on words, thoughts, beliefs, social (group) interactions, and preparatory conduct; understanding technology has become, and will likely increasingly become, central to the admissibility of evidence and understanding its implications in terrorism trials. These technological issues are only compounded when the offence takes place, in whole or in part, overseas, which can happen either in the simple case where an accused is communicating or plotting with individuals overseas (a common occurrence in Canadian cases, first seen in Canada’s first terrorism trial *R v Khawaja*<sup>12</sup>) or where part or all of the offence takes place overseas (for example, where a so-called “foreign fighter” is tried for so-called terrorist travel under sections 83.181 or 83.191 of the *Criminal Code*).

Third, and finally, many academic studies have suggested that there is not a meaningful correlation between international terrorism and mental health needs, or at least that the factors contributing to terrorist ideation are deeply complex and multifaceted.<sup>13</sup> And yet, in Canada, academic

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financing of the Sri Lankan LTTE group. The LTTE was a listed terrorist entity (para 2) and thus, its terrorist agenda would not have to be proven at court, subject to a constitutional challenge of the listing regime. In any event, due to the guilty plea, its status as a terrorist entity went unchallenged.

<sup>12</sup> *R v Khawaja*, 238 CCC (3d) 114, 2008 CanLII 92005 (ONSC) [*Khawaja* ONSC].

<sup>13</sup> Paul Gill & Emily Corner, “Is There a Nexus Between Terrorist Involvement and Mental Health in the Age of the Islamic State?” (2017) 10:1 CTC Sentinel 1; Paul Gill & Emily Corner, “There and Back Again: The Study of Mental Disorder and Terrorist

research has begun to draw links between terrorism prosecutions and the use of mental health experts at trial.<sup>14</sup> Perhaps not surprisingly then, even before beginning the study, the authors anecdotally noted a high number of cases where the mental health of the accused was front and centre in terrorism trials, whether that be in regards to an accused's competence to stand trial in the first place or with regard to how the individual should be treated upon sentencing. Indeed, after completing this study, we found that 13 of the 29 experts that this study has identified work in the field of mental health and were called to speak to the capacity, broadly speaking, of the accused; perhaps not surprisingly, virtually all of these experts have been called by the defence either prior to trial (capacity) or at sentencing.

Yet, despite the theoretical importance – and anecdotal prevalence – of expert evidence appearing in terrorism trials, it is not a topic that has yet been studied in the Canadian context.<sup>15</sup> Simply put, there are no comprehensive empirical or qualitative studies on expert evidence in Canadian terrorism trials – a situation that, on the quantitative side at least, largely mirrors the Canadian experience with expert evidence more broadly.<sup>16</sup>

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Involvement” (2017) 72:3 *American Psychologist* 231; Emily Corner & Paul Gill, “The Nascent Empirical Literature on Psychopathology and Terrorism” (2018) 17:2 *World Psychiatry* 147; Emily Corner & Paul Gill, “Psychological Distress, Terrorist Involvement and Disengagement from Terrorism: A Sequence Analysis Approach” (2019) *J Quantitative Criminology*, DOI: <10.1007/s10940-019-09420-1>.

<sup>14</sup> See Reem Zaia, “Mental Health Experts in Terrorism Cases: Reclaiming the Status of Rehabilitation as a Sentencing Principle” (2017) 64 *Crim LQ* 548 [Zaia, “Mental Health Experts in Terrorism Cases”]; Wagdy Loza, Hy Bloom & Mini Mamak, “The Psychiatrist’s Contribution to Understanding and Preventing Acts of Terrorism” in Hy Bloom & Richard D Schneider, eds, *Law and Mental Disorder: A Comprehensive and Practical Approach* (Toronto: Irwin Law, 2013) 623 at 623–56. See also Reem Zaia, “Forensic Psychiatry and the Extremist: A Review of the Recent Violence Risk Assessment Tools for Offenders Convicted of Terrorism Offences” (2018) TSAS Working Paper No 18-04 [Zaia, “Forensic Psychiatry and the Extremist”].

<sup>15</sup> This is actually true across the Western world. The author is currently working with colleagues in both the United Kingdom and Australia to get a sense for how those jurisdictions have used expert evidence.

<sup>16</sup> For an excellent, recent counter-example where scholars take on empirical questions related to expert evidence in Canada and, particularly, the risks associated with expert evidence and expert biases, see Jason M Chin, Michael Lutsky & Irit E. Dror, “The Biases of Experts: An Empirical Analysis of Expert Witness Challenges” (2019) 42:4 *Man LJ* 21. For similarly documented psycho-social experts during sentencing of terrorists in Canada, see Zaia, “Forensic Psychiatry and the Extremist”, *supra* note 14; Zaia, “Mental Health Experts in Terrorism Cases”, *supra* note 14. The above articles, we

This is all to say that there is very good reason to study expert evidence and its uses in Canadian terrorism trials. This paper thus takes up the challenge. It offers the first empirical breakdown of all terrorism trials in Canada that have made use of expert evidence, with a particular view to the types of expert evidence used, which party (prosecution, defence, or in one case, the judiciary) is using it, how that party is using it, and whether or when expert testimony is ultimately relied upon by the judges.<sup>17</sup> It considers the judicial treatment of experts and attempts to identify where they have been particularly useful or influential to judicial decisions, where the court and/or lawyers might make better use of experts, whether gender is playing a role in the identification or treatment of experts, and so on. This paper then ends with an application of the data to lessons-learned for the defence, prosecution, and courts, as well as what it tells us about the future use of expert opinion evidence in Canadian terrorism trials. This paper will be useful for Crown and defence attorneys and judges alike in helping them to identify when experts have been used to great effect, when they have tended not to be as helpful, when future cases might begin to look to experts to help resolve issues, when Crown and defence should consider calling more (or less) expert evidence (defence should consider relying more heavily on experts during the trial proper rather than just at sentencing), whether equality of arms between the defence and prosecution's ability to identify

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hope, represent a recent reengagement in studying expert evidence from both an empirical and theoretical perspective. By way of contrast, the US appears to be somewhat different with regard to empirical studies of expert evidence at trial. See e.g. Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, "An Empirical Examination of the Use of Expert Witnesses in the Courts: Part II: A Three City Study" (1994) 34:2 *Jurimetrics* 193; Stephanie Domitrovich, Mara L. Merlino and James T. Richardson, "State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons" (2010) 50:3 *Jurimetrics* 371; see generally Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company, 1966). Finally, one outstanding Canadian scholar should be noted for her excellent contributions to understanding expert evidence in Canada from a variety of theoretical and methodological perspectives, that being Dr. Emma Cunliffe. See e.g. Emma Cunliffe, ed, *The Ethics of Expert Evidence*, 1 ed (London: Routledge, 2016); Emma Cunliffe, "A New Canadian Paradigm? Judicial Gatekeeping and the Reliability of Expert Evidence" in Paul Roberts & Michael Stockdale, eds, *Forensic Science Evidence and Expert Witness Testimony: Reliability through Reform?* (Cheltenham: Edward Elgar, 2018) 310 at 310-32; Emma Cunliffe & Gary Edmond, "Gatekeeping in Canada: Mis-steps in Assessing the Reliability of Expert Testimony" (2014) 92 *Can Bar Rev* 327.

<sup>17</sup> See Annex A at the end of this paper for a full list of experts called in various terrorism prosecutions in Canada between September 2001 and September 2019.

and make use of experts is a problem, and finally, where the court might be particularly attuned to risks (e.g. of wrongful conviction) often attendant with the use of (or failure to use) expert evidence properly.

To accomplish these goals, this paper will first offer a discussion of the methodology used to collect the data relied upon in this study. Then, Part II of this paper will offer a very brief review of expert opinion evidence in Canadian criminal law, what it is, and, most importantly, with an expanded explanation of the three reasons above, why we hypothesize that it should in theory be so particularly significant in the context of terrorism prosecutions in Canada—and why this might also mean that we should be very wary of expert evidence in terrorism trials. Part III will then look at the actual use of experts in terrorism trials to date, focusing on the trends in Canadian terrorism prosecutions, including who called the experts (Crown/defence/judge), the gender of the expert, what stage of the proceeding (trial, pre-trial, sentencing), how judges have treated the experts (adopted their testimony, found it credible but ultimately unpersuasive, or finding it unpersuasive), and so on. (Appendix A lists the terrorism prosecutions featuring experts and documents their roles, the stage they appeared at, and how judges treated their evidence. Appendix B provides the experts' basic biographical details.) Finally, Part IV of this paper elaborates on the implications of the numerical findings in Part III, including what these numbers tell us in terms of implications for defence and the Crown in particular, where experts have been used, and what this might tell social scientists and other potential experts about what the legal system needs in terms of academic expertise.

### **A. A Note on Methodology**

Over the course of approximately three years, the authors employed a multi-faceted research methodology to identify when expert evidence has been called in terrorism trials in Canada. In order to obtain an accurate empirical picture, we implemented the following methodology. First, we went through every judgement and decision associated with a terrorism trial in Canada to identify whether experts were referred to (often directly in sentencing decisions, for example), alluded to, or whether there was any evidence presented that would have likely required the use of an expert witness or affidavit. In so doing, we noted all of the named experts, their appearances, and other associated information (gender, topic, etc.). Second, we then went to associated trial and appeal transcripts, as well as exhibits

lists, to see whether it appeared that an expert had been called and, if so, to what did they testify. However, the sheer costs associated with accessing trial transcripts did not permit a comprehensive review of the transcripts of every judgement and interlocutory decision, for example; our focus, therefore, was on following-up on instances in judgements or decisions where evidence was referred or alluded to that might have required an expert. We also focused a good deal on exhibit lists, that is, the lists of documents submitted to court in terrorism trials that would, or should, include any expert evidence reports. Third, we identified the prosecutors and defence lawyers associated with terrorism trials and where possible, asked for their assistance in determining whether and when they had called experts during those trials, whether they had transcripts of those proceedings that they would be willing to share, and so on. Once again, we followed up with trial transcripts where information came to light. Of course, some of those trials took place almost a decade before this research project began, meaning that we cannot be certain that those lawyers and legal assistants had a photographic recollection of all instances where experts were called or, more likely, perhaps should or could have been called but were not. Nevertheless, we cross-referenced our findings from the three sources – judgements and decisions, trial transcripts and exhibit lists, and discussions with lawyers – with news coverage of trials and our own recollections to put together what we hope is an accurate picture of the use of expert evidence in Canadian terrorism trials over an almost-20-year period. In the end, without going through every transcript (hundreds of thousands of pages or more) of every moment of terrorism hearings, we cannot be sure that the study is comprehensive, though we have attempted to minimize, through the above methodological steps, the chances that an expert appearance has been missed. In any event, the ultimate goal of this paper is to provide a starting point for a more informed discussion on the use of expert evidence in terrorism trials and perhaps trials more broadly in Canada. We thus believe that, at minimum, this paper provides a significantly better understanding of terrorism trials in Canada and the role that expert evidence plays in shaping the law, the facts, and ultimately the judicial findings; we hope that this, in turn, leads to some useful working conclusions and observations in this paper. Just as importantly, we hope that others will take up those questions and refine the work through future empirical studies using this dataset (see Appendices A and B), or using some of the information and

analysis provided, to dig deeper on case studies or qualitative analyses on some of the experts and issues raised herein.

## II. A BRIEF LOOK AT EXPERT OPINION EVIDENCE IN CANADIAN COURTS AND WHY IT MIGHT SEEM PARTICULARLY USEFUL IN TERRORISM CASES

The basics surrounding the admission of expert opinion evidence, its importance, and its attendant risks in criminal trials are well-covered terrain. We do not purport to offer a comprehensive review of the subject in general, but rather merely introduce it in order to put into context why it is important in terrorism cases and how we can, subsequently, understand some of the empirical findings found in Part III of this paper.

Expert opinion evidence in Canada operates as an exception to the general rule of evidence that does not permit witnesses to provide opinions,<sup>18</sup> that is, witnesses offer facts – what they saw, heard, know, etc. – and not their opinions about those facts. But sometimes the court will need help understanding the facts of the case. Experts then have a role to play in helping the court to understand the complex subject-matter in which the witness is an expert. The very first requirement of the so-called *Mohan* factors that set the test for the court's reception of expert opinion evidence is thus that the expert opinion (help, really) be necessary. This means that the court must find that an understanding of the subject-matter is “outside the experience and knowledge of the judge or jury...By contrast, if normal experience enables triers of fact to cope, expert evidence should not be received.”<sup>19</sup>

It follows that the expert's duty is to the court, not to the party that called them, and they are to help the court in understanding the subject-matter of their expertise in a fair and balanced manner.<sup>20</sup> *White Burgess Langille Inman v Abbott and Haliburton Co*<sup>21</sup> remains the leading case on the

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<sup>18</sup> *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at paras 14–15 [*White Burgess*].

<sup>19</sup> David Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 213.

<sup>20</sup> Ontario, Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*, by Hon Stephen T. Goudge, vol 3 (Report) (Toronto, ON: Ontario Ministry of the Attorney General, 30 September 2008) at 503 [Goudge, *Report*].

<sup>21</sup> *Supra* note 18.

use and admission of expert evidence at trial.<sup>22</sup> In that case, the Supreme Court of Canada made it clear that, as a starting point, experts “have a special duty to the court to provide fair, objective and non-partisan assistance.”<sup>23</sup>

Experts may then play a number of roles in court processes: they may help with the evaluation of an accused’s mental state, with understanding a particular technology or scientific method, or even parliamentary procedure.<sup>24</sup> The expert may be called, for example, by the Crown to explain the known ideology of an international terrorist group, by the defence in support of a “Not Criminally Responsible” (NCR) application, or by a judge to help the court understand evidence or a subject-area being proffered by the parties.

Our hypothesis is that expert evidence such as this must play a crucial role in the proper resolution of many terrorism cases, simply by nature of the offences, what must be proved, and the relevant issues that they raise. But, because the expertise is crucial to understanding the foundations of the case and, in many cases, the experts will be providing testimony directly as to elements of terrorism offences – for example, whether the possession of certain “religious” texts tends to demonstrate a terrorist ideology – we might also say that the risks associated with expert evidence are correspondingly high. Our hypothesis rests on three primary assertions as to why expert evidence should be particularly salient and deserves particular scrutiny in terrorism cases. These three assertions are discussed below. Part III of this paper will then attempt to test the extent to which the hypotheses are playing out in practice and what the theory might tell us about the practice to date.

First, as stated in the introduction to this paper, terrorism offences are structured within Canada’s *Criminal Code*, importing as they do various elements that would seem ripe for expert opinion evidence. In particular, Canadian terrorism offences are complicated in that there is no criminal offence of terrorist activity. Rather, terrorism offences are set-up to require that one of two predicates be proven: either the offence must be perpetrated on behalf of a terrorist group (e.g. participating in the activity of a terrorist group under section 83.18 of the *Criminal Code*); or one must contribute to

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<sup>22</sup> See e.g. *R v Mohan*, [1994] 2 SCR 9, 114 DLR 4th 419 [Mohan]; *R v Sekhon*, 2014 SCC 15 [Sekhon]; *R v Bingley*, 2017 SCC 12 [Bingley].

<sup>23</sup> *White Burgess*, *supra* note 18 at para 2.

<sup>24</sup> *Paciocco & Stuesser*, *supra* note 19 at 213, citing *Goddard v Day*, 2000 ABQB 799.

a “terrorist activity” (e.g. facilitation of a terrorist activity under section 83.19).<sup>25</sup> But, the definition of “terrorist group” brings us back to “terrorist activity”.

There are two ways to prove a terrorist group (which is, in turn, defined as a terrorist “entity” in the words of the *Criminal Code*)<sup>26</sup> : either by resort to a list of terrorist groups;<sup>27</sup> or the Crown must prove beyond a reasonable doubt that “an entity has one of its purposes or activities facilitating or carrying out any terrorist activity.”<sup>28</sup> Virtually all of the trials that we examined (as contrasted with guilty pleas) have proceeded on the basis of proving in court that a group constitutes a terrorist entity (so, not using the list)<sup>29</sup> and, in any event, the Ontario Superior Court has made it clear that in most cases, the listing process does not allow the Crown to avoid the definition of “terrorist activity”.<sup>30</sup> As a result, in practice, the vast majority of the time the Crown will have to prove contribution to a “terrorist activity”. This is where the complexity arises, at least relative to other crimes.

As noted in the introduction to this paper, Canada’s *Criminal Code* imports an ideological component into the definition of terrorist activity: the impugned act or omission must be committed “in whole or in part for a political, religious or ideological purpose, objective or cause.” The *Criminal Code* also imports a motive requirement, that being that the activity is intended to “intimidate...the public.” Finally, there is a “consequence” component to the definition of terrorist activity: that the act is intended to cause death, endanger life, “cause a serious risk to the health or safety of the public...” and so on.<sup>31</sup> Moreover, the primary intention behind the terrorism offences was to capture preemptive (inchoate or preparatory)<sup>32</sup>

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<sup>25</sup> *Criminal Code*, *supra* note 1, ss 83.18–83.19. The terrorism offence is defined in s 2 of the *Criminal Code* and it incorporates the following offence sections: ss 83.02–83.04, 83.18–83.23.

<sup>26</sup> The *Criminal Code*, *supra* note 1, s 2 defines terrorist group as an entity in subsection 83.01(1). Subsection 83.01(1) then defines “entity” as “a person, group, trust, partnership or fund or an unincorporated association or organization.” For more on the listing process and definition of terrorist entity, see Nesbitt & Hagg, *supra* note 4.

<sup>27</sup> For more on the Canadian listing process and the manner in which it has been used in the past, see Craig Forcese & Kent Roach, “Yesterday’s Law: Terrorist Group Listing In Canada” (2018) 30:2 *Terrorism & Political Violence* 259.

<sup>28</sup> *Criminal Code*, *supra* note 1, s 83.01(1).

<sup>29</sup> Forcese & Roach, *supra* note 27.

<sup>30</sup> *R v Hersi*, 2014 ONSC 1217. For a discussion, see Nesbitt & Hagg, *supra* note 4 at 617.

<sup>31</sup> Nesbitt & Hagg, *supra* note 4 609-610.

<sup>32</sup> Nesbitt, *supra* note 2 at 123.

situations in the planning stages, such that the terrorist plots never come to fruition.<sup>33</sup> Combining the motive, ideological, causal, and inchoate elements, the result is that the prosecution is not just proving that someone committed an assault, for example, but that they were planning to commit a future action, that the planning was driven by a religious, ideological, or political motive, that the goal was to intimidate the public in the perpetration of the action, and that they intended a particular result, that being a serious risk to health, infrastructure, or individuals.

One might say that the Crown regularly leads evidence as to motive, to help demonstrate a reason for committing a crime. For example, when proving first degree murder, a motive can help to show how a history of conflict between individuals or a drug debt left unpaid might explain why a killing was not just an accident, but planned and deliberate—critical elements of first-degree murder.<sup>34</sup> So how, then, are terrorism offences really that different? Most saliently, acting on a religious or ideological motive is a more complicated, nuanced human behavior, involving more complicated reasoning than acting violently because of an impulse or hatred against a single, identifiable party (a spouse, for example). Indeed, defining ideology at all has been notoriously slippery in the social sciences,<sup>35</sup> let alone defining a particular ideology, associating it with a particular person, and then further proving beyond a reasonable doubt that the person's particular ideology was driving their (terrorist) actions. That all becomes more complicated again when the accused's plan remains in the preparatory phase, that is, where the Crown must prove that a particular ideology is driving a set of preparatory actions, the results of which have not come to pass.

Often motive becomes evident in hindsight; it becomes obvious when we see the consequences, for example, when we say you killed someone because you stood to inherit from the will. But foresight is a different matter; it is conceptually more indeterminate (indeterminate in the literal sense: the action may not actually come to pass) to say that you have a particular ideology, and, on that basis, you are surely planning to undertake

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<sup>33</sup> *Ibid* at 123–24.

<sup>34</sup> *Criminal Code*, *supra* note 1, s 231(2).

<sup>35</sup> See e.g. Donald Holbrook & John Horgan, "Terrorism and Ideology: Cracking the Nut" (2019) 13:6 Perspectives on Terrorism 2; Lilliana Mason, "Ideologues without Issues: The Polarizing Consequences of Ideological Identities" (2018) 82:S1 Public Opinion Q 866; Jeffrey M. Bale, *The Darkest Sides of Politics, 1: Postwar Fascism, Covert Operations, and Terrorism* (New York: Routledge, 2018) at 1–45.

future actions. Put another way, when the consequences are not yet evident, one risks entering a sort of circular logic: the argument goes that one would have committed the act because of their ideology, and one can see their ideology clearly based on what they were planning to do in the future; the ideology becomes evident through purported future actions and the likelihood of the future actions is reinforced through the ideology.

The Crown must counter or avoid such real or perceived circularity with independent corroboration for the ideology, such that its proof does not just depend on an inchoate plan and the assertion of a future goal (for example, through tendering as evidence the writings or readings of an individual and with whom the individual was interacting). Such corroboration links the assertion about a particular ideology to the planning that is happening and, if done correctly, it can prove that an individual is motivated by a religious or ideological purpose to carry out a future action with a defined goal (motive and cause) in mind. But, that corroborative evidence only functions as evidential support if it is properly and contextually understood. To understand religion or complex group ideologies and how they manifest and can motivate individuals, or how reading something or watching something or engaging with a particular group can exhibit ideological or religious belief, one must understand the meaning of complicated and often obscure texts, videos, speeches, foreign groups, or religions in which a judge may not be well-versed. In other words, to connect a book and a video to an individual ideology requires someone to make that connection, an expert in many cases. Similarly, connecting an individual to a terrorist group requires proving that some group has, as part of its ideology, the goal of facilitating terrorist activity.

All of this requires a complicated, nuanced marshalling of a lot of background evidence on ideology, religion, motives, and future plans; as such, it also requires a nuanced understanding of what that evidence means to a particular individual. Is a religious text simply something that people that belong to the religion read, or does it have special significance? What does it mean when an individual underscores particular speeches and phrases and not others in a religious text? Does a black flag signal support for “jihadism” or might black cloth used as a flag simply be a sign of a devout Muslim? This was the question that the judge in *R v Ansari* was asked to rule upon (without expert evidence).<sup>36</sup> These are also the foundational questions

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<sup>36</sup> This exact question came up in the case of *R v Ansari*. See Anver M. Emon & Aaqib Mahmood, “Canada v. *Asad Ansari*: Avatars, Inexpertise, and Racial Bias in Canadian

that must be addressed in order to distinguish terrorism from other crimes because it is the ideological and religious components (motive clause) and the intention to intimidate the public, not just enrich the self or harm an individual (the purpose clause), that distinguish terrorism offences from other crimes. In the end, it is clear that this sort of contextually interpreted evidence forms the bulk of what must be proffered by the Crown to prove terrorism. It is crucial to the defence and the case because understanding it properly is necessary to understand individual motivations and goals and thus, guilt or innocence. This is precisely why expert opinion evidence should matter a great deal in terrorism prosecutions. Specifically, these experts can ensure that judges properly understand the evidence that underpins the motive and purpose clauses and thus, the terrorism offences themselves. For this reason, we should see a number of experts called by both the Crown and the defence at trial to speak to the foundational elements of the definition of “terrorist activity” and “terrorist group” and thus, to terrorism offences.

This brings us nicely to the second reason why we hypothesize experts should have an important role to play in terrorism trials in Canada. That is, an expert can speak not just to the elements of terrorism as an offence, to whether a particular ideology is driving the actions of an individual, or whether an association of people is indeed best defined as a “terrorist group”, but also to the collection of such evidence that will, in practice, be used to prove intention, motivation, ideological, or religious purpose. That is, in practice, it is likely that police will look to computers – emails, social media accounts, viewing history, videos made – to instantiate a religious or ideological purpose. What the person has said about themselves will matter and a record of this may exist online. Moreover, all or part of the offences might take place overseas, perhaps in collaboration with an overseas group (say, ISIS in Syria). This means that either the accused will have to communicate from Canada with individuals overseas<sup>37</sup> or from where the

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Anti-Terrorism Litigation” forthcoming in Michael Nesbitt, Kent Roach & David Hofmann, eds, *The Toronto 18 Terrorism Trials* (Calgary: University of Calgary Press) citing “Asad Ansari, Testimony in Chief by Mr. J. Norris”, *R v A Ansari and S Chand*, Ontario Superior Court, 327–29.

<sup>37</sup> This sort of evidence has been extremely prevalent in the so-called foreign fighters cases that Canada has prosecuted to date – most of whom have been prosecuted for actions in Canada in preparation to fight overseas. See for example *Khawaja* ONSC, *supra* note 12 at para 12, where *Khawaja*’s terrorist group – and indeed plot – was mostly in England, though his actions were in Canada.

evidence will be collected to a warzone overseas and thus, there will surely be a good deal of electronic evidence (e.g., YouTube videos, geolocation, or wiretaps). Of course, if the goal of the accused is purportedly to cause death, endanger life, or cause a serious risk to health or safety (the “consequence clause” in the definition of terrorist activity), then the offences themselves will often involve, and have often involved,<sup>38</sup> Improvised Explosive Devices, bomb making ingredients, etc., all of which requires expertise. For example, one might have to explain why purchasing a large amount of fertilizer might not signify a turn to farming for a city dweller, when coupled with other chemical purchases.

Combining assertions one and two above, the result is an extraordinarily complex litigation that requires the court to make sense of what the mere ownership of particular religious texts and social media posts might mean in terms of a plotter’s ideology, whether the individual is associated with a foreign group and if that group has as its purpose the intimidation of the public on ideological grounds, whether fertilizer might have been purchased with the goal of bombing a public place, and so on. This is added to the preemptive nature of most terrorism charges (that we must rely on evidence about what will happen, and why it will happen in the future) and that we are talking about complicated factual matrices – the type of which should often require “special knowledge” and experience going beyond that of the trier of fact.<sup>39</sup> In short, courts should be relying on experts to a far greater degree in terrorism trials than other trials, by virtue of their multi-tiered definitional incorporation of ideology, motive, and the consequence clause.

Third, though social science evidence continues to suggest that there is not an unusual connection between mental health needs and terrorism, a number of the more infamous cases in Canada have had to deal with mental health or capacity as a major factor in the trial or sentencing. In the notorious Via Rail plot, Esseghaier’s competence to stand trial and possible schizophrenia took centre stage at sentencing.<sup>40</sup> In the case against Ayanle Hassan Ali, the prosecution agreed before trial that he was NCR by virtue

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<sup>38</sup> Terrorism cases involving bomb plots include *Khawaja* ONSC, *supra* note 12 at para 5; *R v Jamali*, 2017 QCCS 6078 [*Jamali*]; *R v Nuttall*, 2016 BCSC 1404 [*Nuttall Entrapment Application*] and the Toronto 18 (*R v Amara*, 2010 ONSC 441 [*Amara*]).

<sup>39</sup> See *R v Bédard*, [1987] 2 SCR 398 at 415; 43 DLR (4th) 641.

<sup>40</sup> *R v Jaser*, 2015 ONSC 4729 at paras 1–3 [*Esseghaier* (First Sentencing Hearing)].

of mental illness for all of the crimes save the terrorism offence.<sup>41</sup> And, in the case against Rehab Dughmosh, her competency to subscribe to a terrorist ideology also took centre stage.<sup>42</sup> Moreover, we know from previous studies that rehabilitation – and expert opinion regarding an accused’s capacity for rehabilitation in particular – has proved to be a controversial topic at terrorism sentencing hearings.<sup>43</sup> As such, medical and psycho-social expert evidence appears to be of particular importance in terrorism trials.

If indeed we are correct that expert evidence is, or at least should be, crucial to proving some of the fundamental aspects and formal elements of terrorism offences, then the study of expert evidence in terrorism trials is self-evidently valuable. Looking at how, when, and why experts have been used effectively (or less-than-effectively in the past), can provide lessons for the future. This paper’s look at the use of expert evidence is also intended to lay the foundation for future, in-depth studies on the use of expert evidence by providing links to the cases where evidence was used, the types of expert evidence sought, and the systemic issues that may or may not be arising that require a further look.

But, the seeds of this study were planted as much by an anxious concern about the use of expert evidence in terrorism trials as they were by an ambition that it be used effectively by litigants. Paciocco J. of the Ontario Court of Appeal, writing with Professor Lee Stuesser, has succinctly offered the following to explain how experts, while called to help, can cause problems for the legal system and, in particular, the criminal justice system:

If the evidence requires special training or experience to observe or understand, triers of fact are vulnerable to accepting unreliable testimony; that evidence will be difficult to evaluate because it takes special knowledge or experience to understand; and experts are apt to be impressive and daunting and to use technical language and be resistant to effective cross-examination by lay lawyers.<sup>44</sup>

In the words of the Supreme Court of Canada in *R v Mohan*: “There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not

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<sup>41</sup> *R v Ali*, 2018 ONSC 2838 at para 10 [*Ali*].

<sup>42</sup> *R v Dughmosh*, 2019 ONSC 1036 at para 24 [*Dughmosh*].

<sup>43</sup> See Nesbitt, Oxoby & Potier, *supra* note 5 at pages 597–603. See also Zaia, “Mental Health Experts in Terrorism Cases”, *supra* note 14 at 555–59, 562–66; Robert Diab, “*R v Khawaja* and the Fraught Question of Rehabilitation in Terrorism Sentencing” (2014) 39:2 *Queen’s LJ* 587.

<sup>44</sup> Paciocco & Stuesser, *supra* note 19 at 206.

easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.”<sup>45</sup> These are not groundless concerns; they have been laid bare repeatedly in Canadian<sup>46</sup> case law<sup>47</sup> and, most saliently (and sadly), with the use of expert evidence in the wrongful conviction of Guy Paul Morin,<sup>48</sup> as well as the notorious testimony of (former) coroner, Dr. Charles Smith.<sup>49</sup> For as much help as expert opinion evidence can be, it can also be extremely dangerous, particularly where, as here, that expert evidence will certainly have to speak to foundational elements of the offence – to whether the individual possess the mental capacity or the requisite ideology to be found guilty of terrorism. Put succinctly, the more we are completely reliant on expert evidence, the more we should be cautious of wrongful convictions.

It is for these reasons that we undertook this study and introduce, below, an empirical analysis and initial evaluation of some of the trends on the use of expert opinion evidence in Canadian terrorism trials. But it bears repeating that we offer this as an introduction to the theoretical importance and concerns and as an initial foray into what we have seen at trial thus far. It is our intent that others will use the below dataset to build on it; that others will take some of the initial insights and offer more thorough qualitative analysis and case studies of some of the issues that we can, at this time, only point vaguely towards. The theoretical importance of the work and the attendant risks truly do militate in favour of a host of further inquiries into the fairness and effectiveness of expert evidence in terrorism trials (and, undoubtedly, beyond), and we hope that those with the requisite

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<sup>45</sup> Mohan, *supra* note 22 at 21.

<sup>46</sup> White Burgess, *supra* note 18 starts, in the very first sentence, by saying: “[e]xpert opinion evidence can be a key element in the search for truth, but it may also pose special dangers.” See also Sekhon, *supra* note 22 at para 46; Bingley, *supra* note 22 at paras 30–32.

<sup>47</sup> See e.g. *R v DD*, [2000] 2 SCR 275 at para 52, 191 DLR (4th) 60.

<sup>48</sup> For an important review of the case of Guy Paul Morin and the role that expert evidence played, see Ontario, Ministry of the Attorney General, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin: Executive Summary* (Ontario: Ministry of the Attorney General, 31 March 1998), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin\\_esumm.html](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.html)> [perma.cc/339A-XHR2].

<sup>49</sup> The actions of Dr. Charles Smith and the effect that they had on a number of trials, and convictions, were meticulously detailed in what has become known as the “Goudge Report.” See Goudge, *Report*, *supra* note 20.

expertise will continue to take seriously the risks and opportunities provided by experts in terrorism trials.

### III. EMPIRICAL LOOK AT USE OF EXPERTS IN CANADIAN TERRORISM TRIALS: 2001–2019

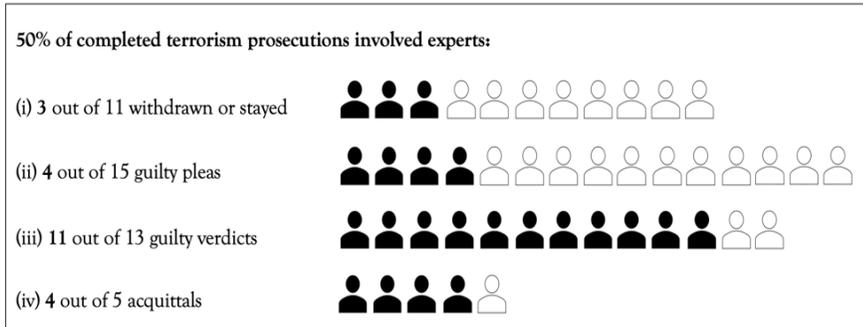
Experts have been called in 22 of the 44 completed terrorism prosecutions as of December, 2019.<sup>50</sup> As of writing, 16 trials have been held (including four joint trials), with experts appearing in ten of these trials.<sup>51</sup> This means that 63% of trials featured at least one expert, while 50% of completed prosecutions featured an expert at some stage. However, 15 of the 18 individuals whose prosecutions involved a trial resulting in an acquittal or conviction included an expert at some stage of their case (83%).

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<sup>50</sup> This total excludes individuals awaiting trial or in trial at the time that this article was written and those charged in absentia. For a list of the individuals prosecuted for terrorism in Canada, see Nesbitt, *supra* note 2 at 100–105. It also includes Chibeb Esseghaier and Raed Jaser, whose guilty verdicts were recently overturned by the Ontario Court of Appeal. See *Esseghaier*, ONCA, *supra* note 2. Three prosecutions are ongoing: Awso Peshdary, Ikar Mao and a Kingston youth. See Ling et al, *supra* note 2; RCMP, *Terrorism Charges in Ontario*, *supra* note 2; Aedan Helmer, “Peshdary trial: Informant lost out on bonus after leaking identity as secret RCMP agent to family”, *Ottawa Citizen* (11 June 2019), online: <[ottawacitizen.com/news/local-news/peshdary-trial-informant-lost-out-on-bonus-after-leaking-identity-as-secret-rcmp-agent-to-family](http://ottawacitizen.com/news/local-news/peshdary-trial-informant-lost-out-on-bonus-after-leaking-identity-as-secret-rcmp-agent-to-family)> [perma.cc/6BMK-CYFC].

<sup>51</sup> There have been four joint trials: Amanda Korody and John Nuttall (*Nuttall Entrapment Application*, *supra* note 38), Sabine Djermane and El Mahdi Jamali (*R v Jamali*, 2017 QCCS 6077 [*Jamali* 2017]), Asad Ansari and Steven Vikash Chand (“Surprise Guilty Plea in Toronto Terror Trial”, *The Canadian Press* (10 May 2010), online: <[www.cbc.ca/news/canada/toronto/surprise-guilty-plea-in-toronto-terror-trial1.891490](http://www.cbc.ca/news/canada/toronto/surprise-guilty-plea-in-toronto-terror-trial1.891490)> [perma.cc/X8EF-XWVW]), and Raed Jaser and Chibeb Esseghaier (*R v Esseghaier*, 2015 ONSC 5855 [*Esseghaier* (Second Sentencing Hearing)]). 12 individuals were tried separately: Ayanle Hassan Ali (*Ali*, *supra* note 41), Othman Ayed Hamdan (*R v Hamdan*, 2017 BCSC 1770 [*Hamdan*]), Khurram Syed Sher (*R v Sher*, 2014 ONSC 4790), Shareef Abdelhaleem (*R v Abdelhaleem*, 2011 ONSC 1428 [*Abdelhaleem*]), Ismael Habib (*R v Habib*, 2017 QCCQ 1581 [*Habib*]), Momin Khawaja (*Khawaja* ONSC, *supra* note 12), Said Namouh (*R v Namouh*, 2009 QCCQ 9324 [*Namouh*]), Nishanthan Yogakrishnan (*R v NY*, [2009] OJ No 6495 [NY]), Rehab Dughmush (*Dughmush*, *supra* note 42), Misbahuddin Ahmed (*R v Ahmed*, 2014 ONSC 6153 [*Ahmed*]), Mohamed Hersi (*R v Hersi*, 2014 ONSC 4414 [*Hersi*]) and a Quebec youth (*R v LSJPA*, 2015 QCCQ 12938 [*LSJPA*]). No experts testified during the trial stage of the Ansari/Chand and Esseghaier/Jaser joint trials. No experts testified at the trial stage during the prosecutions of Abdelhaleem, Habib, Sher, and Yogakrishnan. See Appendix A below.

The following graphic shows expert appearances<sup>52</sup> according to each prosecution’s outcome:



(i);<sup>53</sup> (ii);<sup>54</sup> (iii);<sup>55</sup> (iv).<sup>56</sup>

<sup>52</sup> For a list of these expert appearances, see Appendix A below. The discrepancy between the number of trials and outcomes associated with a trial (i.e., guilty verdicts and acquittals) arises because four joint trials were held (see the cases listed, n 51).

<sup>53</sup> The three individuals whose prosecution featured expert evidence, despite their charges being stayed, were John Nuttall, Amanda Korody, and an Alberta youth. See Gareth Hampshire, “Terror charges stayed against Alberta teen”, *CBC News* (23 September 2016), online: <[www.cbc.ca/news/canada/edmonton/terror-charges-stayed-against-alberta-teen-1.3776673](http://www.cbc.ca/news/canada/edmonton/terror-charges-stayed-against-alberta-teen-1.3776673)> [perma.cc /MP7]-HT56]. Nuttall and Korody were convicted, but their charges were stayed after a successful entrapment application (*Nuttall Entrapment Application*, *supra* note 38).

<sup>54</sup> The four individuals referred to here are Fahim Ahmad (*R v Ahmad*, 2010 ONSC 5874 [Ahmad 2010]); Amara (*Amara*, *supra* note 38); Saad Gaya (*R v Gaya*, 2010 ONSC 434 [Gaya]); and Saad Khalid (*R v Khalid*, 2009 CarswellOnt 9874, 91 WCB (2d) 53 (ONSC) [Khalid Sentencing]).

<sup>55</sup> The 11 individuals referred to here are Shareef Abdelhaleem (*Abdelhaleem*, *supra* note 51), Misbahuddin Ahmed (*Ahmed*, *supra* note 51), Steven Chand (*R v Chand*, 2010 ONSC 6538 [Chand]), Rehab Dughmosh (*Dughmosh*, *supra* note 42), Chibeb Esseghaier (*Esseghaier* (Second Sentencing Hearing), *supra* note 51), Mohamed Hersi (*Hersi*, *supra* note 51), Raed Jaser (*Esseghaier* (Second Sentencing Hearing), *supra* note 51), Momin Khawaja (*Khawaja* ONSC, *supra* note 12), Saïd Namouh (*Namouh*, *supra* note 51), a Quebec Youth (*LSJPA*, *supra* note 51), and Nishanthan Yogakrishnan (*NY*, *supra* note 51). This count includes Esseghaier and Jaser, but note that this verdict was recently overturned in *Esseghaier* ONCA, *supra* note 2, and a new trial ordered.

<sup>56</sup> The four individuals referred to here are Ayanle Hassan Ali (*Ali*, *supra* note 41), Sabrine Djermane and El Mahdi Jamali (*Jamali* 2017, *supra* note 51), and Othman Hamdan (*Hamdan*, *supra* note 51).

Unfortunately, there is no Canadian data to compare these numbers either to trials in general in Canada, or to other comparable or perhaps similar offences – perhaps reinforcing the need to begin studying expert evidence in Canada in more detail. However, several older studies out of the US indicate that the US usage rate in general criminal trials, for what it is worth, is generally lower than we are seeing in Canadian terrorism trials.<sup>57</sup> Anecdotally, the use of experts in terrorism trials appears to be much higher than one would expect across the Canadian judicial system, though, again, numbers do not exist to demonstrate the veracity of that observation or the extent of the divergence, which we would hypothesize is quite high. So far, a total of 29 different individuals have been qualified as experts in terrorism trials,<sup>58</sup> though we also identified a number of incidents where Crown witnesses, usually police, offered testimony that arguably required an expert qualification but was proffered without a formal designation as such by the court (a concern we return to in Part IV).<sup>59</sup> In any event, the 29 formally qualified experts made a total of 40 appearances before various courts, with six experts making multiple appearances.<sup>60</sup>

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<sup>57</sup> A 1966 US study found that an expert witness was called in approximately 25–30% of criminal trials by jury. They surveyed approximately 7000 trials. See Harry Kalven Jr & Hans Zeisel, *The American Jury* (Boston: Little, Brown and Company, 1966). A 1994 US study found that 61% of criminal cases involved expert witnesses. This was based on surveying judges in three US cities. See Daniel W. Shuman, Elizabeth Whitaker & Anthony Champagne, “An Empirical Examination of the Use of Expert Witnesses in the Courts: Part II: A Three City Study” (1994) 34:2 *Jurimetrics* 193 at 204. A 2010 US study found that psychologists and psychiatrists were the most frequent type of scientific or medical expert across all dockets (29%). See Stephanie Domitrovich, Mara L Merlino & James T Richardson, “State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons” (2010) 50:3 *Jurimetrics* 371 at 383.

<sup>58</sup> For the full list of these individuals, see Appendix A below.

<sup>59</sup> The authors believe that this would be an extremely fruitful avenue for future study.

<sup>60</sup> Sgt. Sylvain Fiset had four appearances (*Khawaja* ONSC, *supra* note 12 at para 61; *Jamali*, *supra* note 38 at para 24; Isabel Teotonio, “Video shows Toronto 18 Convict Testing Bomb Trigger”, *The Toronto Star* (20 October 2009), online: <[www.thestar.com/news/crime/2009/10/20/video\\_shows\\_toronto\\_18\\_convict\\_testing\\_bomb\\_trigger.html](http://www.thestar.com/news/crime/2009/10/20/video_shows_toronto_18_convict_testing_bomb_trigger.html)> [perma.cc/6RCM-XXBL]; *Amara*, *supra* note 38 at para 38). Cst. Tarek Mokdad (*Jamali* 2017, *supra* note 51 at para 11; *Hamdan*, *supra* note 51 at para 46; *LSIPA*, *supra* note 51), Dr. Julian Gojer (*Chand*, *supra* note 55; *Amara*, *supra* note 38 at para 85; *Ahmad* 2010, *supra* note 54 at para 37), and Dr. Lisa Ramshaw (*Essegheier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Gaya*, *supra* note 54 at para 41; *Khalid* Sentencing, *supra* note 54 at para 26) each had three appearances. Donna Garbutt (*Amara*, *supra* note 38 at para 38; Teotonio, *supra* note 60), and Dr. Phillip Klassen (*Ali*, *supra* note 41

## A. The “Type of Expert”

We have broken these experts down into three broad categories for the purposes of understanding why they were called (and, as it turns out, when they were called): social science experts<sup>61</sup> (proving an act or activity satisfies the definition of terrorist activity, explaining religious or political materials and their significance, and so on); technical experts<sup>62</sup> (authenticating electronic evidence and proving explosive offences like bomb making, as per sections 81 and 82 offences in the *Criminal Code*); and experts in psychology or psychiatry<sup>63</sup> (NCR assessments, fitness assessments, and sentencing

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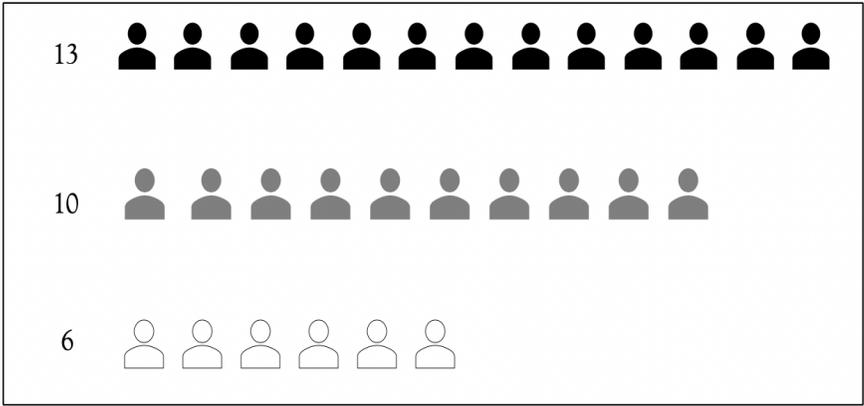
at para 7; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63) had two appearances.

<sup>61</sup> The social science experts are Abdi Aynte (*Hersi*, *supra* note 51 at para 21); Cst. Tarek Mokdad (*Hamdan*, *supra* note 51 at 46); Dr. Barbara Perry (*R v Hersi*, 2014 ONSC 1273 [*Hersi* Dr. Perry Voir Dire]); Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at para 476); Dr. Reuven Paz (*Namouh*, *supra* note 51 at para 45); Dr. Rita Katz (*Namouh*, *supra* note 51 at paras 28–32); Dr. Sean Maloney (*Ahmed Trial Transcript*, Day 13 (2 June 2014) at 1263 (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law) [*Ahmed Trial Transcript*]); Matthew Bryden (*Hersi*, *supra* note 51 at para 20); Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 55); Mohammed Fadel (*R v Khalid*, 2009 CarswellOnt 5007 at paras 59–61, 88 WCB (2d) 648 [*Khalid Gardiner Hearing*]).

<sup>62</sup> The technical experts are Cpl. Barry Salt (Geordon Omand, “Accused B.C. terrorists’ laptop full of extremist content, violent video games: trial”, *The Vancouver Sun* (29 April 2015), online: <[www.vancouversun.com/technology/accused+terrorists+laptop+full+extremist+content+violent+video+games+trial/11014453/story.html](http://www.vancouversun.com/technology/accused+terrorists+laptop+full+extremist+content+violent+video+games+trial/11014453/story.html)> [perma.cc/42W D-8ABN] [Omand, “Laptop Full of Extremist Content”]); Cst. Peter Cucheran (Geordon Omand, “B.C. Bomb Plot Trial Hears from RCMP Explosives Expert”, *The Globe and Mail* (15 May 2015), online: <[www.theglobeandmail.com/](http://www.theglobeandmail.com/)> [perma.cc/Z4ZP-AAHU] [Omand, “B.C. Bomb Plot Trial”]); Cst. Robin Shook (*R v Hamdan*, 2017 BCSC 676 at para 37 [*Hamdan Voir Dire*]); Donna Garbutt (Teotonio, *supra* note 60); Kevin Ripa (*Hamdan Voir Dire*, *supra* note 62 at para 31); Sgt. Sylvain Fiset (*Khawaja ONSC*, *supra* note 12 at para 61).

<sup>63</sup> The psychiatric/psychology experts counted here are: Dr. Ann Marie Dewhurst (*R v JR (Alberta Youth)*, 2015 ABQB 712 at paras 20–21 [*JR (Alberta Youth)*]), Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 7), Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at para 46), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 37; *Chand*, *supra* note 55; *Amara*, *supra* note 38 at 85), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Khalid* Sentencing, *supra* note 54 at para 26), Dr. Philip Klassen (*Ali*, *supra* note 41 at para 7; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Sumeeta Chatterjee (*Dughmosh*, *supra* note 42), Dr. Vinesh Gupta (*JR (Alberta Youth)*, *supra* note 63), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), and Dr. Nathan Pollock (*NY*, *supra* note

reports) speaking to behavior and mental health (usually appearing at criminal trials during the sentencing phase of the proceedings). Future studies may be able to further refine these categories, though we think of them as a useful starting place. The graphic below illustrates the numbers of qualified experts across these three categories:



Psychiatry & Psychology: 

Social Science: 

Technical: 

Further breakdowns and details of these three categories are provided below.

### 1. *Psychiatric/Psychological*

Experts with a background in psychology and psychiatry represented the largest category of experts. 13 individuals were qualified as experts in this category and together, they made a total of 18 appearances (or 45% of all appearances). 13 of these appearances occurred at the sentencing stage, which accounts for 33% of all of the expert appearances we examined. Two

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51). This table also includes the psychiatric experts tendered at the behest of the amici in *Essegbaier* (Dr. Philip Klassen and Dr. Lisa Ramshaw) and *Dughmosh* (Dr. Sumeeta Chatterjee).

experts appeared before trial at a hearing to determine whether pre-trial detention was warranted.<sup>64</sup> Two appeared at Ayanle Hassan Ali's trial, where their evidence went to the issue of whether the accused warranted an NCR designation after a guilty plea to the non-terrorism charges that he faced. Dr. Sumeetra Chatterjee appeared pre-trial in *Dughmosh*, where she assessed whether Ms. Dughmosh was fit to stand trial, although her report was considered in the sentencing judge's reasons.<sup>65</sup>

Generally, this category of experts displayed no special expertise or particular interest in terrorism per se. 11 were either forensic psychiatrists or forensic psychologists who worked with a wide range of offenders. One was a psychiatrist with a general practice.<sup>66</sup> At least four maintained a private practice at their own clinic, while nine were employed in an academic and/or government institution.<sup>67</sup> Out of this group of 13 experts, only two demonstrated a particular interest in terrorism. Dr. Wagdy Loza, a forensic psychiatrist, developed a tool for assessing recidivism risk for religious extremists in 2007.<sup>68</sup> As well, Dr. Jess Ghannam, who appeared at Raed Jaser's sentencing, had evaluated the mental health of detainees at Guantanamo Bay. The sentencing judge, however, did not find that Dr. Ghannam's terrorism-related background added any weight to his expert assessment.<sup>69</sup> In contrast, as will be discussed below, the fact that this category of experts lacked particular expertise in terrorism offenders seemed to lessen the weight that judges placed on their evidence.

As already noted, this category of experts made 13 appearance at the sentencing stage. 11 of these appearances concerned an offender's rehabilitative prospects and their likelihood to repeat offend (recidivism). Sentencing reports were tendered at each of these appearances, which were all at the behest of the offender.<sup>70</sup> In fact, an offender's recidivism risk and

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<sup>64</sup> Ali, *supra* note 41 at para 7.

<sup>65</sup> *Dughmosh*, *supra* note 42 at para 19.

<sup>66</sup> Dr. Arif Syed (*R v Amara*, 2010 ONSC 251 at para 24 [*Amara Voir Dire*]).

<sup>67</sup> Those employed in academia and/or in a government institution were: Dr. Hy Bloom, Dr. Julian Gojer, Dr. Wagdy Loza, Dr. Philip Klassen, Dr. Gary Chaimowitz, Dr. Sumeeta Chatterjee, Dr. Lisa Ramshaw, Dr. Jess Ghannam, and Dr. Nathan Pollock. Those with exclusively private practices were: Dr. Steven Cohen, Dr. Vinesh Gupta, Dr. Ann Marie Dewhurst, and Dr. Arif Syed. For complete citations on this point, see Appendix B below.

<sup>68</sup> Ahmed, *supra* note 51 at para 30.

<sup>69</sup> *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 40, 52-53.

<sup>70</sup> The 11 appearances counted here are: Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Hy Bloom (*Abdelaheem*, *supra* note 51 at para 46), Dr. Jess Ghannam (*Esseghaier*

rehabilitative prospects were the issues that expert evidence was most frequently tendered across all categories of expert evidence in terrorism prosecutions.<sup>71</sup>

There are several possible reasons for the preponderance of expert evidence on these issues. First, the relative seriousness of terrorism offences and the correspondingly long sentences that flow<sup>72</sup> may have spurred defence counsel to seek out quality expert evidence. Relatedly, the Supreme Court's judgement in *Khawaja* – the only Supreme Court judgement dealing with the principles of sentencing in the terrorism context – effectively requires individuals convicted of terrorism offences to show evidence at the sentencing hearing that they are unlikely to re-offend. Indeed, the Supreme Court held that an offender's failure to tender evidence on this point is sufficient to justify a harsher sentence.<sup>73</sup> Third, there is the simple fact that 15 terrorism offenders pled guilty, which meant that an offender's recidivism risk and rehabilitative prospects were at issue in more cases than, for instance, whether an offender participated in the activity of a terrorist group.<sup>74</sup> Fourth and finally, there seems to be a legitimate connection between some of the accused and mental health or capacity concerns, while many other accused were youthful, first-time offenders<sup>75</sup> (which, historically, has been a sign in criminal law to consider the individual's capacity to 'turn things around' and rehabilitate). The fact that at least some Canadian courts have repeatedly refused to treat youthfulness meaningfully as a relevant mitigating factor in terrorism

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(Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 37; *Chand*, *supra* note 55; *Amara*, *supra* note 3838 at 45), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Khalid Sentencing*, *supra* note 54 at para 26), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), and Dr. Nathan Pollock (*NY*, *supra* note 51).

<sup>71</sup> For comparison, the entire category of social science experts made 12 appearances and by no means did these 12 appearances concern the same legal issue. For instance, Dr. Omid Safi testified in relation to an entrapment application (*Nuttall Entrapment Application*, *supra* note 38 at para 476), Mohamed Fadel's testimony went to Khalid's moral culpability (*Khalid Gardiner Hearing*, *supra* note 61 at paras 59–61), and Dr. Barbara Perry's proposed testimony supported an allegation that an undercover officer was Islamophobic (*Hersi Dr. Perry Voir Dire*, *supra* note 61). See the section on social science experts below.

<sup>72</sup> Nesbitt, Oxoby & Potier, *supra* note 5 at 569–70, 613–14 (relatively long sentences).

<sup>73</sup> See *R v Khawaja*, 2012 SCC 69 at para 123 [*Khawaja* SCC]. For a broad discussion of this topic, see Nesbitt, Oxoby & Potier, *supra* note 5 at 597–603.

<sup>74</sup> Nesbitt, *supra* note 2 at 110.

<sup>75</sup> *Ibid* at 114.

sentencing decisions, in stark contrast to the usual approach to youth in the criminal justice system, might also be forcing defence lawyers to lead more evidence in support of the prospects of a youthful, first-time offender to rehabilitate.<sup>76</sup>

We turn now to the sentencing reports themselves. The reports featured interviews with the offender on their crime (especially their motive), opined on their personality, and summarized their biographic and medical history.<sup>77</sup> In several cases, the offender's family and friends were also interviewed.<sup>78</sup> Offenders were also evaluated using diagnostic tools designed to assist the evaluation of their recidivism risk. In two cases, offenders were evaluated using tools designed especially for terrorism offenders.<sup>79</sup> The sentencing reports tended to be extensive, but they varied in length and apparent thoroughness. In *Ahmed*, Dr. Loza testified that Mr. Ahmed's sentencing report involved more work than any other he had completed over his long career working in corrections and with offenders. Dr. Loza spent seven-and-a-half hours interviewing the offender and another 60 hours reviewing the trial transcripts.<sup>80</sup> Not all experts were as thorough. For instance, Dr. Gojer's report in *Ahmad* was apparently based on a single, two-and-a-half-hour interview and was prepared without considering the evidence on Ahmad's terrorist activity.<sup>81</sup> The relative novelty of assessing a terrorism offender and the seriousness of the offence may account for the extra attention some of these experts gave to their reports. In any event, in the future, defence counsel may wish to consider the thoroughness of an expert before approaching them for a report; our study suggests the divergence can indeed be wide.

The sentencing reports provide a window into the motivations and mental health of terrorism offenders in Canada. It is outside the scope of

<sup>76</sup> Nesbitt, Oxoby & Potier, *supra* note 5 at 59-97.

<sup>77</sup> *Abdelhaleem*, *supra* note 51 at paras 46-57; *Ahmad*, *supra* note 54 at paras 37-44; *Amara*, *supra* note 38 at paras 45-61; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 41-43.

<sup>78</sup> *Abdelhaleem*, *supra* note 51 at para 47; *Ahmad* 2010, *supra* note 54 at para 44; *Amara*, *supra* note 38 at para 45.

<sup>79</sup> The first is the Violent Extremist Risk Assessment (developed by Pressman & Flockton). See *Amara*, *supra* note 38 at para 41; *Ahmed*, *supra* note 51 at para 32. The second is the Assessment and Treatment of Radicalization Scale (developed by Loza). See *Ahmed*, *supra* note 51 at para 30.

<sup>80</sup> *Ahmed*, *supra* note 51 at para 17.

<sup>81</sup> *Ahmad* 2010, *supra* note 54 at para 44. See also *Amara*, *supra* note 38 where the report was prepared based on 4 hours of interviews with the offender.

this paper to fully canvass the findings of these reports on the mental health of terrorism offenders. However, the key findings are relevant to appreciating the role psychiatric and psychological experts played in terrorism prosecutions and how judges received their evidence. Five reports found that the offender expressed remorse or regret over their offence.<sup>82</sup> Two reports found the offender made no such expression. Notably, in two instances (*Abdelhaleem* and *Jaser*), religious or ideological motivation was considered a less significant factor in the commission of the offence.<sup>83</sup> Dr. Ghannam, for instance, determined that Mr. Jaser's offence followed from his drug addiction. Dr. Bloom found one Toronto 18 plotter lacked entrenched ideological views and was motivated out of a desire for financial gain, to please his father, and to achieve notoriety in the Islamic world.<sup>84</sup> Moreover, several sentencing reports found that the offenders were high functioning, socially responsible, and otherwise lacking the characteristics associated with violent offenders.<sup>85</sup> In several reports, these relatively positive findings led to a conclusion that the offender's rehabilitative prospects were positive and their recidivism risk was low.<sup>86</sup> Nevertheless, despite these relatively favourable conclusions in sentencing reports, judges seemed to place minimal weight on these reports and imposed relatively harsh sentences.<sup>87</sup> This outcome will be evaluated in more detail below, when discussing the judicial treatment of experts to date.

Psychiatric and psychological expert evidence was also tendered on the issue of whether an accused was NRC or unfit to stand trial. In these cases, experts attempted to distinguish between mental illness and mere extremist religious beliefs. *Ali* is the sole case where experts testified in relation to a defence of NCR. In *Ali*, the accused stabbed several uniformed personnel at a Canadian Armed Forces recruiting centre. He was charged with a variety of crimes, including nine counts of committing indictable offences "for the

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<sup>82</sup> Five reports made findings of remorse or regret: *Ahmed*, *supra* note 51 at para 24, 41, 46; *Amara*, *supra* note 38 at para 123; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 42; *Khalid Sentencing*, *supra* note 54 at para 54; *Gaya*, *supra* note 54 at para 35.

<sup>83</sup> *Abdelhaleem*, *supra* note 51 at para 51; *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38.

<sup>84</sup> *Abdelhaleem*, *supra* note 51 at para 52.

<sup>85</sup> *Ahmed*, *supra* note 51 at para 36; *Amara*, *supra* note 38 at para 45; *Khalid Sentencing*, *supra* note 54 at paras 27-30; *Gaya*, *supra* note 55 at para 43.

<sup>86</sup> Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14 at 562-66.

<sup>87</sup> For more discussion, see Nesbitt, Oxoby & Potier, *supra* note 5 at 594-95.

benefit of, at the direction of or in association with a terrorist group" contrary to section 83.2 of the *Criminal Code*.<sup>88</sup> Two experts testified at trial, one for the defence (Dr. Gary Chaimowitz) and one for the Crown (Dr. Phillip Klassen). The experts agreed that Mr. Ali had schizophrenia and that his illness manifested through his religious beliefs.<sup>89</sup> Both experts agreed that Mr. Ali's mental illness contributed to the development of his radical views.<sup>90</sup> However, Dr. Klassen and Dr. Chaimowitz noted the possibility that Mr. Ali's actions could be attributed to his extremist religious beliefs, not his mental illness. Both experts ultimately rejected this hypothesis. Dr. Klassen tentatively concluded that it was more likely that Mr. Ali's illness coupled with his radical views compromised his moral reasoning and drove his actions. Dr. Chaimowitz agreed, although he was more adamant that Mr. Ali's delusions undermined his moral judgment.<sup>91</sup> Thus, both experts supported a finding that Mr. Ali was not criminally responsible. The trial judge accepted these findings and the guilty plea agreement, though the Crown proceeded separately with the associated terrorism charge, which was tried (and failed) separately.<sup>92</sup>

Experts were also called on to draw the line between mental illness and religious belief in *Esseghaier*.<sup>93</sup> In that case, Dr. Ramshaw – who was called by the defence and had previously appeared as a defence expert and court-appointed expert<sup>94</sup> – opined that Mr. Esseghaier was unfit to participate in sentencing. She found that Mr. Esseghaier was exhibiting delusions and other behavior indicating schizophrenia, noting that he believed “the officers and prisoners [at the Detention Centre] had conspired to make each of the days shorter by creating fake light in his cell.”<sup>95</sup> By contrast, a second expert, Dr. Klassen – who had also appeared as a Crown expert in *Ali* – agreed that Esseghaier was mentally ill but found that he was fit to participate in the sentencing.<sup>96</sup> However, in cross-examination, Dr. Klassen opined that it was also possible that Esseghaier was not ill but just very

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<sup>88</sup> *Ali*, *supra* note 41 at para 1.

<sup>89</sup> *Ibid* at paras 10, 24–26.

<sup>90</sup> *Ibid* at paras 42–43, 45–47.

<sup>91</sup> *Ibid* at para 47.

<sup>92</sup> *Ibid* at para 101.

<sup>93</sup> *Esseghaier* (First Sentencing Hearing), *supra* note 40.

<sup>94</sup> Dr. Ramshaw was a defence expert for Gaya and Khalid (*Gaya*, *supra* note 54 at paras 41–43; *Khalid* Sentencing, *supra* note 54 at paras 22–33).

<sup>95</sup> *Esseghaier* (First Sentencing Hearing), *supra* note 40 at para 29.

<sup>96</sup> *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 65.

religious.<sup>97</sup> The sentencing judge, for his part, rejected both experts' findings that Mr. Esseghaier was mentally ill, or at least too ill to be criminally responsible for his actions, and determined that he was fit to participate in the sentencing proceedings.<sup>98</sup>

As *Esseghaier* shows, the fact that terrorism and the instincts that motivate such behavior can be so hard to understand has led to some confusion in courts. In particular, there has been some confusion regarding whether an offender is suffering a serious mental illness or is guided by extreme religious or ideological beliefs that exist independent of the mental illness. The Canadian experience has borne out that the study of the relationship between extremist, terrorist beliefs and mental illnesses (like schizophrenia) remains a valid topic of study, if only because the relationship between the two seems to have caused problems for the courts – and for medical experts such as Dr. Klassen. Teasing out this relationship is not merely of academic interest, since *Ali*, *Esseghaier*, and *Dughmash* show that determining the interaction between the two is relevant to issues of fitness and, ultimately, criminal responsibility. It may also be relevant to determining whether an offender is more amenable to rehabilitation (assuming that they can receive treatment for the mental illness that led to their offending), though courts to date have been extremely reluctant to accept such testimony. In sum, the link between mental illness and terrorism looks to be an area that will continue to require expert evidence in terrorism prosecutions.

## 2. Social Science Experts

Ten individuals have been qualified as social science experts in Canadian terrorism trials.<sup>99</sup> These ten individuals made a total of 12 appearance before various courts, accounting for 30% of all expert appearances in all terrorism trials. Compared to the other categories, the experts in this category came from a more diverse range of backgrounds. Five of these experts were employed in academia, with specializations varying from Canadian military history, Islamic faith and thought, Islamic law, and the sociology of hate. Two studied the history and politics of

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<sup>97</sup> *Ibid* at para 81.

<sup>98</sup> *Ibid* at para 82.

<sup>99</sup> As noted above, the concept of social science evidence embraces expert evidence covering religious, political, historical, or sociological topics.

Somalia and worked as consultants or in journalism.<sup>100</sup> Three experts had specialized expertise in terrorism, two were private analysts, and one, Cst. Tarek Mokdad, was an investigator with the RCMP.<sup>101</sup> One expert was an Imam (Navaid Aziz).<sup>102</sup> Given the diversity of backgrounds, it is unsurprising that the subject-matter of their testimony was also highly variable. Broadly speaking, their testimony involved explaining religious ideology or texts,<sup>103</sup> general political or historical issues,<sup>104</sup> and the specific activities of a terrorist group.<sup>105</sup>

Despite these differences, most appearances by social science experts (ten out of 12) concerned the same general purpose: proving or disproving the *mens rea* and *actus reus* elements of the terrorism offences at trial and, specifically, the predicates of the definition of terrorist activity or the definition of a terrorist group. For instance, in *Hersi*, the accused was charged with knowingly attempting to participate in the activity of a terrorist group (section 83.18 of the *Criminal Code*) after planning a trip to Somalia, via Egypt, and informing an undercover officer that he intended to join Al-Shabaab.<sup>106</sup> The Crown's expert, Matthew Bryden, a political analyst, attested to both the *actus reus* and *mens rea* of the offence.<sup>107</sup> For one, he opined on whether Al-Shabaab was a terrorist group and how it recruits foreign fighters to engage in violent activity, both points going to the *actus reus* of the offence.<sup>108</sup> He also opined on how notorious Al-Shabaab's activities were, which went to establishing the knowledge requirement in the offence's *mens rea*.<sup>109</sup>

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<sup>100</sup> Abdi Aynte and Matthew Bryden: *R v Hersi*, 2014 ONSC 1258 at para 10 [*Hersi* Bryden Voir Dire]; *Hersi Trial Transcripts*, at 321-22 (ll 30-ll 24) (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law).

<sup>101</sup> *Hamdan*, *supra* note 51 at para 46. Dr. Reuven Paz and Dr. Rita Katz were private analysts. See *Namouh*, *supra* note 51 at paras 32, 45.

<sup>102</sup> *Hamdan*, *supra* note 51 at para 55.

<sup>103</sup> *Ibid.* See also *Khalid Gardiner Hearing*, *supra* note 61 at para 100; *Jamali 2017*, *supra* note 51 at para 11.

<sup>104</sup> *Hersi*, *supra* note 51 at paras 20-21, 23-24; *Ahmed Trial Transcript*, *supra* note 61 at 1276-1302.

<sup>105</sup> In *Namouh*, Dr. Katz expounded on the activity of the al-Qaeda linked Global Islamic Media Front. See *Namouh*, *supra* note 51 at paras 28, 48-62. In *Hersi*, Bryden and Aynte opined on al-Shabab. See *Hersi*, *supra* note 51 at paras 20, 24.

<sup>106</sup> *Hersi*, *supra* note 51 at paras 10-11.

<sup>107</sup> *Hersi* Bryden Voir Dire, *supra* note 100 at para 19.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.* See also *Hersi*, *supra* note 51 at paras 20-21.

*Ahmed* provides another example. In that case, Misbahuddin Ahmed was charged under section 83.18 of the *Criminal Code* – participating in the activities of a terrorist group – after plotting with his co-accused, Hiva Alizadeh, to detonate a bomb.<sup>110</sup> The Crown’s theory was that Mr. Ahmed and Mr. Alizadeh formed a terrorist group, drawing upon materials and skills that Mr. Alizadeh acquired in an Afghan training camp.<sup>111</sup> To support this claim, the Crown led evidence from Dr. Sean Maloney, a military historian with expertise in Afghanistan, who opined on the type of training camp Mr. Alizadeh attended.<sup>112</sup> Dr. Maloney explained that the camps provided extremist religious indoctrination, gave instruction on conducting violent attacks (including bomb-making), and encouraged attacks in the countries of its foreign participants.<sup>113</sup> Thus, Dr. Maloney’s evidence went to establishing that, together, Mr. Ahmed and Mr. Alizadeh formed a terrorist “entity” whose purpose was carrying out terrorist activity (which, again, is one definition of a terrorist group in the *Criminal Code*).

In general, social science experts provided evidence on the *actus reus* and *mens rea* – such as that discussed above – in three different ways: interpreting specific pieces of evidence (e.g., Navaid Aziz in *Hamdan*), providing a general background (e.g., Dr. Maloney in *Ahmed*), and, in one case, expounding on an in-depth analysis of an accused’s activities within a terrorist group (Dr. Rita Katz in *Namouh*).<sup>114</sup> The first approach, a focused interpretation of specific pieces of evidence, arose in *Hamdan* and *Ahmed*. In *Hamdan*, two experts, Cst. Tarek Mokdad and Navaid Aziz offered opinion evidence on the question of whether Mr. Hamdan’s Facebook posts counselled terrorist activity.<sup>115</sup> Cst. Mokdad is an investigator with the RCMP who developed an interest in “jihadist extremist groups”, cultivated

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<sup>110</sup> *Ahmed*, *supra* note 51 at para 1.

<sup>111</sup> Chris Cobb, “Ahmed Says He Wanted to Set His Alleged Terrorism Accomplice on Right Path”, *The Ottawa Citizen* (24 June 2014), online: <[ottawacitizen.com/news/local-news/ahmed-says-he-wanted-to-set-his-alleged-terrorism-accomplice-on-right-path](http://ottawacitizen.com/news/local-news/ahmed-says-he-wanted-to-set-his-alleged-terrorism-accomplice-on-right-path)> [perma.cc/3928-LWKW]; Colin Freeze, “Details of terror plot emerge after Ottawa man’s guilty plea”, *The Globe and Mail* (17 September 2014), online: <[www.theglobeandmail.com/news/](http://www.theglobeandmail.com/news/)> [perma.cc/TA97-RW6H].

<sup>112</sup> *Ahmed Trial Transcript*, *supra* note 61 at 1298–1301.

<sup>113</sup> *Ibid*; Dr Sean Maloney, “Jihadist Activities in Afghanistan: An Overview” (Expert Report) at 16–17 (on file with author, contact Michael Nesbitt at the University of Calgary, Faculty of Law).

<sup>114</sup> *Hamdan*, *supra* note 51 at paras 46, 55; *Ahmed Trial Transcript*, *supra* note 61 at 1276–1302; *Namouh*, *supra* note 51 at paras 71–73.

<sup>115</sup> *Hamdan*, *supra* note 51 at paras 99–102, 106, 148–50.

without formal study or education on the topic.<sup>116</sup> Mr. Aziz is an Imam and the leader of an institute in Calgary offering Islamic studies.<sup>117</sup> In *Hamdan*, both experts went through individual Facebook posts and offered their opinion on the ideological or political message that they encapsulated. For instance, where there was a post quoted from the Quran or Hadiths, Mr. Aziz explained how mainstream Muslims would interpret the passage compared to Salafist jihadists, and he offered his view on which interpretation Mr. Hamdan seemed to favour and why.<sup>118</sup> Expert testimony on the ideological or political significance of individual pieces of evidence also figured in *Ahmed*. In that case, Dr. Sean Maloney opined, *inter alia*, on the ideological significance of a video found on compact disks in Mr. Ahmed and Mr. Alizadeh's residence.<sup>119</sup> The video depicted individuals participating in military drills, purportedly in Afghanistan. Dr. Maloney explained the features of the video that indicated it depicted an al-Qaeda training camp.<sup>120</sup>

Not all social science evidence was so narrowly focused on interpreting individual pieces of evidence. Social science experts also provided general background relevant to interpreting the evidential record on an accused's activities as a whole. In *Hamdan*, for instance, Cst. Mokdad surveyed ISIS' use of social media to propagate its message and recruit supporters. Cst. Mokdad explained that Mr. Hamdan's posts picked-up and parroted ISIS messaging.<sup>121</sup> In *Ahmed*, Dr. Maloney opined on the network of terrorist training camps, various jihadist groups founded in Afghanistan, and the recruitment of trainees from all over the world to these camps.<sup>122</sup> The Crown expert in *Hersi*, Matthew Bryden, and the defence expert, Abdi Aynte, also provided a general overview of Al-Shabaab's activity.<sup>123</sup> In these instances, the experts were not so focused on interpreting the ideological or political significance of individual pieces of evidence, but rather on providing a context in which to interpret the accused's activities.

The final (third) approach, where an expert provides an in-depth analysis of the accused's terrorist activities, arose in *Namouh*. In *Namouh*, the

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<sup>116</sup> *Ibid* at para 86.

<sup>117</sup> *Ibid* at para 99.

<sup>118</sup> *Ibid* at paras 148–150.

<sup>119</sup> *Ahmed Trial Transcript*, *supra* note 61 at 1303.

<sup>120</sup> *Ibid* at 1302–03.

<sup>121</sup> *Hamdan*, *supra* note 51 at para 46.

<sup>122</sup> *Ahmed Trial Transcript*, *supra* note 61 at 1302.

<sup>123</sup> *Hersi*, *supra* note 51 at 20–21, 23–24; *Hersi Bryden Voir Dire*, *supra* note 100 at para 28.

accused was alleged to have participated in al-Qaeda's propaganda wing, the Global Islamic Media Front (GIMF). The Crown's main expert witness was Dr. Rita Katz, the director of SITE Intelligence (a private firm providing intelligence and analyses on terrorist groups).<sup>124</sup> While Dr. Katz's report consisted of a general overview of GIMF's operations, it also detailed her organization's investigation of Mr. Namouh's alleged activities on GIMF. She documented, for instance, that a special thread was created on GIMF's forum to praise Mr. Namouh's contributions to GIMF.<sup>125</sup> She also noted Mr. Namouh's statements on the GIMF site, wherein he commented on "his hatred for the West, and even for other non-jihadist Muslims, as well as his strong love for jihad and al-Qaeda."<sup>126</sup> Thus, Dr. Katz's evidence relayed a detailed investigation of the accused's activities and covered what typically might come from a police investigator rather than a private expert witness.

Expert social science evidence was also led in *Nuttall* to support the accused's entrapment application. Following their conviction at trial, Mr. Nuttall and Ms. Korody brought an entrapment application, maintaining that the RCMP induced them to plant the bomb at the BC legislature that led to their conviction. To support their application, they tendered expert evidence from Dr. Omid Safi, a professor in Islamic faith and thought.<sup>127</sup> Dr. Safi testified that the undercover RCMP officer working with Mr. Nuttall and Ms. Korody misrepresented Islamic tenets and encouraged them to adopt a narrow, radical, and violent view of Islam.<sup>128</sup> Butler J. explained how this evidence supported a finding of entrapment:

As Dr. Safi clarified in his evidence, by promoting the introspective approach to the interpretation of the faith, and at the same time failing to point out to Mr. Nuttall the Modernist non-violent approach to jihad, the RCMP isolated Mr. Nuttall from any moderate viewpoint and simultaneously propelled him toward a more radical concept of jihad.<sup>129</sup>

As already noted, social science experts were the second most frequent category of experts called in terrorism trials. Yet, given the ideological and motive requirements in the definition of terrorist activity, it seems that social science experts ought to have been called even more frequently. It is,

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<sup>124</sup> *Namouh*, *supra* note 51 at para 32.

<sup>125</sup> *Ibid* at para 71.

<sup>126</sup> *Ibid* at para 72.

<sup>127</sup> *Nuttall Entrapment Application*, *supra* note 38 at para 476.

<sup>128</sup> *Ibid* at paras 482-83, 485-86, 489.

<sup>129</sup> *Ibid* at para 480.

however, important to keep in mind that social science expertise is particularly relevant at the trial stage, where the Crown and defence are contesting whether the elements of the offences are met. Thus, where an offender pled guilty, it figures that social science experts will not feature prominently in their case (the *Gardiner* hearing in *Khalid* is the exception here).<sup>130</sup> Indeed, at the trial stage, social science experts were the most frequently cited expert – only seven technical experts and two psychiatry or psychology experts figured at the trial stage, whereas social science experts made 11 appearances at this stage of proceedings.<sup>131</sup> Nevertheless, a social science expert did not appear in nine of the 16 cases that went to trial.<sup>132</sup>

There are at least two factors that seem to have excused resort to social science expert witnesses in some of these instances. First, trial judges have relied on judicial notice to substitute expert opinion evidence in at least two cases that we uncovered. In both of these cases, judges relied on judicial notice in determining whether the armed conflict exception applied, which operates as a defence to terrorism charges where the defendant can prove that they were operating within the bounds of international law associated with armed conflict. Put simply, it ensures that an otherwise legal military bombing during war (armed conflict, technically) is not considered terrorism. In *Khawaja*, the accused claimed that he built a detonator to support the Taliban government in Afghanistan and so, as a result of being a legitimate participant in an international armed conflict, the armed conflict exception applied. Rather than resorting to extensive submissions or expert evidence as to whether there was an armed conflict in Afghanistan and, more to the point, whether the armed insurgents' (Taliban's) activities were terrorist in nature (and thus, the armed conflict exception did not apply), the trial judge simply took judicial notice of the fact that there was an armed conflict in Afghanistan at the time of Mr. Khawaja's offences and that the insurgents' actions were terrorist. Thus, it fell outside of the bounds

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<sup>130</sup> Pursuant to the *Criminal Code*, *supra* note 1, s 724(3), a *Gardiner* hearing is held during sentencing when there is a dispute or conflict between the parties concerning the facts that are relevant to the determination of an offender's sentence following a guilty plea. During the hearing, evidence is led on the fact(s) in issue according to the ordinary rules of evidence. See also *R v Gardiner*, [1982] 2 SCR 368, 140 DLR (3rd) 612.

<sup>131</sup> Social science experts figured only in *Hamdan*, *Hersi*, *Ahmed*, *Khalid*, *Nuttall*, *Namouh*, and *Jamali*.

<sup>132</sup> As noted above, social science experts made a total of 12 appearances. Mohamed Fadel's appearance at a *Gardiner* hearing was the sole social science appearance outside of the trial stage.

of the armed conflict exception.<sup>133</sup> The same issue arose in *R v LSJPA*. In that case, the trial judge relied on judicial notice to find an armed conflict existed in Syria and that ISIS was a terrorist group.<sup>134</sup> *Khawaja* and *LSJPA* show that Crown and defence counsel may encourage a trial judge to rely on judicial notice, at least as it relates to the applicability of the armed conflict exception in places like Syria or Afghanistan. This factor accounts for the absence of expert evidence on, at least, the armed conflict exception – which is admittedly rather rare and tangential to the vast majority of cases so far (indeed, it was raised only in these two cases and not as a major issue for trial).

Second, in a few cases, the evidence tendered at trial sufficed, seemingly without the need for opinion evidence, to show the ideological purpose and motive of the accused, as well their involvement with a terrorist group. For example, in *Habib*, the accused was charged with attempting to leave Canada for the purpose of participating in the activity of a terrorist group (section 83.181 of the *Criminal Code*). During the RCMP's investigation of Mr. Habib, they set up a Mr. Big operation,<sup>135</sup> which led Mr. Habib to admit that he joined ISIS in Syria, subsequently returned to Canada, and planned to rejoin the group.<sup>136</sup> Since ISIS is a listed terrorist entity, Habib's admission provided a firm basis to infer that the elements of section 83.181 were met in his case. As but another prominent example, in *Khawaja*, the judge drew inferences from the lay witness testimony attesting to Mr. Khawaja's violent extremist views, rather than relying on experts to help

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<sup>133</sup> See *Khawaja* ONSC, *supra* note 12 at paras 1, 5–6. See especially *Khawaja* ONSC, *supra* note 12 at para 125. Cf United Nations Security Council, *Resolution 1378 (2001)* S Res 1378 (2001), UNSCOR, 2001, 1 and other UN Security Council resolutions on which the judge relied to make the finding. See also *Criminal Code*, *supra* note 1 at 83.01(1)(b): The armed conflict exception “does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict.” The international law requirement will exclude acts intended to terrorize a population, since such actions contravene the *Geneva Conventions: Khawaja* SCC, *supra* note 73 at para 102.

<sup>134</sup> *LSJPA*, *supra* note 51 at paras 233–57.

<sup>135</sup> For an excellent article on Mr. Big Stings in Canada, see Adelina Iftene, “The Hart of the (Mr.) Big Problem” (2016) 63 *Crim LQ* 151.

<sup>136</sup> *Habib*, *supra* note 51 at paras 60–62.

draw the link for the court.<sup>137</sup>

With that said, we had still expected to see a good deal more social science experts at terrorism trials. To start, all of the trials to date have concerned al-Qaida-inspired terrorism, meaning that understanding religious and cultural texts not well-understood by the judges presiding over Canadian terrorism cases to date has played a prominent role in almost every case to date. Moreover, understanding foreign terrorist groups, or cultural touchstones of Islamist extremist ideology has been central to every trial to date (the one non-Islamist extremist prosecution to date was a guilty plea, not a trial). Finally, as we will discuss in further detail below, the defence presumably has a real interest in adding nuance to how an accused might understand a religious text or ideological communication but have not made significant use of social science experts to date.

### 3. Technical Experts

Six technical experts figured in terrorism prosecutions, accounting for ten appearance or 25% of all appearances. Five were employed with the RCMP and one worked as a private consultant.<sup>138</sup> None demonstrated special expertise or interest in terrorism offenders. Broadly speaking, technical experts further subdivided into two types: those with expertise in explosives and those with expertise in digital forensics (technology).

Expert evidence on explosives was relevant to three issues. First, it went to support a finding of guilt on elements of the predicate offence to a terrorism charge (making a bomb for a terrorist group, for example) and the definition of terrorist activity. 12 individuals were charged with a terrorism offence and a predicate offence involving explosives.<sup>139</sup> In the cases that

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<sup>137</sup> *Khawaja* ONSC, *supra* note 12 at paras 7, 130. Three witnesses, along with Mr. Khawaja's own correspondence, established his interest in and desire to support violent extremist activity.

<sup>138</sup> The technical experts employed with the RCMP were Sgt. Sylvain Fiset, Donna Garbutt, Cpl. Barry Salt, Cst. Peter Cucheran, and Cst. Robin Shook. The private consultant was Kevin Ripa. For complete citations on these experts' employment, see Appendix B below.

<sup>139</sup> The 12 cases were: *Khawaja* ONSC, *supra* note 12 at para 1; El Mahdi Jamali and Sabrine Djermane ("Montreal couple cleared of terror charges, boyfriend guilty of explosives-related offence", *CBC News* (19 December 2017), online: <[www.cbc.ca/news/canada/](http://www.cbc.ca/news/canada/)> [perma.cc/6YBS-A2WM] [CBC News, "Montreal Couple Cleared"]; *Jamali*, *supra* note 38; *Abdelhaleem*, *supra* note 51; *R v Alizadeh*, 2014 ONSC 5421; *Amara*, *supra* note 38 at paras 4–5; *Gaya*, *supra* note 54 at para 2; *Khalid* Sentencing, *supra* note 54 at para 3; John Nuttall and Amanda Korody in *Nuttall Entrapment Application*, *supra* note

went to trial, expert opinion evidence was led to interpret the evidence of explosives in all but one case. For instance, in *Khawaja*, the accused worked on a detonator, nicknamed the “hifidigimonster”, for a terrorist cell in London, England. The Crown charged Mr. Khawaja with two counts under section 83.2, where the predicate offences were the explosive offences in subsection 81(1)(c) and subsection 81(1)(d) of the *Criminal Code*.<sup>140</sup> To support the charges under these predicate offences, the Crown tendered the expert opinion of Sgt. Fiset, who opined that the electrical components discovered in the accused’s possession could function as a detonator for a 600 kg bomb.<sup>141</sup> This amount of explosives, Sgt. Fiset explained, would cause serious damage to infrastructure, death, and serious bodily harm. The trial judge found Sgt. Fiset’s evidence went to establishing that Mr. Khawaja committed both of the predicate explosive offences.<sup>142</sup>

Second, in several cases, expert evidence on explosives was also relevant to the *mens rea* of the terrorism offence proper. *Khawaja* again provides an illustrative example. In that case, Mr. Khawaja maintained that he built the detonator for use in Afghanistan, although the Crown showed that the terrorist cell that commissioned the detonator planned to use it for a fertilizer bomb in London.<sup>143</sup> In his testimony, Sgt. Fiset opined that the detonator was most useful in underdeveloped environments (like Afghanistan), not a developed urban environment, as one would just use a cellphone in a city.<sup>144</sup> This finding led the trial judge to conclude that Mr. Khawaja was ultimately in the dark about the plan to use the detonator in London. Consequently, the trial judge concluded that the Crown failed to show Mr. Khawaja had the requisite *mens rea* for a section 83.2 offence (the

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38 at para 5; Misbahuddin Ahmed (Chris Cobb, “Convicted terrorist unaware he was committing crime, expert testifies”, *The Ottawa Citizen* (15 October 2014), online: <[ottawacitizen.com/news/local-news/convicted-terrorist-unaware-he-was-committing-crime-expert-testifies](http://ottawacitizen.com/news/local-news/convicted-terrorist-unaware-he-was-committing-crime-expert-testifies)> [perma.cc/GAV5-FCF7]; Qayyum Abdul Jamal (Isabel Teotonio, “Four Have Terror Charges Stayed”, *The Toronto Star* (15 April 2008), online: <[www.thestar.com/news/gta/2008/04/15/four\\_have\\_terror\\_charges\\_stayed.html](http://www.thestar.com/news/gta/2008/04/15/four_have_terror_charges_stayed.html)> [perma.cc/FPK2-UYCW] [Teotonio, “Four Have Charges Stayed”]). Ahmed was the sole individual whose case proceeded to trial on an explosive offence, but no explosive expert apparently testified.

<sup>140</sup> *Khawaja* ONSC, *supra* note 12 at para 1.

<sup>141</sup> *Ibid* at paras 61–67.

<sup>142</sup> *Ibid* at para 100.

<sup>143</sup> *Ibid* at paras 6, 109.

<sup>144</sup> *Ibid* at paras 70–71.

commission of an offence for a terrorist group).<sup>145</sup> Lastly, in three of the Toronto 18 cases, the sentencing judge relied on an expert report regarding the extent of the explosive devices at issue in that terrorism plot. The judge found that to be indicative of the moral culpability of the offenders.<sup>146</sup> Thus, evidence from explosive experts played at least three different roles in terrorism prosecutions.

The second type of technical expert evidence we identified spoke to digital forensics. There are two examples where this type of expert evidence was led. The first arose in *Hamdan*. In that case, Mr. Hamdan was charged with three counts of counselling the commission of an offence for the benefit of a terrorist group and one count of instructing persons to carry out terrorist activity.<sup>147</sup> The counts related to a series of Facebook (social media) posts. The RCMP used non-forensic grade software to take screenshots of the posts, which omitted the posts' metadata and source code. At a *voir dire* on the admissibility of the posts, defence counsel maintained that since this information was lost, the screenshots did not meet the best evidence rule, nor could they be authenticated per section 31.1 of the *Canada Evidence Act*.<sup>148</sup> In short, the posts were inadmissible. During the *voir dire*, both the Crown and defence called expert evidence relating to digital forensics. The defence expert was Kevin Ripa, a private consultant, who was qualified as an "expert in the field of digital forensic analysis, and internet and webpage architecture."<sup>149</sup> Mr. Ripa opined that the failure to capture the source code meant that he was unable to analyze whether the posts had been altered or corrupted.<sup>150</sup> The trial judge accepted Mr. Ripa's evidence that the RCMP was less than meticulous in capturing the posts.<sup>151</sup> Nevertheless, the judge found that the screenshots satisfied the best evidence rule and could be admitted, citing the relatively low bar for satisfying these two requirements.<sup>152</sup>

The second example of expert evidence on digital forensics arose in *Nuttall*. In that case, Mr. Nuttall and Ms. Korody were charged under

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<sup>145</sup> *Ibid* at paras 100-01.

<sup>146</sup> *Amara, supra* note 38 at paras 38, 102; *Gaya, supra* note 54 at para 27; *Khalid Gardiner Hearing, supra* note 61 at para 55.

<sup>147</sup> *Hamdan, supra* note 51 at para 2.

<sup>148</sup> *Hamdan Voir Dire, supra* note 62 at paras 39-41.

<sup>149</sup> *Ibid* at para 31.

<sup>150</sup> *Ibid* at para 33.

<sup>151</sup> *Ibid* at paras 79-80.

<sup>152</sup> *Ibid* at paras 43-52, 82-85.

section 83.2, committing an indictable offence for the benefit of a terrorist group, and section 83.19, knowingly facilitating terrorist activity.<sup>153</sup> The charges arose out of an undercover investigation into what became Nuttall and Korody's plan to place a homemade explosive on the grounds of the British Columbia legislature in Victoria. During their jury trial, the Crown called Cpl. Barry Salt, an expert in digital forensics, who opined on the extremist content found on the laptops taken from the accused (including an al-Qaeda bombmaking recipe), the significance of the content's location on the laptop, and the likelihood that one of the accused was responsible for accessing it.<sup>154</sup> While it is obviously unknown how the jury relied on this evidence, it was relevant, for instance, to establishing the high *mens rea* requirement in section 83.19, which requires that an accused specifically intended to carry out terrorist activity.<sup>155</sup>

As already noted, technical experts accounted for about 25% of appearances and were, therefore, the smallest category of experts appearing in terrorism prosecutions. There are several reasons that can account for the comparatively fewer appearances of technical experts to date. For one, in many of the terrorism cases prosecuted to date, the evidence grounding the charges in terrorism prosecutions has not required technical or scientific opinion expertise to interpret. In other words, while police had to call officers responsible for scraping social media or collecting bomb-making materials, it was sufficient for those experts to state the facts (that is, what they did, why, and so on). The courts have not largely seen it fit to require expert opinion evidence to help explain the meaning of the resultant evidence. Cases involving bomb-making plots are notable exceptions to this rule, although only three of the four trials involving bomb plots featured explosive experts.<sup>156</sup> As well, while several terrorism cases have involved RCMP investigators testifying to forensic searches of laptops or other electronic devices, this evidence appears to have been tendered through ordinary fact witnesses.<sup>157</sup> *Nuttall* and *Hamdan* are exceptions, as opinion

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<sup>153</sup> *Nuttall*, *supra* note 38 at para 5.

<sup>154</sup> Omand, "Laptop Full of Extremist Content", *supra* note 62.

<sup>155</sup> Nesbitt & Hagg, *supra* note 4 at 637.

<sup>156</sup> The four trials involving explosive offences were: *Nuttall* and *Korody*, *Ahmed*, *Djermane* and *Jamali*, and *Khawaja* (see the sources cited, n 139). The three trials featuring explosives experts were *Nuttall* and *Korody*, *Djermane* and *Jamali*, and *Korody* (see the sources cited, n 139).

<sup>157</sup> See, for instance, *Khawaja* ONSC, *supra* note 12 at paras 16, 34–36, 48, 99; *LSJPA*, *supra* note 51 at paras 32–39.

evidence on digital forensics was required for the issues in those cases. Thus, the relatively low numbers of technical experts show that the evidence in terrorism cases calls, or at least has called, more frequently for religious or ideological expertise than technical or scientific expertise.

A second factor is that one form of technical expertise, translating foreign languages, was provided through individuals qualified as social science experts or dispensed with entirely because the relevant texts in evidence were already in English. For example, in *Hamdan*, Mr. Aziz provided Arabic translation and social science testimony at the same time.<sup>158</sup> The same practice occurred in *Khalid*, where Professor Fadel both translated and interpreted the religious texts on Mr. Khalid's computer.<sup>159</sup> *Khalid*, *Djermane*, and *Nuttall* are examples where the extremist literature in evidence was already in English.<sup>160</sup>

Finally, Canada has had relatively few cases to date concerning the actions of "foreign fighters" (as of 2013, sections 83.181, 83.191, and 83.202 of the *Criminal Code*).<sup>161</sup> Of those, all have either been guilty pleas or cases that were prosecuted on the basis of evidence collected within Canada (that is, as the individual is planning to travel), as opposed to cases where the evidence tendered in court was collected abroad. But, there is some concern that things might change and that Canada will have to address its "foreign fighter" problem.<sup>162</sup> The Crown will then almost certainly have to rely on evidence collected abroad – in places like Syria and Somalia where Canadian officials have no known footprint – to secure prosecutions. This, in turn, will require more complex evidence including, one would imagine, more technical evidence related to social media posts, wiretaps, geolocations (including those provided by other countries like Canada's so-called "Five-Eyes" partners), and so on. If that is correct, then we may indeed see an increase in technical experts in terrorism trials to come. Likewise, *Hamdan* was the first case that contemplated Canada's "instructing" a terrorist group offence (section 83.21), and there have not yet been charges under Canada's

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<sup>158</sup> *Hamdan*, *supra* note 51 at para 55.

<sup>159</sup> See *Khalid Gardiner Hearing*, *supra* note 61 at paras 98, 100.

<sup>160</sup> *Ibid.* See also Paul Cherry, "Terror Trial: Bomb Recipe Came from al-Qaida Publication, Court Told", *The Montreal Gazette* (30 October 2017), online: <montrealgazette.com/news/local-news/terror-trial-bomb-recipe-came-from-al-qaidas-inspire-court-told> [perma.c c/TMM4-Q8ZD] [Cherry, "Terror Trial"]; Omand, "Laptop Full of Extremist Content," *supra* note 62.

<sup>161</sup> See Nesbitt, *supra* note 2 at 115, 120–22.

<sup>162</sup> *Ibid.*

recently-updated “counselling [the] commission of [a] terrorism offence” provision (which was updated as of June 2019 in *An Act Respecting National Security, 2017*).<sup>163</sup> As *Hamdan* revealed, it is likely that future charges under such provisions would contemplate at least some online activity, thereby creating the possibility of more experts in this technical area. As a result, though the number of technical experts called to date was lower than we had initially hypothesized, that might change as the type of cases – and particularly the type of terrorism offence charged – changes.

**B. When was the Evidence Called and by Whom?**

We also looked at when the expert was called, that is to say, the stage of trial, as well as by whom the expert was called (defence or Crown). The table below provides a visual.<sup>164</sup>

|                 | Pretrial  | Trial  | Sentencing   |
|-----------------|---|--|--|
| Crown Experts   | 0   | 1   | 0  |
|                 | 0   | 8   | 0  |
|                 | 0   | 8   | 4   |
| Defence Experts | 2  | 1   | 11  |
|                 | 0   | 3   | 1   |
|                 | 0   | 1  | 0  |

Psychology:  Social Science:  Technical: 

<sup>163</sup> Bill C-59, *An Act respecting national security matters*, 1st Sess, 42nd Parl, 2017 (as passed by the House of Commons 19 June 2018); *Criminal Code*, *supra* note 1, s 83.221.

<sup>164</sup> This table shows the number of expert appearances by stage of proceedings. Three psychiatric experts appearing at behest of *amicus* are excluded: the two psychiatric experts at sentencing in *Esseghaier* (First Sentencing Hearing), *supra* note 40 at paras 26 and 36 (Dr. Lisa Ramshaw and Dr. Phillip Klassen, respectively) and the expert in *Dughmosh*, *supra* note 42 at para 19 (Dr. Sumeeta Chatterjee), who assessed the availability of an NCR defence and whose findings were also relied on in sentencing. Dr. Omid Safi, who appeared on behalf of the defence in *Nuttall Entrapment Application*, *supra* note 38 is counted at the trial stage.

(Further breakdowns of the Pretrial,<sup>165</sup> Trial,<sup>166</sup> and Sentencing<sup>167</sup> categories are provided in the footnotes below).

Though the above table does not show it, three psychiatric experts were also appeared as *amici* at the behest of trial judges: two psychiatric experts in *Esseghaier* at sentencing and one in *Dughmosh*, who assessed the availability of an NCR defence and whose findings were also relied on in sentencing.<sup>168</sup>

One can see from the table that the tendency is for the Crown to call experts during trial proper. This can be explained – and indeed, the

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<sup>165</sup> During pre-trial proceedings, defence counsel tendered expert evidence from two individuals: Dr. Vinesh Gupta and Dr. Anne-Marie Dewhurst. See *JR (Alberta Youth)*, *supra* note 63.

<sup>166</sup> During trials, the Crown tendered expert evidence from the following individuals: Dr. Sean Maloney (*Ahmed Trial Transcript*, *supra* note 61 at 1263), Cst. Tarek Mokdad (*Jamali 2017*, *supra* note 51 at para 11; *Hamdan*, *supra* note 51 at para 46; *LSJPA*, *supra* note 51 at para 60), Sgt. Sylvain Fiset (*R v Jamali 2017*, *supra* note 38 at para 24; *Khawaja ONSC*, *supra* note 12 at para 61), Dr. Rita Katz (*Namouh*, *supra* note 51 at para 32), Dr. Reuven Paz (*Namouh*, *supra* note 51 at paras 45–46), Cst. Peter Chucheran (Omand, “B.C. Bomb Plot Trial”, *supra* note 62), Cpl. Barry Salt (Omand, “Laptop Full of Extremist Content”, *supra* note 63), Matthew Bryden (*Hersi*, *supra* note 51 at paras 20–21; *Hersi Bryden Voir Dire*, *supra* note 100), and Dr. Philip Klassen (*Ali*, *supra* note 41 at para 7). This count excludes Dr. Sumeeta Chatterjee, who appeared on behalf of the amicus in *Dughmosh*, *supra* note 42 at para 19. Defence counsel tendered expert evidence from the following individuals: Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 7), Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 55), Abdi Aynte (*Hersi*, *supra* note 51 at paras 20–21), Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at para 476), and Dr. Barbara Perry (*Hersi Dr. Perry Voir Dire*, *supra* note 61).

<sup>167</sup> During sentencing, the Crown tendered expert evidence from two individuals: Donna Grabutt (Teotonio, *supra* note 60; *Amara*, *supra* note 38 at para 38, *Khalid Gardiner Hearing*, *supra* note 61 at para 55), Sgt. Sylvain Fiset (Teotonio, *supra* note 60; *Amara*, *supra* note 38 at para 38; *Khalid Gardiner Hearing*, *supra* note 62 at para 55). This count excludes the two psychiatric experts called in *Esseghaier*, *supra* note 40 at paras 26, 36, who appeared at the behest of *amici* (Dr. Lisa Ramshaw and Dr. Phillip Klassen). The defence tendered expert evidence from the following individuals: Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at para 46), Dr. Julian Gojer (*Ahmad 2010*, *supra* note 54 at para 37; *Amara*, *supra* note 38 at para 31; *Chand*, *supra* note at para 65), Dr. Wagdy Loza (*Ahmed*, *supra* note 51 at para 13), Dr. Arif Syed (*Amara*, *supra* note 38 at para 45), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 41; *Khalid Sentencing*, *supra* note 54 at para 26), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 43), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 38), Dr. Nathan Pollock (*NY*, *supra* note 51 at para 7) and Mohammed Fadel (*Khalid Gardiner Hearing*, *supra* note 61 at para 59).

<sup>168</sup> *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 63; *Dughmosh*, *supra* note 42 at paras 19, 35.

evidence seems to bear it out – fairly simply. First, it is on the Crown to prove terrorist activity beyond a reasonable doubt and, particularly, the religious or ideological motive. Given that 55 of 56 charges to date have been against “Islamist Extremists”, the Crown would have to prove religious ideology and motivation.<sup>169</sup> Second, this sort of information, as well as details regarding terrorist financing, bomb making, authentication of online videos, and so on, all require technical expertise. It is thus no surprise to see six RCMP officers testifying as experts (and, as discussed below, a host of other RCMP officers offering what is arguably expert testimony without ever having been formally admitted as expert witnesses).<sup>170</sup>

Nevertheless, it is surprising to see that only four defence experts – three in the social sciences – have been called during trial (pre-guilt) to speak to the elements of the offences, particularly when compared with the 16 Crown experts – eight in the social sciences. By contrast, the defence called all of the psychiatric evidence at sentencing, which is twice as many experts as the defence called at any other stage of proceedings.

For reasons that will be apparent momentarily, this brings us nicely to the judicial treatment of experts to date, including how they have treated experts at various stages of the proceedings. For a large portion of experts, the treatment is classified as unknown (see Appendix A for the associated numbers).<sup>171</sup> This is because either the expert appeared in a jury trial or there was no decision available where an assessment of the judicial

treatment of the expert could be made. The following table sets out the judicial treatment of experts where such a determination<sup>172</sup> was possible:

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<sup>169</sup> The exception was *Thambaiturai*, *supra* note 11, where the accused was convicted for terrorist financing for fundraising for the LTTE, a listed terrorist entity from Sri Lanka.

<sup>170</sup> The RCMP experts were Sgt. Sylvain Fiset, Donna Garbutt, Cst. Tarek Mokdad, Cst. Peter Cucheran, Cst. Robin Shook, and Cpl. Barry Salt (see, n 63). See also *Hamdan Voir Dire*, *supra* note 62 at para 37; *Khawaja* ONSC, *supra* note 12.

<sup>171</sup> The table below shows the treatment of experts in 30 out of the 40 recorded appearances. Treatment of experts in seven appearances is unknown, either because the judge mentioned the expert without comment or because there are no reported decisions assessing the expert’s evidence that is available (as in, for example, a jury trial). The treatment of the psychiatric experts in *Esseghaier*, *supra* note 40 (Dr. Philip Klassen and Dr. Lisa Ramshaw) and *Dughmash*, *supra* note 42 (Dr. Sumeeta Chatterjee) is known but excluded because they were appointed at the behest of the amicus.

<sup>172</sup> Treatment was classed as positive if (a) the expert evidence was admitted and the expert’s evidence was expressly relied on in the judge’s reasoning or (b) the expert evidence was admitted and was otherwise treated positively (e.g., the judge praised the expert’s methods). Treatment was classed as negative if (a) the judge refused to admit the expert

|                 |   | Positive  | Mixed   | Negative  |
|-----------------|---|---|---|---|
| Crown Experts   | 1 |  | 0   | 0   |
|                 | 4 |  | 0   | 1  |
|                 | 5 |  | 0   | 1  |
| Defence Experts | 6 |  | 1  | 5  |
|                 | 4 |  | 0   | 1  |
|                 | 1 |  | 0   | 0   |

Psychology:  Social Science:  Technical: 

(positive,<sup>173</sup> mixed,<sup>174</sup> and negative treatment<sup>175</sup>)

or (b) the judge admitted the expert evidence but criticized or found fault with the evidence. Mixed treatment arose where the judge’s reasoning relied on aspects of the expert’s opinion but criticized other parts of it.

<sup>173</sup> The Crown experts that were treated positively were: Donna Garbutt (based on the sentencing judge’s reliance on the findings of the expert report Garbutt prepared: Teotonio, *supra* note 60; Amara, *supra* note 38 at paras 38–39, 102; Khalid Gardiner Hearing, *supra* note 61 at para 55), Sgt. Sylvain Fiset, (Teotonio, *supra* note 60; Amara, *supra* note 38 at paras 38–39, 102; Khalid Gardiner Hearing, *supra* note 61 at para 55; Khawaja ONSC, *supra* note 12 at paras 61, 100), Matthew Bryden (*Hersi*, *supra* note 51 at para 20), Cst. Tarek Mokdad (*LSJPA*, *supra* note 51 at paras 60, 218), Dr. Rita Katz (*Namouh*, *supra* note 51 at paras 70–73), Dr. Philip Klassen (*Ali*, *supra* note 41 at para 18), and Dr. Reuven Paz (*Namouh*, *supra* note 51 at paras 45–46). The defence experts that were treated positively were: Abdi Aynte (*Hersi*, *supra* note 51 at paras 21, 24), Dr. Omid Safi (*Nuttall Entrapment Application*, *supra* note 38 at paras 476, 701, 703, 705, 707, 712, 715), Mohammad Navaid Aziz (*Hamdan*, *supra* note 51 at para 99), Mohammed Fadel (*Khalid Gardiner Hearing*, *supra* note 61 at para 100), Kevin Ripa (*Hamdan Voir Dire*, *supra* note 62 at para 101), Dr. Gary Chaimowitz (*Ali*, *supra* note 41 at para 18), Dr. Hy Bloom (*Abdelhaleem*, *supra* note 51 at paras 74, 76), Dr. Lisa Ramshaw (*Gaya*, *supra* note 54 at para 69; *Khalid*, *supra* note 55 at paras 26, 63, 101, 128), Dr. Steven Cohen (*Gaya*, *supra* note 54 at para 69), and Dr. Nathan Pollock (*NY*, *supra* note 51 at paras 7–8).

<sup>174</sup> Dr. Wagdy Loza was the defence expert with a mixed treatment (*Ahmed*, *supra* note 51 at paras 39, 45, 51).

<sup>175</sup> The Crown experts that were treated negatively were: Cst. Tarek Mokdad (*Hamdan*, *supra* note 51 at paras 92–98) and Cst. Robin Shook (*Hamdan Voir Dire*, *supra* note 62 at paras 37, 79–80). The defence experts that were treated negatively were Dr. Arif Syed (*Amara*, *supra* note 38 at paras 95, 97–98), Dr. Jess Ghannam (*Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 52–53), Dr. Julian Gojer (*Ahmad* 2010, *supra* note 54 at para 44); *Amara*, *supra* note 38 at paras 95, 97–98; *Chand*, *supra* note at

In general, Crown experts received more “positive” treatment from the courts than defence experts. However, this might also be explained by what experts were called and, in particular, for what purpose. In particular, psychological experts were the most disputed category of expert by a fair margin, whereas the testimonies of both social science and technical experts were generally treated favourably by judges. In fact, seven of 14 experts that we coded as related to psychology had mixed or negative treatment, compared to one out of six technical experts and two out of ten social science experts. As a result, at this stage, it is unclear whether the defence experts have been treated more unfavourably because they are defence experts, because they tend to speak at sentencing to rehabilitation and mental health (psychology experts), or perhaps simply because the low sample size is skewing the trends thus far and, as the use of experts increases, these numbers will adjust.

However, for now, there is qualitative evidence to suggest that the treatment of experts is more associated with their area of expertise than anything else and this should be scrutinized going forward, as the sample sizes increase. Several qualitative academic studies have now discussed the judicial treatment of rehabilitation of convicted terrorists and, particularly, how judges have tended to be skeptical of the possibility of terrorist rehabilitation. Judges have even gone so far as to put the onus on the defence to prove a capacity for rehabilitation, lest the accused’s sentence be aggravated.<sup>176</sup> If that research is to be believed, it is perhaps not surprising then to see expert evidence dismissed when it speaks directly to prospects for rehabilitation. Instead, it may be that expert reports on recidivism and rehabilitation are not given significant weight by courts because, as several cases in our study suggest, there is not enough research on how to evaluate terrorism offenders:

When it comes to predicting whether Mr. Chand is likely to [reoffend], I am not prepared to give Dr. Gojer’s evidence much weight. This is not a criticism of Dr. Gojer but recognition of the fact that, at the moment, forensic psychiatry and psychology have little to offer in this area.<sup>177</sup>

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para 71), and Dr. Barbara Perry (*Hersi* Dr. Perry Voir Dire, *supra* note 61 at paras 29–31).

<sup>176</sup> Nesbitt, Oxoby & Potier, *supra* note 5 at 597–603; Zaia, “Mental Health Experts in Terrorism Cases,” *supra* note 14, particularly at 566–67.

<sup>177</sup> Chand, *supra* note 55 at para 71. In *Abdelhaleem*, *supra* note 51 at para 48, Dr. Bloom stated that “[a]ssessing individuals charged with terrorism-related offences is a relatively novel area in the field of psychiatry” and he was “not aware of any universally accepted

If courts are particularly risk-averse when it comes to the sentencing of terrorism offenders (meaning that they tend toward longer sentences and carceral terms), which research strongly suggests has indeed been the case,<sup>178</sup> and if, as seems to be the case, they are looking for proof that an individual can be rehabilitated or will not re-offend,<sup>179</sup> then courts will be more likely to treat skeptically any expert evaluations that suggest the possibility of rehabilitation. A mere possibility offers insufficient certainty in the context of terrorism offences, meaning that while the expert opinion might be honestly received, it will also be kindly dismissed.

But, of course, this could also be a case of confirmation bias: even if we accept that courts have scrutinized the rehabilitation of terrorists in a way not seen with other crimes, this does not necessarily mean that courts have been biased, in the traditional sense of the term, against such experts in terrorism trials. Perhaps, as another option, it is because the quality of the expert testimony or the way that it was presented was lacking. This did indeed appear to be the case in several situations, including the trial of Raed Jaser:

Dr. Ghannam's analysis of the wiretap evidence adduced at trial was biased and selective and did not live up to the standards of objectivity expected of expert witnesses. He appeared to simply adopt his client Jaser's analysis, rather than doing an independent, objective, and principled analysis of his own.<sup>180</sup>

In the end, the fact that psychology experts adduced primarily by defence at sentencing hearings seem to be treated differently from other expert testimony deserves further qualitative study, and we hope that researchers will take up the mantle. Will the trend continue, and will such expert testimony be dismissed to a greater degree than that of other experts? Is there good reason for that, that is, is it simply because of the quality of the field or the testimony? Or might it simply be that courts have less use for expert testimony with respect to prospects for rehabilitation than other types?

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risk assessment tool that could predict an individual's risk of recidivism for such offences." Dr. Wagdy Loza in *Ahmed*, *supra* note 51 at para 28 also noted that the "currently available" risk assessment tools have not yet been standardized for terrorism offenders and so are less appropriate for terrorism offenders. See generally Zaia, "Mental Health Experts in Terrorism Cases", *supra* note 14 at 562-66.

<sup>178</sup> Nesbitt, Oxoby & Potier, *supra* note 5 at 597-603.

<sup>179</sup> *Ibid* at 600-01. Recall here that, as mentioned, it seems that courts have put the onus on offenders to prove that they can be rehabilitated.

<sup>180</sup> *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 52 [emphasis added].

### C. Gender

Finally, of the experts called to date, six have been women and 23 have been men (79% percent men).<sup>181</sup> The disproportionate number of male experts is, perhaps cynically, not surprising, but it is another area worthy of further qualitative study. Does this reflect a failure of legal counsel to canvass for gender parity in expertise? Worse, does it signal an implicit bias? Is it reproducing the gender-breakdown in the fields that have provided experts in Canada (security or terrorism studies, for example)? There is, we suggest, clearly some interesting gender and qualitative (case study) work to be done to better understand the nature and effects of the gender breakdown of expert opinion evidence to date. We hope that others will use these rather stark initial numbers associated with the gender of expert witnesses at terrorism trials as an opportunity to evaluate the experts, their testimony, and their treatment from a gender lens. Some initial questions from the authors include: Is the trend to date merely the result of a small sample size, or is there a gendered element to the numbers (and, particularly, the low number of women experts)? Given that fewer female experts have been called to testify, it begs the question of how female experts are treated judicially, and what accounts for the treatment? A good example for a future case study is the judicial treatment of Dr. Barbara Perry's proposed testimony.<sup>182</sup> Dr. Perry is a leading Canadian luminary and an expert in extremism by any measure, whose treatment (followed/not) we classified as negative (not).<sup>183</sup> How does the treatment of those like Dr. Perry compare to similar experts who happen to be male? Does the Crown have a moral or even a legal obligation to help ensure better gender parity of

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<sup>181</sup> The female experts were: Donna Garbutt, Dr. Sumeeta Chatterjee, Dr. Lisa Ramshaw, Dr. Barbara Perry, Dr. Ann Marie Dewhurst and Dr. Rita Katz. See Appendix B below for complete citations.

<sup>182</sup> In *Hersi*, Dr. Barbara Perry was called to testify regarding whether an undercover police officer demonstrated Islamophobia in interpreting aspects of *Hersi's* behaviour. Dr. Perry's evidence was found inadmissible for various reasons: 1) it lacked probative value, since Dr. Perry admitted that she could not determine if the undercover officer displayed Islamophobia without knowing the officer, and *Hersi* never testified that his behaviour had an innocent motive that was misconstrued, 2) Her methods lacked reliability: "[i]mportantly, the individuals who were interviewed [for the study] were not selected randomly" and "[s]he is also inclined to overstate the evidence in order to make her point." See *Hersi* Dr. Perry Voir Dire, *supra* note 61 at paras 29-30.

<sup>183</sup> For background on Dr. Perry and her expertise, see "Barbara Perry" (last visited 23 June 2020), online: *Ontario Tech, Social Science & Humanities* <[socialscienceandhumanities.uoit.ca/research/researcher-profiles/dr.-barbara-perry.php](https://socialscienceandhumanities.uoit.ca/research/researcher-profiles/dr.-barbara-perry.php)> [perma.cc/4DPU-WNC8].

experts at trial? What role might the defence play, particularly considering the intersection of low total numbers of female experts called and the low total number of social science experts in particular called at trial (pre-guilt) by the defence? Whatever the answers are to these questions, the preliminary numbers herein indicate a fairly stark gender divide, one that begs for further study in the years to come.

#### **IV. APPLYING THE DATA TO PAST AND FUTURE TERRORISM CASES**

In this final part, we draw out some of the implications and lessons learned from the above numbers, particularly those relevant to practitioners or for future study.

The data suggests that our three hypotheses largely held true, those being: (1) that Canada's terrorism offences are structured such that expert opinion evidence would play an important and prevalent role in terrorism prosecutions and, in particular, that social science expertise would be used to help understand the foundational (predicate) elements of terrorism offences (terrorist activity and terrorist groups); (2) that technical expertise would be used in at least some terrorism trials; and (3) that we would see a large number of psycho-social experts speaking to the capacity of accused. However, in this study, we did not see the scope of confirmation of our hypotheses that we expected. We have offered above some preliminary explanations for why that might have been the case and perhaps why that might change (and the number of experts used might even increase) going forward. Nevertheless, there is a need for further evaluation of some of the trends seen herein. There are also a number of implications and lessons learned from this study that will not be evident until the numbers above are pieced together. Let us do that now.

Experts were used in fully half of all completed trials. The Crown, for its part, relied on more experts at pre-verdict (at trial), whereas the defence tended to rely on psychiatric experts at sentencing proceedings. But we also saw that the testimonies of Crown experts and experts at trial were generally considered favourably by the judiciary, whereas the result was much more mixed for primarily defence experts testifying at sentencing hearings (or during pre-trial capacity hearings). So, the question arises: what, if anything, is the cause of this trend? Is there a trend emerging where defence experts are being dismissed and, if so, why? Is it that expert evidence with respect to

the facts of the case is generally being accepted – reinforcing the need for defence to find appropriate experts on crucial elements of the offence during trial – while psychology experts, which were almost exclusively called by defence during sentencing, tend to be dismissed by judges? The answers have a number of important repercussions, so let us briefly discuss them now, particularly as they relate to lessons for practitioners going forward.

First, we saw that the Crown was significantly more likely to call social science experts to speak to the elements of the terrorism offences. Coupled with the fact that such expertise was generally treated favourably by the court, this begs the question of why defence has not called many experts during trial, that is, pre-verdict? If this evidence is most likely to be accepted, which this study has found to date, and if the vast majority of these experts are speaking to foundational elements of the offence, which this study also found to be true, then defence lawyers in the future should be seriously considering whether they require their own experts at trial. Certainly the comparative value of calling an expert at trial versus at sentencing seems to be high, both because such experts to date are more likely to be treated favourably by the court and because the expertise founds the judicial understanding of the basic elements of the offence and thus, whether the person is found guilty at all.

Of course, one reason why we might be seeing a greater number of experts called by the Crown at trial is an inequality of arms as between the defence and the Crown. That is, given the importance of such experts to elements of the offences and thus, to findings of guilt or innocence, it is important that defence has the same capacity to call experts at trial for highly technical elements of terrorism trials. Now, this might implicate access to financial resources to pay experts, an inequality of arms that is often a concern as between the Crown and defence. But, if the government has simultaneously created a system of terrorism offences that require social science expertise to understand at the basic level (i.e., the elements of the offence) and we see legal aid cuts across the country, then we have a fairly serious systemic access to justice and rule of law issue here. That is mitigated somewhat by the reality that experts are supposed to help the court and not advocate for the party calling them, though that will likely be cold comfort for defence lawyers (and future accused) in Canada.

Inequality of arms in this sense does not simply mean the capacity to pay for needed experts. For defence lawyers – not accustomed to running terrorism trials in Canada, being that they remain fortunately rare and are

nobody's bread and butter — it also means who to be aware of when social science experts might help, how they can shed light on crucial issues, how defence might properly understand religious and social contexts that are used to create inferences about religiously-motivated terrorist offences, and so on. By contrast, the Crown prosecution service is developing a highly-qualified cadre of experts in terrorism and the December 2019 Mandate Letter to the Attorney General and Minister of Justice in Canada proposes the creation of a “Director of Terrorism Prosecution”, which will serve to increase Crown capacity in this area.<sup>184</sup> Now, greater Crown capacity to properly understand and prosecute terrorism offences in Canada should surely be lauded. However, it is well worth monitoring the effect of these advancements on defence and particularly whether they have the capacity to offer needed expert evidence for their clients when it is so crucial to the outcome (guilt or innocence) of the case.

As to the defence tendency to call psycho-social evidence at sentencing, what we can say is that the quality of the expert and particularly their familiarity with mental health, terrorism, recidivism, and rehabilitation (and options to help with rehabilitation) seem to have made a big difference at trial in terms of judicial treatment of the expert testimony. Those with a specialization or experience in terrorism tended to garner greater judicial respect than generalists. Defence lawyers should keep this in mind when calling such experts in future trials.

Tactically, the other implications of these findings for defence lawyers are a little trickier. On the one hand, it would seem that defence resources are much better spent on experts at trial, both because the testimony of experts at trial is more likely to be treated favourably and because such experts tend to speak to the elements of the charged offences and thus, guilt or innocence. The flip side of this is that Canadian courts have created a unique “tactical burden”<sup>185</sup> on the defence to call evidence that speaks to the defendant's capacity for rehabilitation: “The [Court in *Esseghaier*] created an aggravating factor out of a traditional mitigating factor (rehabilitation) and then, presumably because rehabilitation is not a traditional aggravating factor in sentencing, did not require the Crown to

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<sup>184</sup> Douglas Quan, “Can New Federal Unit Address Canada's 'Inconsistent Track Record' in Terrorism Prosecutions?”, *The National Post* (2 January 2020), online: <nationalpost.com/news/canada/can-new-federal-unit-address-canadas-inconsistent-track-record-in-terrorism-prosecutions> [perma.cc/7TNG-WWAS].

<sup>185</sup> *R v Esseghaier* (Second Sentencing Hearing), *supra* note 51 at para 97.

prove it beyond a reasonable doubt as is normally required for aggravating factors.”<sup>186</sup> As such, the lesson for the defence might better be that they should be calling an expert to speak to the accused’s capacity for rehabilitation in virtually all cases and thus, that the number of such experts to date is far too low.

In the end, the use of experts at sentencing coupled with the court’s approach to sentencing terrorism (the creation of a tactical burden to speak to prospects for rehabilitation) and the tendency to dismiss such expert testimony whenever it is equivocal (which it always will be because one cannot predict with certainty whether an offender will re-offend) has required defence counsel to search out and pay experts to evaluate and speak to the defendant’s capacity. This has also resulted in a situation where prospects for rehabilitation, though necessarily playing a key role at sentencing by virtue of the tactical burden on defence, nevertheless rarely play the “mitigating” role that the *Criminal Code* says it must.<sup>187</sup> Courts might reasonably ask whether, viewing the discrete rules and approaches to psycho-social expert testimony as a whole rather than in isolation, the system of sentencing terrorism offenders offers procedural fairness for the defence. To be clear, we make no claim one way or another here. Instead, we merely point out the inconsistency that seems to arise from the sentencing practices in terrorism cases and the burden that seems to have been placed on defence.

Courts – and perhaps future academics studying this area – might also reasonably ask whether there is a problem with understanding medical and psychological testimony, regardless of mental health and capacity, particularly as it is presented at sentencing. In other words, why are courts so much more likely to dismiss such medical testimony, which the experts obviously feel is relevant and helpful?

Finally, though not the original intention of this study, the authors anecdotally noted on more than one occasion instances where experts could have helped better understand an issue or piece of evidence at trial – usually a religious text or complex social dynamic – but they were not called. Perhaps this should have been foreseen: one of the impetuses for this study in the first place was why, in Canada’s very first terrorism trial, *R v Khawaja*, the Crown asked the judge to take judicial notice of the fact that an armed conflict in Afghanistan existed at the relevant time (as has already been

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<sup>186</sup> Nesbitt, Oxoby & Potier, *supra* note 5 at 600-01.

<sup>187</sup> *Criminal Code*, *supra* note 1, s 718(d).

discussed).<sup>188</sup> As the trial judge noted therein, expert opinion evidence was indeed preferable to judicial notice on this question, given the issue seemingly required drawing inferences from specialized knowledge about the Taliban, their activities, and their motivation.<sup>189</sup> However, the trial judge determined that judicial notice could substitute for expert evidence in the case, given some facts about the Taliban were so notorious.<sup>190</sup> Relying on these facts, he concluded that the Taliban insurgency constituted terrorist activity and the exception did not apply to Mr. Khawaja.<sup>191</sup> Similarly, in *LSJPA*, the accused was charged with attempting to leave Canada for the purpose of participating in the activity of a terrorist group (section 83.181 of the *Criminal Code*). The Crown alleged that the accused planned to join ISIS in Syria. Similar to Mr. Khawaja's argument, the accused maintained the armed conflict exception applied to ISIS' activity in Syria. No expert evidence was led by either the Crown or defence on this point. This is a prime example of a situation where, arguably, the issues were far too complex for a finding of judicial notice and instead, an expert could have provided helpful information (likely to reach the same result).

But the authors also noted numerous incidents, prime for further study, where police witnesses or informants presented evidence that looked to skirt the line with expert opinion.<sup>192</sup> Religious symbology and ideation were discussed in every trial to date, yet social science experts only appeared 12 times across all cases. Some of this is surely the result of a decision not to require expert evidence in cases that, upon examination from afar, might be prime for such evidence. On the other hand, perhaps they actually used expert evidence without labelling it as such. However, surely some of these instances resulted from situations where neither the Crown, the judge, nor

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<sup>188</sup> See *supra* note 133 and accompanying text.

<sup>189</sup> *Khawaja* ONSC, *supra* note 12 at para 110.

<sup>190</sup> *Ibid* at para 113.

<sup>191</sup> The trial judge determined that the exception did not apply to Mr. Khawaja, not because the Taliban's actions met the definition of terrorist activity (something that is necessary to even engage the exception), but because Mr. Khawaja's was not actually fighting in the armed conflict in Afghanistan – the actions for which he was charged were carried out in Canada, the UK, and Pakistan. See *Khawaja* ONSC, *supra* note 12 at para 128. The Supreme Court of Canada rejected this interpretation of the exception's scope, holding that it could be relied on if the conflict occurred in a country other than the one where actions underlying the alleged offence took place. See *Khawaja* SCC, *supra* note 73 at para 96.

<sup>192</sup> See for example *R v Ahmad*, 2009 CanLII 84777 (Ont SC) at paras 118–35.

even defence recognized the necessity, or at least the benefit, that expert social science evidence could provide.

This brings us to a final consideration, that being the real need in the context of terrorism trials to define the scope of witness' area(s) of expertise and keep their testimony within that circumscribed scope of expertise. The Goudge Inquiry into Coroner Charles Smith's testimony across a number of trials is perhaps the preeminent Canadian example of why it is so important to properly define the subject area of the witness' expertise and keep the questions, and thus the experts, within that scope.<sup>193</sup> A failure to so circumscribe expert opinion evidence is no small thing because it can, as was the case for Charles Smith (on more than one occasion), lead to wrongful convictions, the very worst outcome for a justice system. Yet, despite the importance of properly recognizing the need and place for expert opinion evidence, and then properly defining the expert's subject-matter expertise and limiting testimony thereto, this warning was perhaps not always followed in the cases studied here. Too often, it appears that complex phenomena that are surely outside the day-to-day training of most lawyers, such as the specifics of particular religions or ideologies, foreign conflicts, or technical international legal doctrines, were evaluated without the use of any experts. Meanwhile, some experts that were called in Canadian terrorism trials have been given extraordinary leeway to opine on a broad range of topics; examples of the latter include the testimony of Dr. Rita Katz in *Namouh*, who opined on virtually all aspects of the GIMF and Namouh's activities<sup>194</sup> and Cst. Tarek Mokdad in *Hamdan*, who opined on both religious doctrine and ISIS' recruitment practices, despite not being necessarily qualified – and certainly not qualified as an expert before the Court – for testimony on either subject.<sup>195</sup>

## V. CONCLUSION

We hope that this study provides insight for prosecutors and defence on the use of experts and the opportunities for such opinion evidence to help the courts and the cases of the lawyers. Expert witnesses are indeed extremely important in terrorism trials, and it was the authors' finding that

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<sup>193</sup> Goudge, *Report*, *supra* note 20 at 475.

<sup>194</sup> *Namouh*, *supra* note 51.

<sup>195</sup> *Hamdan*, *supra* note 51 at paras 46, 95–96.

we likely need to see more use of expert opinion evidence in future terrorism trials to ensure fair, robust legal outcomes.

We have noted some lessons learned for practitioners, as well as areas of concern or to keep an eye on moving forward. In particular, we have noted the likely need for greater resort to expert opinion evidence, particularly social science expertise, coupled with the possible rise in technical experts if Canada sees an increase in prosecutions against so-called foreign fighters. Defence, in particular, might look to make greater use of experts, particularly at the trial stage where their testimony is, thus far, treated more favourably and where defence experts can speak to crucial elements of the criminal offence – like whether an individual was truly motivated by a religious ideology – and thus, to the ultimate guilt or innocence of the accused. The defences' use of experts at sentencing, particularly as concerns the capacity for rehabilitation, is decidedly mixed. Defence may think about the value of experts at this stage, particularly if there is a trade-off with their capacity to bring experts at other times during the trial (particularly pre-findings of guilt). Of course, it may also be for the court to reckon with why the testimonies of recognized experts in their fields are being dismissed to an extent not seen with other experts (who have generally been treated favourably by the courts), when it is medical/psychological and speaks to rehabilitation.

We have also noted several concerns with respect to the use of expert evidence, particularly so if its use increases. First, there is a stark gender disparity in the experts called in trials to date, one that requires both further study and, surely, a correction. Second, there is a real risk of an inequality of arms between the prosecution and defence developing with respect to terrorism trials, especially given the reliance on expertise to speak to various foundational elements of terrorism offences.

A final concern for the court, and indeed for academics looking for future fruitful areas of study in terrorism trials, is the courts' anecdotal reliance on non-experts (or, at least, persons not properly qualified as experts) for insights that look startlingly like they require expertise – that they are beyond the ken of the common lawyer. Given what we know of the dangers of failing to properly scrutinize expert opinion evidence and the scope of expertise of those that offer opinion evidence, there is the real risk of wrongful convictions without increased scrutiny of both expert evidence and non-expert evidence that skirts the line with expert opinion evidence. A wrongful conviction is the very worst outcome for a legal system and, for

this reason alone, we hope going forward that expert evidence in terrorism trials will be given greater attention and scrutiny by researchers and practitioners alike.

## Appendix A: List of Accused and Associated Experts in Terrorism Trials

| Accused             | Expert                             | Defence<br>or<br>Crown | Class                 | Stage of<br>Proceedings | Treatment |
|---------------------|------------------------------------|------------------------|-----------------------|-------------------------|-----------|
| Shareef Abdelhaleem | Dr. Hy Bloom <sup>196</sup>        | D                      | Psychiatry/Psychology | Sentencing              | Positive  |
| Fahim Ahmad         | Dr. Julian Gojer <sup>197</sup>    | D                      | Psychiatry/Psychology | Sentencing              | Negative  |
| Misbahuddin Ahmed   | Dr. Wagdy Loza <sup>198</sup>      | D                      | Psychiatry/Psychology | Sentencing              | Mixed     |
|                     | Dr. Sean Maloney <sup>199</sup>    | C                      | Social Science        | Trial                   | Unknown   |
| Ayanle Hassan Ali   | Dr. Philip Klassen <sup>200</sup>  | C                      | Psychiatry/Psychology | Trial                   | Positive  |
|                     | Dr. Gary Chaimowitz <sup>201</sup> | D                      | Psychiatry/Psychology | Trial                   | Positive  |
| Zakaria Amara       | Dr. Arif Syed <sup>202</sup>       | D                      | Psychiatry/Psychology | Sentencing              | Negative  |
|                     | Dr. Julian Gojer <sup>203</sup>    | D                      | Psychiatry/Psychology | Sentencing              | Negative  |
|                     | Donna Garbutt <sup>204</sup>       | C                      | Technical             | Sentencing              | Positive  |
|                     | Sgt. Sylvain Fiset <sup>205</sup>  | C                      | Technical             | Sentencing              | Positive  |

<sup>196</sup> *Abdelhaleem, supra* note 51 at paras 46–57, 74–76, 78.

<sup>197</sup> *Ahmad* 2010, *supra* note 54 at paras 37–44.

<sup>198</sup> *Ahmed, supra* note 51 at paras 13–51; *R v Ahmed*, 2017 ONCA 76.

<sup>199</sup> *Ahmed Trial Transcript, supra* note 61.

<sup>200</sup> *Ali, supra* note 41 at paras 7–10.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Amara Voir Dire, supra* note 66; *Amara, supra* note 38 at paras 44–61, 75–98.

<sup>203</sup> *Amara Voir Dire, supra* note 66.

<sup>204</sup> *Amara, supra* note 38.

<sup>205</sup> *Ibid.*

|                     |                                       |        |                       |                      |          |
|---------------------|---------------------------------------|--------|-----------------------|----------------------|----------|
| Steven Vikash Chand | Dr. Julian Gojer <sup>206</sup>       | D      | Psychiatry/Psychology | Sentencing           | Negative |
| Rehab Dughmash      | Dr. Sumeeta Chatterjee <sup>207</sup> | Amicus | Psychiatry/Psychology | Pre-Trial/Sentencing | Positive |
| Sabrine Djermane    | Cst. Tarek Mokdad <sup>208</sup>      | C      | Social Science        | Trial                | Unknown  |
|                     | Sgt. Sylvain Fiset <sup>209</sup>     | C      | Technical             | Trial                | Unknown  |
| Chibeb Esseghaier   | Dr. Lisa Ramshaw <sup>210</sup>       | Amicus | Psychiatry/Psychology | Sentencing           | Negative |
|                     | Dr. Philip Klassen <sup>211</sup>     | Amicus | Psychiatry/Psychology | Sentencing           | Mixed    |
| Saad Gaya           | Dr. Lisa Ramshaw <sup>212</sup>       | D      | Psychiatry/Psychology | Sentencing           | Positive |
|                     | Dr. Steven Cohen <sup>213</sup>       | D      | Psychiatry/Psychology | Sentencing           | Positive |

<sup>206</sup> Chand, *supra* note 55 at paras 65–71.

<sup>207</sup> Rehab Dughmash was subject to a psychiatric assessment before standing trial to determine the availability of a defence of not criminally responsible; this report was also relied on in her sentencing (see *Dughmash*, *supra* note 42 at paras 19, 24–25, 27); Alyshah Hasham, “Canadian Tire Attacker Paranoid, Deluded, Court-Ordered Report Finds”, *The Toronto Star* (21 January 2019), online: <[www.thestar.com/news/gta/2019/01/21/canadian-tire-attacker-paranoid-deluded-court-ordered-report-finds.html](http://www.thestar.com/news/gta/2019/01/21/canadian-tire-attacker-paranoid-deluded-court-ordered-report-finds.html)> [perm a.cc/4LWX-VNGF].

<sup>208</sup> Jamali 2017, *supra* note 51 at para 11. See generally Paul Cherry, “Terror expert says accused couple showed interest in extremist imam”, *The Montreal Gazette* (3 November 2017), online: <[montrealgazette.com/news/local-news/terror-trial-expert-analyzes-video-s-photos-found-on-computers-of-accused-couple](http://montrealgazette.com/news/local-news/terror-trial-expert-analyzes-video-s-photos-found-on-computers-of-accused-couple)> [perma.cc/5W5Q-M6M8].

<sup>209</sup> Jamali, *supra* note 38 at para 24.

<sup>210</sup> *Esseghaier (First Sentencing Hearing)*, *supra* note 40 at paras 26, 61–62; *Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

<sup>211</sup> *Esseghaier (First Sentencing Hearing)*, *supra* note 40 at para 36; *Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

<sup>212</sup> Gaya, *supra* note 54 at paras 41–43, 69, 73; *R v Gaya*, 2010 ONCA 860 at paras 12, 14, 16 [*Gaya Sentencing Appeal*].

<sup>213</sup> Gaya, *supra* note 54 at para 43; *Gaya Sentencing Appeal*, *supra* note 212.

|                       |                                       |   |                       |            |          |
|-----------------------|---------------------------------------|---|-----------------------|------------|----------|
| Othman Ayed Hamdan    | Cst. Tarek Mokdad <sup>214</sup>      | C | Social Science        | Trial      | Negative |
|                       | Navaid Aziz <sup>215</sup>            | D | Social Science        | Trial      | Positive |
|                       | Cst. Robin Shook <sup>216</sup>       | C | Technical             | Pre-Trial  | Negative |
|                       | Kevin Ripa <sup>217</sup>             | D | Technical             | Pre-Trial  | Positive |
| Mohammed Hassan Hersi | Matthew Bryden <sup>218</sup>         | C | Social Science        | Trial      | Positive |
|                       | Abdi Aynte <sup>219</sup>             | D | Social Science        | Trial      | Positive |
|                       | Dr. Barbara Perry <sup>220</sup>      | D | Social Science        | Trial      | Negative |
| El Mahdi Jamali       | Cst. Tarek Mokdad <sup>221</sup>      | C | Social Science        | Trial      | Unknown  |
|                       | Sgt. Sylvain Fiset <sup>222</sup>     | C | Technical             | Trial      | Unknown  |
| Raed Jaser            | Dr. Jess Ghannam <sup>223</sup>       | D | Psychiatry/Psychology | Sentencing | Negative |
| JR (Alberta Youth)    | Dr. Vinesh Gupta <sup>224</sup>       | D | Psychiatry/Psychology | Pre-Trial  | Unknown  |
|                       | Dr. Ann Marie Dewhurst <sup>225</sup> | D | Psychiatry/Psychology | Pre-Trial  | Unknown  |

<sup>214</sup> *Hamdan*, *supra* note 51 at paras 46, 51, 55–98 [*Hamdan*].

<sup>215</sup> *Ibid* at paras 55, 94, 99–102, 106, 148–50, 173.

<sup>216</sup> *Hamdan Voir Dire*, *supra* note 62 at para 37.

<sup>217</sup> *Ibid* at para 31.

<sup>218</sup> See *Hersi Bryden Voir Dire*, *supra* note 100 at para 3; *Hersi*, *supra* note 51 at paras 20, 23.

<sup>219</sup> *Hersi*, *supra* note 51 at paras 21, 24.

<sup>220</sup> *Hersi Dr. Perry Voir Dire*, *supra* note 61.

<sup>221</sup> *Jamali 2017*, *supra* note 51 at paras 11, 31.

<sup>222</sup> *Jamali*, *supra* note 38 at para 24. See also Cherry, “Terror Trial”, *supra* note 160.

<sup>223</sup> *Esseghaier* (Second Sentencing Hearing), *supra* note 51 at paras 38–53.

<sup>224</sup> *JR (Alberta Youth)*, *supra* note 63 at paras 20–21.

<sup>225</sup> *Ibid*.

|               |                                    |   |                       |                        |          |
|---------------|------------------------------------|---|-----------------------|------------------------|----------|
| Saad Khalid   | Donna Garbutt <sup>226</sup>       | C | Technical             | Sentencing             | Positive |
|               | Sgt. Sylvain Fiset <sup>227</sup>  | C | Technical             | Sentencing             | Positive |
|               | Dr. Lisa Ramshaw <sup>228</sup>    | D | Psychiatry/Psychology | Sentencing             | Positive |
|               | Mohammed Fadel <sup>229</sup>      | D | Social Science        | Sentencing             | Positive |
| Momin Khawaja | Sgt. Sylvain Fiset <sup>230</sup>  | C | Technical             | Trial                  | Positive |
| Amanda Korody | Cst. Peter Cucheran <sup>231</sup> | C | Technical             | Trial                  | Unknown  |
|               | Dr. Omid Safi <sup>232</sup>       | D | Social Science        | Entrapment Application | Positive |
|               | Cpl. Barry Salt <sup>233</sup>     | C | Technical             | Trial                  | Unknown  |

<sup>226</sup> See Teotonio, *supra* note 60.

<sup>227</sup> *Ibid.*

<sup>228</sup> Khalid Sentencing, *supra* note 54 at paras 22-33, 128, 145; Khalid Gardiner Hearing, *supra* note 61 at paras 56-58.

<sup>229</sup> Khalid Gardiner Hearing, *supra* note 61 at paras 59-61, 100, 104-106.

<sup>230</sup> Khawaja ONSC, *supra* note 12 at paras 61-72; Khawaja ONCA, *supra* note 4 at paras 48-50, 226-29.

<sup>231</sup> See Omand, “B.C. Bomb Plot Trial”, *supra* note 62.

<sup>232</sup> Nuttall Entrapment Application, *supra* note 38 at paras 476-503, 696-717; R v Nuttall, 2016 BCSC 466 [Nuttall *Voir Dire re Entrapment Application*].

<sup>233</sup> Omand, “Laptop Full of Extremist Content”, *supra* note 62.

|                         |                                    |   |                       |                        |          |
|-------------------------|------------------------------------|---|-----------------------|------------------------|----------|
| Quebec Youth (LSJPA)    | Cst. Tarek Mokdad <sup>234</sup>   | C | Social Science        | Trial                  | Positive |
| Said Namouh             | Dr. Rita Katz <sup>235</sup>       | C | Social Science        | Trial                  | Positive |
|                         | Dr. Reuven Paz <sup>236</sup>      | C | Social Science        | Trial                  | Positive |
| John Stuart Nuttall     | Cst. Peter Cucheran <sup>237</sup> | C | Technical             | Trial                  | Unknown  |
|                         | Dr. Omid Safi <sup>238</sup>       | D | Social Science        | Entrapment Application | Positive |
|                         | Cpl. Barry Salt <sup>239</sup>     | C | Technical             | Trial                  | Unknown  |
| Nishanthan Yogakrishnan | Dr. Nathan Pollock <sup>240</sup>  | D | Psychiatry/Psychology | Sentencing             | Positive |

<sup>234</sup> LSJPA, *supra* note 51 at paras 60–85, 218.

<sup>235</sup> *Namouh*, *supra* note 51 at paras 28, 31–48, 70, 73; *R v Namouh*, 2010 QCCQ 943 at para 72 [*Namouh* Sentencing].

<sup>236</sup> *Namouh*, *supra* note 51 at paras 45–47.

<sup>237</sup> See Omand, “Laptop Full of Extremist Content”, *supra* note 62; Omand, “B.C. Bomb Plot Trial”, *supra* note 62.

<sup>238</sup> *Nuttall Entrapment Application*, *supra* note 38; *Nuttall Voir Dire re Entrapment Application*, *supra* note 232.

<sup>239</sup> Omand, “Laptop Full of Extremist Content”, *supra* note 62; Omand, “B.C. Bomb Plot Trial”, *supra* note 62.

<sup>240</sup> *NY*, *supra* note 51 at paras 7–8.

## Appendix B: Biographical Details of Experts in Terrorism Trials

| Name of Expert                        | Gender | Specialization              | Employment Background         | Residence |
|---------------------------------------|--------|-----------------------------|-------------------------------|-----------|
| Dr. Hy Bloom <sup>241</sup>           | M      | Forensic psychiatry         | Academia/Private consultant   | Canada    |
| Dr. Julian Gojer <sup>242</sup>       | M      | Forensic psychiatry         | Academia/Clinical practice    | Canada    |
| Dr. Wagdy Loza <sup>243</sup>         | M      | Forensic psychology         | Academia/Prison Administrator | Canada    |
| Dr. Nathan Pollock <sup>244</sup>     | M      | Forensic psychology         | Academia/Clinical practice    | Canada    |
| Dr. Sean Maloney <sup>245</sup>       | M      | Canadian military historian | Academia                      | Canada    |
| Dr. Philip Klassen <sup>246</sup>     | M      | Forensic psychiatry         | Academia/Clinical practice    | Canada    |
| Dr. Gary Chaimowitz <sup>247</sup>    | M      | Forensic psychiatry         | Academia/Clinical practice    | Canada    |
| Dr. Sumeeta Chatterjee <sup>248</sup> | F      | Forensic psychiatry         | Academia/Clinical practice    | Canada    |
| Dr. Arif Syed <sup>249</sup>          | M      | General psychiatrist        | Clinical practice             | Canada    |
| Donna Garbutt <sup>250</sup>          | F      | Explosives                  | RCMP                          | Canada    |
| Sgt. Sylvain Fiset <sup>251</sup>     | M      | Explosives                  | RCMP                          | Canada    |
| Cst. Tarek Mokdad <sup>252</sup>      | M      | Islamic-inspired terrorism  | RCMP                          | Canada    |
| Dr. Lisa Ramshaw <sup>253</sup>       | F      | Forensic psychiatry         | Academia                      | Canada    |

<sup>241</sup> Abdelhaleem, *supra* note 51 at paras 46–57, 74–76, 78.

<sup>242</sup> See Ahmad 2010, *supra* note 54 at paras 37–44.

<sup>243</sup> See Ahmed, *supra* note 51 at paras 13–51.

<sup>244</sup> NY, *supra* note 51.

<sup>245</sup> Ahmed Trial Transcript, *supra* note 61.

<sup>246</sup> See Ali, *supra* note 41.

<sup>247</sup> *Ibid.*

<sup>248</sup> Dughmosh, *supra* note 42.

<sup>249</sup> Amara Voir Dire, *supra* note 66; Amara, *supra* note 38 at paras 44–61, 75–98.

<sup>250</sup> Amara, *supra* note 38.

<sup>251</sup> *Ibid.*

<sup>252</sup> See *R v Namouh*, 2017 QCCS 6077.

<sup>253</sup> *Esseghaier (First Sentencing Hearing)*, *supra* note 40; *R v Esseghaier (Second Sentencing Hearing)*, *supra* note 51.

|                                       |   |                                  |                                      |        |
|---------------------------------------|---|----------------------------------|--------------------------------------|--------|
| Dr. Steven Cohen <sup>254</sup>       | M | Forensic psychiatry              | Clinical practice                    | Canada |
| Mohammad Navaid Aziz <sup>255</sup>   | M | Islam & Islamic thought          | Imam                                 | Canada |
| Cst. Robin Shook <sup>256</sup>       | M | Digital forensics                | RCMP                                 | Canada |
| Kevin Ripa <sup>257</sup>             | M | Digital forensics                | Private consultant                   | Canada |
| Cpl. Barry Salt <sup>258</sup>        | M | Digital forensics                | RCMP                                 | Canada |
| Matthew Bryden <sup>259</sup>         | M | Somalia/Horn of Africa           | Political analyst/private consultant | Kenya  |
| Abdi Aynre <sup>260</sup>             | M | Somalia/Horn of Africa           | Journalist/Political Consultant      | Canada |
| Dr. Barbara Perry <sup>261</sup>      | F | Sociology of hate crimes         | Academia                             | Canada |
| Dr. Jess Ghannam <sup>262</sup>       | M | Clinical psychology              | Academia/Clinical practice           | Canada |
| Dr. Vinesh Gupta <sup>263</sup>       | M | Adolescent forensic psychiatrist | Clinical practice                    | Canada |
| Dr. Ann Marie Dewhurst <sup>264</sup> | F | Adolescent forensic psychologist | Clinical practice                    | Canada |
| Dr. Mohammed Fadel <sup>265</sup>     | M | Islamic law & thought            | Academia                             | Canada |
| Sgt. Sylvain Fiset <sup>266</sup>     | M | Explosives                       | RCMP                                 | Canada |

<sup>254</sup> See *Gaya*, *supra* note 54 at paras 41–43; *Gaya Sentencing Appeal*, *supra* note 212.

<sup>255</sup> See *Hamdan*, *supra* note 51 at paras 55, 94, 99–102, 106, 148–50, 173.

<sup>256</sup> See *Hamdan Voir Dire*, *supra* note 62.

<sup>257</sup> *Ibid.*

<sup>258</sup> Cpl. Barry Salt appeared in the case against John Nuttall. See Omand, “Laptop Full of Extremist Content”, *supra* note 62.

<sup>259</sup> See *Hersi Bryden Voir Dire*, *supra* note 100; *Hersi*, *supra* note 51.

<sup>260</sup> See *Hersi*, *supra* note 51.

<sup>261</sup> See *Hersi Dr. Perry Voir Dire*, *supra* note 61.

<sup>262</sup> See *Essegheier* (Second Sentencing Hearing), *supra* note 51 at paras 38–53.

<sup>263</sup> See *JR (Alberta Youth)*, *supra* note 63.

<sup>264</sup> *Ibid* at para 21.

<sup>265</sup> See *Khalid Gardiner Hearing*, *supra* note 61.

<sup>266</sup> *Khawaja ONSC*, *supra* note 12; *Khawaja ONCA*, *supra* note 4 at paras 226–29.

|                                    |   |   |                            |        |
|------------------------------------|---|---|----------------------------|--------|
| Cst. Peter Cucheran <sup>267</sup> | M | Explosives                                  | RCMP                       | Canada |
| Dr. Omid Safi <sup>268</sup>       | M | Contemporary and pre-modern Islamic thought | Academia                   | USA    |
| Dr. Rita Katz <sup>269</sup>       | F | Islamic-inspired terrorism                  | Private analyst/consultant | USA    |
| Dr. Reuven Paz <sup>270</sup>      | M | Islamic-inspired terrorism                  | Private analyst/consultant | Israel |

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<sup>267</sup> See Omand, “Laptop Full of Extremist Content”, *supra* note 62; Omand, “B.C. Bomb Plot Trial”, *supra* note 62.

<sup>268</sup> *Nuttall Entrapment Application*, *supra* note 38 at paras 473-503, 696-717; *Nuttall Voir Dire re Entrapment Application*, *supra* note 232.

<sup>269</sup> *Namouh Sentencing*, *supra* note 255; *Namouh*, *supra* note 51 at paras 31-48, 70, 73.

<sup>270</sup> *Namouh*, *supra* note 51.