

ANTI-TERRORISM ACT, 2015: THE WAY FORWARD



NATIONAL COUNCIL OF CANADIAN MUSLIMS

ABOUT THE NATIONAL COUNCIL OF CANADIAN MUSLIMS

The National Council of Canadian Muslims (NCCM) was founded in 2000 as an independent, non-partisan, non-profit grassroots organization to be a leading voice for Muslim civic engagement and the promotion of human rights.

The NCCM's mandate is to protect the human rights and civil liberties of Canadian Muslims, promote their public interests, build mutual understanding between communities, and confront Islamophobia. We work to achieve this mission through our work in four primary areas including community education and outreach, media engagement, anti-discrimination action, public advocacy and partnering with other social justice and public interest organizations.

The NCCM has testified before several parliamentary committees on important legislation, including previous iterations of the Anti-Terrorism Act; has participated in the Arar Commission, the Air India Inquiry, and the Iacobucci Internal Inquiry; and has appeared before the Supreme Court of Canada on a variety of issues of national importance.

The NCCM regularly provides media commentary on issues affecting Canadian Muslims. It offers frequent seminars and workshops on Islamic practices and issues of religious accommodation, and produces a number of publications, which include guides outlining Islamic religious practices for journalists, employers, educators, and health care providers. Our publications are regularly requested by government departments, local and national media outlets, police services, hospitals, schools, businesses, and various non-profit groups.

The NCCM documents and resolves discrimination and bias-related complaints. It produces reports on anti-Muslim sentiment and reports its findings annually to the ODIRH of the Organization for Security and Co-operation in Europe (OSCE). It has also presented findings at national and international conferences. The NCCM is federally incorporated and is fully funded and sustained through private donations from Canadians. The NCCM does not accept donations from foreign organizations or governments.

NCCM BRIEFING DOCUMENT RE ANTI-TERRORISM ACT, 2015

Executive Summary

In March 2015, the National Council of Canadian Muslims (NCCM) testified before the House of Commons Standing Committee on Public Safety and National Security (SECU) on Bill C-51, the *Anti-terrorism Act, 2015* (the “*Act*”). While the NCCM supported, and continues to support, all measures that effectively enhance national security, we maintain that these measures must also respect human rights and the standards of government restraint established in the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).

Any law that threatens constitutional rights must be strongly justified. The NCCM is deeply concerned that the *Act* threatens *Charter* rights and civic values in ways that are not demonstrably justified in a free and democratic society. Of particular concern to NCCM is the likelihood that the *Act* will disproportionately harm Canadian Muslims.

Bill C-51 received royal assent and became law in June 2015. During the election campaign the Liberal Party of Canada defended the *Act*, saying that it would improve the safety of Canadians. The Prime Minister also pledged to repeal or amend certain identified problematic elements of the legislation.

Events in the world continue to shape national security discussions in the media and within the general public. Some have expressed concern about the influx of Syrian refugees while murderous attacks in November 2015 in Paris, Beirut and Baghdad, and in January 2016 in Istanbul and Jakarta, also emanate from the Syrian conflict. It remains critically important to recall that refugees are victims of war, a product of armed conflict. Civilians fleeing for their lives should not be presumed to be anything other than in need of protection.

The NCCM believes that the *Act* is unnecessary. Its purported benefit of ensuring the safety of Canadians is unproven, while its features such as no-fly lists and secret information sharing, are proven to decrease personal security for some Canadians. The *Act* invites breaches of constitutional rights and freedoms by creating vague and redundant powers, such as the amendments to the *Criminal Code*, which create an offence of “knowingly advocating or promoting the commission of terrorism in general”. This is vague and overbroad and almost certain to be applied in an unconstitutional manner. Moreover, there are existing provisions in the *Criminal Code* that are designed to prevent and punish acts of terrorism, including facilitating, participating in, instructing, harbouring and financing terrorism.

The NCCM is particularly concerned about the effects of the *Act* on Canadian Muslims. In recent years, Muslims around the world have been subjected to heightened

suspicion. Canadian Muslims are no exception, and are adversely impacted by the intensification of national security measures. The *Act* has the real potential to chill speech, worship and associations, where Canadian Muslims may fear engaging in lawful activity out of fear of suspicion, contrary to expressive freedom and equality rights under the *Charter*. Not only is this problematic from a *prima facie* legal perspective it is also counterproductive in that those, like religious scholars, who may be most effective in demystifying and deconstructing the simplistic narratives of violent extremists may be scared into silence for fear of being implicated by association.¹

The NCCM is also concerned with the effects of the *Act* due to rising Islamophobia in Canada and abroad. There has been a reported increase in hate crimes against Canadian Muslims since the November 2015 attacks. Any law that purports to strengthen national security should take into account the potential impact on the Canadian Muslim community and other vulnerable minorities. Sound national security policy is designed for the benefit of all Canadians and should not make any group of Canadians more insecure or the subject of stereotyping, stigma and over-policing.

The NCCM's position has consistently been to urge the government to repeal the *Act* in its entirety and to introduce its own legislation that takes into account the balance between legitimate national security concerns and civil liberties. Alternatively, if the *Act* is not repealed, then provisions that ensure greater oversight of the operation of national security agencies, accompanied by a greater focus on community-based solutions, are required.

Canada cannot spy and arrest its way out of the problem of radicalization. The NCCM believes that "radicalization" is a multi-faceted phenomenon which includes roots in extreme alienation, often among youth, that leads to violent anti-social behaviour. For this reason, countering radicalization happens best at the grassroots level, with government working in partnership with groups that are best informed and equipped to tackle this social challenge. The government should recognize the efforts of communities and community leaders in addressing the underlying causes of radicalization. These community-based initiatives should be supported, not only financially, but also through specialized resource support.

¹ Barlett, Jamie and Birdwell, Jonathan and King, Michael. "*The edge of violence: a radical approach to extremism*," DEMOS report online: http://www.demos.co.uk/files/Edge_of_Violence_-_web.pdf

Recommendations

1. The NCCM urges the government to repeal the *Act* in its entirety.
2. In the alternative, if the *Act* is not repealed, the NCCM would prioritize the following changes:
 - Increased and continued focus on community-based solutions to combat radicalization.
 - Greater oversight through a Parliamentary national security committee, expanding the powers of SIRC, and the formation of a “super SIRC” to coordinate national security agencies.
 - Full statutory review of the *Act* every three years, as well as the establishment of a sunset clause on certain provisions.
 - Consistent information sharing between government departments and agencies, as well as the adoption of the Arar Commission recommendations.
 - Abandon current no-fly lists or at minimum, require the government to meaningfully review all appeals by Canadians on the no-fly list.
 - Narrow overbroad definitions in the *Act*.

Proposed Government Amendments

The new government has pledged to amend several problematic elements of the *Anti-terrorism Act, 2015*, as follows:

- Focus on community outreach and counter-radicalization efforts, including the creation of a Community Outreach and Counter-radicalization Coordinator.
- Improve oversight by implementing a Parliamentary National Security Oversight Committee. This committee would provide regular, ongoing oversight of national security agencies. It would ensure that the Security Intelligence Review Committee (SIRC), an independent external review body, annually reviews all operations performed by the Canadian Security Intelligence Service (CSIS.) The committee would also require the Privacy Commissioner to provide the government with an annual report on information sharing between departments and agencies, the result of which would be made public.
- No longer require judges to provide CSIS with warrants that may violate the *Canadian Charter of Rights and Freedoms*. Broadly speaking, the Government should prevent CSIS from engaging in tactics that violate Canadian law.
- Limit the powers of the Communications Security Establishment (CSE) by requiring a warrant to engage in any surveillance of Canadians.

- A full review of the *Act* after three years, as well as adding sunset clauses to specific provisions.
- Placing the legal onus on the government to review appeals with regards to the Canadian no-fly list.
- Narrow overly broad definitions, such as clearly defining “terrorist propaganda.”

Response to Proposed Amendments in Relation to Canadian Muslims

Community-Based Solutions

One of the features of the previous government’s approach to national security policy was its unwillingness to build relationships of trust and mutual interdependence with Canadian Muslim communities. If the government were seriously concerned that some young members of the Canadian Muslim community were being radicalized and recruited into violent activity, it makes no sense why the government treated community organizations with contempt and refused to take an interest in the grassroots. Legislation and security powers can only go so far. What is needed is genuine engagement with Canadian Muslims as partners in national security.

To that end, the NCCM supports the new government’s prioritization of community outreach and counter-radicalization efforts, including the creation of the Office of Community Outreach and Counter-radicalization Coordinator. By far the most effective, and least costly, approach to combating radicalization to criminal violence is delivered within communities. Community-based solutions are the best defence against radicalization to violence, by “dissuading at-risk individuals from going further down the path of violent extremism before they commit a crime.”²

Canadian Muslim communities and community leaders have been at the forefront of confronting radicalization to criminal violence. The NCCM, for example, has worked in conjunction with the Islamic Social Services Association (ISSA) on the “United Against Terrorism” handbook, which challenges extremist messages of violence, addresses responsible citizenship, and advises Canadians on what to do if they suspect someone is being radicalized to violence.

² Kenny, Colin, “Ten signs that someone is becoming radicalized to violence,” online: <<http://colinkenny.ca/en/p106133>>.

The work done by Canadian Muslim communities, however, has been patchwork. What is needed is a planned and synchronized effort that recognizes the multi-faceted nature of the problem, and which harnesses expertise and resources from a variety of sources. There is a need for coordinated national support of grassroots' activities in areas like counselling, de-radicalization/re-purposing initiatives, education, and social media messaging.

The NCCM is willing to partake in public consultations and work with the federal government at the grassroots partnership level to develop and implement a national coordinated strategy for community-based initiatives.

Strengthening Review and Oversight

While the *Act* purports to enhance national security by strengthening the powers of national security agencies, it does so with minimal oversight and at a high cost to the *Charter* rights and freedoms of Canadians. This is of particular concern to Canadian Muslims, who are more likely than others to find themselves targeted by national security investigations. The Arar Commission concluded that the "potential for infringement on the human rights of innocent [Muslim and Arab] Canadians" is higher in national security enforcement due to the stricter scrutiny to which members of these groups are subjected. Thus, any deficiencies in the *Act* or its enforcement will disproportionately affect Canadian Muslims.

a) Parliamentary National Security Committee

The NCCM supports the new government's proposal to establish a parliamentary, all-party, national security committee to provide regular oversight of national security agencies. The committee's focus should be on the "overall efficiency and effectiveness of Canada's security and intelligence community, laws and policies."³ The committee should have full access to secret information in order to engage in thorough review.

As stated by Prime Minister Trudeau, "this committee should not be a parliamentary committee, but a committee of parliamentarians." As elected officials, parliamentarians would bear the onus of providing ongoing, and much-needed, oversight of national security operations in order to ensure that individual rights and freedoms are not being breached. The committee should maintain an ongoing discourse with civil society to ensure the work of the national security institutions is cognizant of the social impact it produces.

³ Roach, Kent and Craig Forcese. "A Three-Part System to Modernize Canada's Inadequate Review of National Security," online: <<http://ssrn.com/abstract=2714498>>

b) Security Intelligence Review Committee (SIRC)

The NCCM welcomes the proposed amendment for SIRC to review all, as opposed to some, of the operations performed by CSIS. With the previous government's abolition of the office of the Inspector General of CSIS, there is a pressing need to augment the powers of SIRC such that this oversight body has the resources and authority to effectively supervise the activities of CSIS.

SIRC has never had the capacity to examine CSIS's total range of conduct. Historically, it has only examined past activities, and has not conducted any real-time monitoring. Moreover, it is disproportionately under-funded and under-staffed as compared to CSIS. In 2014, SIRC employed an Executive Director and 17 staff members and had a budget of \$2.8 million. This is a tiny fraction of CSIS's operational budget of \$516 million.⁴ The NCCM is concerned that SIRC will not be able to do more than a partial review of CSIS's new powers under the *Act*.

Additionally, SIRC's ability to review is constrained by legal limitations that prevent it from investigating when government agencies collaborate. The Arar Commission concluded that review bodies could not adequately oversee information sharing between institutions when their jurisdiction remained "stovepiped" or "siloeed."⁵ In its present condition, SIRC is ill-equipped to effectively oversee the activities of CSIS. It requires a renewed mandate for SIRC to engage in global oversight and review of all agencies and agency sharing, so as to avoid the "stovepipe" problem.

c) Creation of a "super SIRC"

To better coordinate national security agencies, the NCCM would also recommend that the Liberal government form a unified, whole-of-government committee, or "super SIRC," similar to the Five Eyes intelligence partners. A "super SIRC" could be mandated to review all national security activities in government, including information sharing.

As noted by the Arar Commission, the "super SIRC" would allow for the formation of "statutory gateways" for collaboration between federal departments and agencies, in order to close accountability gaps. This "super SIRC" could include the review bodies for CSIS, CSE, and RCMP, in addition to the 17 other federal departments implicated by the *Act*. It could also be a focal point for complaints.

⁴ Roach, Kent and Craig Forcese and Leah Sherriff. "Bill C-51 Backgrounder #5: Oversight and Review: Turning Accountability Gaps into Canyons?" online: < <http://ssrn.com/abstract=2571245> >

⁵ Roach, Kent and Craig Forcese. "Bill C-51 Backgrounder #3: Sharing Information and Lost Lessons from the Maher Arar Experience" online: < <http://ssrn.com/abstract=2565886> >

The NCCM maintains, however, that this unified, whole-of-government committee should remain independent of Parliament, reporting to and being appointed by the Parliamentary national security committee.

In the case of all three oversight committees, Parliamentary, SIRC, and “super SIRC,” the NCCM would encourage the appointment and involvement of Canadian Muslims in order to ensure a balance of individual rights and freedoms with collective security measures in the context of a multicultural and increasingly diverse Canadian society.

In addition, the NCCM supports the Liberal government’s proposal to limit the powers of the Communications Security Establishment (CSE) by requiring a warrant to engage in the surveillance of Canadians. Under the law as it currently stands, the activities of the CSE could capture the private communications of law-abiding Canadians.

Mandatory Legislative Review

The *Act* creates extraordinary powers that should be viewed, at best, as a ‘necessary evil’ in a liberal democracy. The revelations from the Arar Commission demonstrate the terrible impact of errors in the use of extraordinary powers. Not only is the individual’s life destroyed but so are those of his loved ones, while a minority community is scapegoated. The NCCM urges the government to consider the potential effects of the *Act* on the Canadian Muslim community. The risks are known; what is needed is robust review.

As it stands, the *Act* does not provide for a mandatory 3-5 year review of its operation, nor does it contain sunset clauses to allow for further legislative action. Sunset clauses allow the government to re-examine the usefulness of legislation after a set period of time and to seek a renewed legislative mandate. A sunset clause allows the government to affirm or revise its position rather than be tethered to legislation that proves ineffective or harmful. It further allows a government to distance itself from the negative, unintended consequences that often flow from extraordinary powers legislation by allowing the law to expire.

The NCCM supports the new government’s proposal for a full statutory review of the *Act* every three years, as well as instituting a sunset clause on certain provisions. These provisions, however, have not yet been identified. We strongly encourage the government to review, in particular, the effects of the *Security of Canada Information Sharing Act* and the *Safe Air Travel Act* on Canadians, as well as the new *Criminal Code* offence of advocating and promoting terrorism in general. This would ensure that extraordinary powers do not become normalized without evidence of effective security enhancement and mitigation of harm to civil liberties. Parliament should revisit the *Act* at regular intervals and confirm official support to renew these extraordinary powers.

Information Sharing

The *Act* creates the *Security of Canada Information Sharing Act*, which authorizes government agencies and institutions to disclose information to other government institutions that have jurisdiction or responsibilities in respect to “activities that undermine the security of Canada.” The context of “activities that undermine the security of Canada” is broad and difficult to define, and could result in constitutional violations against innocent Canadians, including innocent Canadian Muslims.

The new government proposes that the federal Privacy Commissioner be required to provide the government with an annual report on information sharing between departments and agencies, which would be made public. The NCCM is supportive of this amendment, but does not think that it goes far enough. The NCCM urges the government to implement the recommendations made in the Arar Commission⁶ with respect to information sharing by the RCMP, which could also be adapted by other government departments:

- The RCMP should ensure that, whenever it provides information to other departments and agencies, whether foreign and domestic, it does so in accordance with clearly established policies respecting screening for relevance, reliability and accuracy and with relevant laws respecting personal information and human rights.
- The RCMP should never share information in a national security investigation without attaching written caveats in accordance with existing policy. The RCMP should review existing caveats to ensure that each precisely states which institutions are entitled to have access to the information subject to the caveat and what use the institution may make of that information. Caveats should also generally set out an efficient procedure for recipients to seek any changes to the permitted distribution and use of the information.
- The RCMP’s information-sharing practices and arrangements should be subject to review by an independent, arms-length review body.

No-Fly Lists

No-fly lists have a devastating impact on those who are wrongly named. Canadian Muslims and their families are the most adversely affected by the list, the consequences of which damage their personal and professional interests.

⁶ Arar Commission Report at 334-342.

The *Act* creates a mechanism to challenge a listing, but it is an ineffective check. First, a person can never know with certainty that they are on the list. Second, a listed person is not given any information about how or why they were placed on the list. Third, while a listed person may ask to have their name removed, the Minister is not bound to reply to the request. Fourth, the onus rests on the listed person to demonstrate not only that the Minister was wrong to put their name on the list, but that the Minister acted unreasonably in so doing. Given the lack of access to information prescribed in the *Act*, the onus is virtually impossible for a listed person to meet.

Thus, the review process fails to provide meaningful protection against error and puts Canadian Muslims at disproportionate risk of having their constitutional rights violated through false designations with no real opportunity for correction. Because the no-fly list may be shared with foreign entities, this produces a spiralling web of exclusion from air travel for the listed person. The effect is that a person can be literally grounded indefinitely and burdened with the stigma of “suspected terrorist”, with no hope of relief.

A listed person should have a meaningful opportunity to contest their designation on the no-fly list, as it produces a significant restraint on their liberty and other constitutional rights and freedoms.

The NCCM maintains that no-fly lists have not been demonstrated to achieve greater benefit to security than harm to personal liberty and as such should be abandoned in their current form in favour of a more transparent and rights-respecting means to ensure aviation security. At minimum, the NCCM supports the proposal requiring the government to fully review all appeals by Canadians on the no-fly list.

Overbroad Definitions

The NCCM supports the new government’s proposed measure to narrow overly broad definitions, such as the use of “terrorist propaganda” in the *Criminal Code*. It is unclear how this provision is necessary given existing provisions regarding terrorism in the *Criminal Code*. Furthermore, adding “terrorist propaganda” to a customs tariff under this Act puts excessive discretion in the hands of customs officials that is susceptible to unconstitutional abuse.

The NCCM also urges the government to consider narrowing other overbroad definitions such as “activities that undermine the security of Canada” in the *Security of Canada Information Sharing Act*, as well as the new offence in the *Criminal Code*, s.83.221. The language of this offence, as well as the definitions in the Act, are vague and may

contribute to a chilling effect on Canadian Muslim communities, who are disproportionately affected by expression-based offences.⁷

Conclusion

The NCCM believes that the *Act* is unnecessary to ensure the safety and security of Canadians, while the threat it poses to civil liberties and the equality rights of Canadian Muslims is disproportionate to any purported benefit. The *Act* should therefore be repealed in its entirety.

Should the government choose to repeal problematic elements of the *Act*, in an effort to better balance collective security with individual rights, the NCCM would be supportive of the proposed amendments. However, while we encourage greater oversight of national security agency operations and a mandatory review of the *Act*, we would also urge the government to fully implement the recommendations made in the Arar Commission report with respect to information sharing by government departments.

Of utmost importance are community-based solutions. Legislating greater security powers is not the best way to counter the contemporary phenomenon of radicalization. The most effective approach to combating this threat would be to develop informed social policy regarding radicalization to criminal violence, and to pursue a broad consultative strategy to address its root causes. The NCCM would be a willing partner to the federal government in this regard at the grassroots level.

⁷ Roach, Kent and Craig Forcese. "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence," online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2560006>