

THE SPIES WHO HATE US:[†] OFFICIAL MISDEEDS AND SOWING DISTRUST IN CANADIAN NATIONAL SECURITY

Faisal Bhabha*

There are no assurances. There is, rather, the virtual certainty that an agency chartered to protect 'national security,' cloaked in secrecy, and accountable to no one who does not share – or actively encourage – its conspiratorial mystique will continue to commit monstrous crimes...¹

I. Introduction

On December 14, 2017, the Canadian Security Intelligence Service (“CSIS” or “the service”) announced that it had reached an out-of-court settlement with five of its employees.² The group of intelligence officers and analysts sued the service in July 2017 alleging that racist, anti-Muslim, sexist, and homophobic discrimination and harassment were rampant among staff and supervisors, and was tolerated at the highest levels of the service.³ The allegations appeared to be corroborated by the findings of an informal internal investigation into CSIS’s Toronto Region office, which was released publicly in October 2017. The report exposed an internal culture at CSIS that included “misogynistic, offensive and inappropriate comments and jokes... and even bullying by colleagues and managers, which remained unchecked for years”.⁴ The

[†] The title of this article is borrowed from a comment of the same title published in 1977 in the American leftist magazine, *The Progressive*, after secret and redacted documents were obtained from the United States’ Central Intelligence Agency (CIA) pursuant to freedom of information litigation. The information revealed illegal and abusive conduct by the agency. The comment posited that spies who behave illegally do harm to the very purposes they are meant to serve. Such spies, the comment argued, are “guided by the most cynical contempt not just for our ‘enemies,’ real or imagined, but for our strictures, our rules, our principles, our values – and for us.” The implication is that “us” refers to the citizenry, for whom the rule of law and constitutional rights are established.

* Associate Professor, Osgoode Hall Law School of York University, Toronto, Canada. The author is indebted to Mariam Sheikh for her unstinting research support. He also thanks Amrita Pal for additional research assistance and Kiran Kang for helpful comments on an earlier draft.

¹ “Comment: The Spies Who Hate Us” *The Progressive* (October 1977) at 6–7.

² The Canadian Press, “Canada’s Spy Agency Reaches Settlement in Discrimination and Harassment Lawsuit”, *CBC News* (15 December 2017), online: <www.cbc.ca/news>.

³ Statement of Claim, *John Doe #1, Jane Doe #1, John Doe #2, John Doe #3 and Jane Doe #2 and Her Majesty the Queen in Right of Canada*, Court File No T-1032-17, filed on July 13, 2017, Federal Court, Toronto [Claim].

⁴ Canadian Security Intelligence Service, “Workplace Climate Assessment – Toronto Region Office and Districts – Executive Summary (conducted between April 18 and June 23, 2017; Executive Summary of

report noted that, within CSIS, “jokes and discriminatory comments are still being made with regards to ethnicity and the communities being monitored. There is still some bias against and a general lack of thoughtfulness towards cultural differences and sensitivities.”⁵

In announcing the settlement of the civil claim, CSIS Director, David Vigneault, gave no specifics about the confidential terms, which presumably included significant financial compensation to the plaintiffs.⁶ Vigneault pledged that the service would work “to ensure that the behaviour of all employees reflects the CSIS Employee Code of Conduct principles of respect for democracy, respect for people, integrity, stewardship, and professional excellence.”⁷

Falling back on formal policies did little to assuage concern that toxicity within CSIS was likely influencing the agency’s work in counter-terrorism operations.⁸ When read alongside the experiences of individuals and communities caught in the web of Canadian national security law and policy since September 11, 2001 (hereinafter “9/11”), the allegations appeared to confirm the persistent complaints of Canadian Muslim communities about religious and ethnic profiling in national security practices, discrimination in counter-terrorism investigations, and overbroad suspicion and monitoring of Muslim communities and institutions. The essence of these grievances appeared to concord with the employees’ allegations concerning discriminatory attitudes and behaviour within the service.

The employees’ allegations against CSIS come into yet clearer focus when assessed in light of the findings of the two commissions of inquiry that looked into the matters of Maher Arar,⁹ and Abdullah Almalki, Ahmad Abou El-Maati, and Muayyed

confidential report released to the public in October 2017), online: <<https://csis.gc.ca/nwsrm/wca-2017-10-26-en.php>> [CSIS, “Workplace Climate Assessment”].

⁵ *Ibid.*

⁶ Claim, *supra* note 3 at para 1. The claim itself sought \$35 million total in general damages, special pecuniary damages, and aggravated *Charter* damages, in addition to “an amount to be determined” for “future and anticipated medial and out of pocket expenses”.

⁷ CSIS, News Release, “Director Vigneault Statement Regarding Settlement of Civil Litigation” (14 December 2017), online: <https://www.canada.ca/en/security-intelligence-service/news/2017/12/director_vigneaultstatementregardingsettlementofcivillitigation.html>.

⁸ See statement by Laurentian University’s Gary Kinsman in Arshy Mann, “Here’s Why Allegations of CSIS’ Homophobia and Racism should Concern all Canadians”, *Xtra* (August 11, 2017): “The work of people in CSIS is to identify certain individuals as being threats to national security and enemies of the country...This is bound to create an internal culture within those work settings that actually reproduces those types of prejudices and bigotry”, online: <<https://www.dailyxtra.com>>.

⁹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006) at 14, online: <epe.lac-bac.gc.ca/100/206/301/pcobcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf> [*Arar Inquiry*].

Nureddin.¹⁰ These innocent men were found to have been subjected to rendition to torture, with Canadian complicity, in the early years of the US war on terror.¹¹ At least two salient features of those cases, now more than a decade past, continue to resonate: First, Canadian authorities were known to be working in very close cooperation with American counter-terrorism officials and were under tremendous pressure to cooperate on US terms; and secondly, Canadian intelligence officials made a series of false assumptions and demonstrated discriminatory attitudes in forming the basis for their suspicions, which were found not reasonable on the evidence in the circumstances. The same features were at play in Canada's failings towards the former child prisoner, Omar Khadr, who was illegally interrogated by Canadian intelligence officers while detained at the US detention facility in Guantanamo Bay, Cuba. This combination of deference to US priorities, the "war on terror" ideology, and intelligence failures based at least in part on discriminatory assumptions, caused Canada to violate *Charter* rights and ruin lives. The impact was felt throughout the Canadian Muslim community.

When Canada joined the US war on terror in the aftermath of the co-ordinated attacks on the twin towers and the Pentagon, it surrendered to a series of counter-terrorism assumptions and goals that were primarily ideological and lacked definitional precision. After 9/11, the battle against "radical Islam" – whatever that meant – was adopted as the rationalizing discourse and primary frame for US counter-terrorism policy and action. What was dangerous to the US was also presumed to be dangerous to Canada, and the idea that Islamic terrorism posed a lethal threat to Canada, both militarily and ideologically, took hold.¹² The Liberal government, led by then-Prime Minister Jean Chrétien and Justice Minister Anne McLellan, implemented the first anti-terrorism law in December 2001,¹³ followed shortly by an overhaul of immigration legislation in June 2002.¹⁴ The approach sought to, among other things, tighten up immigration, define "terrorism" offences, and expand criminal power into preventative action and the denial of *habeas corpus* based on suspicion.¹⁵ This framework has consistently guided Canadian national security policy, and it was

¹⁰ Public Safety Canada, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Ottawa: Public Works and Government Services Canada, 2008) [*Jacobucci Inquiry*].

¹¹ See Canada, Law and Government Division, "Extraordinary Rendition: International Law and the Prohibition of Torture", by Laura Barnett, PRB 07-48E (Ottawa: Parliament of Canada, 17 July 2008).

¹² See Maureen Duffy, *Turning the Kaleidoscope: Fractured Narratives and Altered Presumptions in Anti-Terrorism Detention Practices* (DCL Thesis, McGill University Institute of Comparative Law, 2012) (Montreal: McGill University Libraries, 2013) [Duffy, *Turning the Kaleidoscope*]. See also Piotr Cap, *Legitimation in Political Discourse: A Cross-Disciplinary Perspective on the Modern US War Rhetoric*, 2nd ed (Newcastle: Cambridge Scholars Publishing, 2010).

¹³ *Anti-terrorism Act*, SC 2001, c 41 [ATA 2001].

¹⁴ *Immigration and Refugee Protection Act*, SC 2001, c 27.

¹⁵ See Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011) at 279–381, 391–92, 395–96 [Roach, *9/11 Effect*].

intensified and broadened with the adoption of new powers in the *Anti-terrorism Act, 2015*.¹⁶

Beneath the legislative framework is a normative framework constituting the ideology and value system of the security establishment – those with legal power to investigate and disrupt terrorism threats. The enemy in the war on terror is not conventional. In fact, the enemy is imprecise, ambiguous, and barely knowable.¹⁷ It could potentially be anyone who appears to hold certain types of belief. This has led to an emphasis on the markers of difference, and has bred fears of infiltration by an extremist “other”.¹⁸ For many, the war on terror was not just fought with bombs and guns, but also with ideas, language, and demography.¹⁹ Those who believe Muslims are overrunning western civilization, for instance, point to a combination of Islam’s alleged proclivity to extremism and the lack of shared values to justify scepticism that Muslims can comfortably integrate into western society.²⁰ Issues of gender equality, freedom of expression, and the role of religion in public life are often cited as sites of irreconcilable conflict between the west and Islam.²¹ The correlation of religiosity, especially outward religious observance, with the likelihood of being a terrorist seems implicitly obvious, even if not true. Evidence does not support any such correlation, and actually suggests that religious knowledge and community can be a powerful antidote to extremism.²²

The gap between fact and stereotype about Muslims has made all the difference when it has mattered most. The cases of Maher Arar and others provide illustration of the interplay of discrimination and incompetence. Even good faith slips and errors can produce egregious discriminatory effects when they occur in conditions in which a particular type of person or group suffers stigma. Discrimination is always reciprocated with diminished trust. Thus, the seeds of abuse that were sown in the

¹⁶ *Anti-terrorism Act, 2015*, SC 2015, c 20 [ATA 2015]. This Act came into force on June 18, 2015.

¹⁷ See Duffy, *Turning the Kaleidoscope*, *supra* note 12 at 48–49.

¹⁸ See e.g. Cato, “Coming to America: The Weaponization of Immigration” (2007) 46:2 Washburn LJ 309 at 313 (The author is identified as a “former Senior Counsel at the United States Department of Justice”, and argues that, “Immigration, secure borders, and terrorism are linked, not because all immigrants are terrorists, but because nearly all terrorists in the West have been immigrants. Terrorists have shrewdly manipulated the openness of the United States and exploited America’s traditions of inclusion, invoking the compassion expressed in our laws to enable their crimes”).

¹⁹ See Piotr Cap “Follow-ups in the US Anti-terrorist Discourse: Proposal for a Macro-Discursive Approach to Monologic Follow-up Sequences” (2015) 26:5 Discourse & Society 543 [Cap, “Follow-ups”].

²⁰ See Richard Jackson, “Constructing Enemies: ‘Islamic Terrorism’ in Political and Academic Discourse” (2007) 42:3 Government and Opposition 394 [Jackson, “Constructing Enemies”].

²¹ See e.g. Sam Harris, “The Reality of Islam” (8 February 2006), *Sam Harris* (blog), online: <<https://samharris.org/the-reality-of-islam/>> (“Mainstream Islam itself represents an extremist rejection of intellectual honesty, gender equality, secular politics and genuine pluralism. The truth about Islam is as politically incorrect as it is terrifying: Islam is all fringe and no center”).

²² Aziz Z Huq, “The Signaling Function of Religious Speech in Domestic Counterterrorism” (2011) 89:4 Tex L Rev 833 at 877–78; Institute for Social Policy and Understanding, *American Muslim Poll: Participation, Priorities, and Facing Prejudice in the 2016 Election* (March 2016) at 8, online: <<https://www.ispu.org/public-policy/american-muslim-poll-2016/>>.

early post-9/11 period produced a generation of Canadian Muslims who are deeply distrustful of CSIS, who do not believe Canada has been fair or just in its fight against terrorism, and who feel that they have been made to belong to a despised and targeted minority within Canadian society.²³

This article begins at Part II by summarizing the settled civil claim by the five CSIS employees and related materials which fill in the picture of a toxic workplace culture within the national spy service. Part III discusses the record of official misdeeds and highlights findings from the public inquiries that resonate and align with the allegations of workplace toxicity. Part IV summarizes recent empirical research demonstrating that there is a considerable degree of distrust of counter-terrorism policy and institutions, and fear of terror stigma, within Muslim communities across the country. Finally, Part V describes and analyses legislative reform in national security, notably the Conservative government's controversial enactment of new anti-terrorism legislation in 2015, and the Liberal government's subsequent efforts to amend parts of it. It highlights that Canada's current national security consensus is that building collaborative relationships with targeted communities is a critical component of preventing threats. The article concludes by returning to this fundamental paradox in Canadian counter-terrorism: On the one hand, experts and government agree that effective counter-terrorism requires constructive relationships between national security agencies and targeted communities, which can only function with trust and good faith. On the other hand, as a result of official errors and illegal conduct, the lack of political accountability or internal reform, and the failure to root out bias in operations, there remain formidable obstacles to cooperation between the national security agencies and Canadian Muslims.

II. Blowing the Whistle on CSIS

In the aftermath of the adoption of the *ATA 2015* (which received royal assent on June 18, 2015) and a federal election in October 2015, the new Liberal Prime Minister, Justin Trudeau promised "sunny ways" as he ended nearly 10 years of Conservative rule under Stephen Harper.²⁴ Then, in July 2017, a group of five CSIS employees, including three Intelligence Officers and two Analysts, sued the service for \$35 million in damages caused by years of alleged workplace toxicity. They claimed that harassment, discrimination, intimidation and abuse, including racist, sexist and homophobic remarks and attitudes, were rampant at all levels of the service.²⁵ The statement of claim avoided divulging confidential information, as its focus was on workplace behaviour rather than investigative work. While all of the claimants were

²³ See Patti Tamara Lenard & Baljit Nagra, "Public Safety Report: Muslim Community Concerns and Experiences Regarding Counter-Terrorism Legislation in Canada" in Kanishka Research Team, *Securitizing Minority/Muslim Canadians: Evaluating the Impact of Counter-Terrorism, National Security and Immigration Policies Since 9/11* (University of Ottawa, 2016).

²⁴ "Justin Trudeau's 'Sunny Ways' a Nod to Sir Wilfred Laurier" *CBC News* (20 October 2015), online: <www.cbc.ca/news>.

²⁵ Claim, *supra* note 3 at paras 10–11.

still employed with CSIS at the time that the proceeding was commenced, they were also all on medical leave for various reasons of mental and physical ailment caused by years of alleged workplace harassment and discrimination.

The claim provides a fascinating glimpse into the internal culture of Canada's highly secretive intelligence agency. Although containing unproven allegations mostly denied by the Attorney General of Canada, the substance of the suit deserves attention. The allegations represent factual claims by long-serving employees who banded together at considerable personal risk to blow the whistle on harassment and discrimination within the service in a year that was characterized by a global tidal wave of anti-harassment whistleblowing.²⁶ This article does not seek to evaluate the legal merits of the specific allegations. The mere fact that such a case was brought is reason enough to study its content. The claim is summarized below as a means of drawing focus to the subjective voices of the claimants, who are most certainly now silenced by non-disclosure clauses in terms of settlement. While the claim may now be moot for the unnamed individuals, the relevance of its substance goes beyond the personal grievances of the claimants. The claim engages squarely the public interest.

The employees' allegations depict a national security agency rife with conduct and attitudes that are antithetical to official government policy, baseline workplace standards, and Canadian constitutional values. While the legal claim was never proven in court, as detailed below, its allegations are corroborated to a considerable degree by contemporaneous independent findings and to some degree by public admissions by the CSIS director himself. Because the workplace at issue is the one that leads national security intelligence gathering, and now exercises threat disruption powers under the *ATA 2015*, the allegations are directly pertinent to pressing issues of law and public policy. Read in light of the record of court and commissions of inquiry findings over the previous decade, the allegations appear to confirm that, when it comes to anti-Muslim bias and cultural incompetence, little has changed within Canada's security agencies.

(i) ***Bahira***

Bahira worked as an intelligence officer for 15 years, starting shortly after 9/11. In 2004, she began wearing hijab (Muslim headscarf). She alleged that her appearance caused an "uproar" within the service, producing a "stirring of suspicion so intense that it exists today."²⁷ She claimed that she was questioned at length by her managers about how she could continue her duties as a spy while wearing hijab. The presumption seemed to be that being visibly Muslim would render her unable to perform the essential duties of her job.

²⁶ For instance, the #MeToo movement, ignited in the weeks after the claim was filed, exposed pervasive sex discrimination and harassment in the entertainment industry, with similar revelations from other industries emanating thereafter.

²⁷ Claim, *supra* note 3 at para 57.

Bahira claimed that as a result of the service's suspicions, she was directed to report all of her anticipated activities within the Muslim community, including attendances at mosques and social events, to her superiors. She described a meeting with the Director General of Personnel Services and representatives of Internal Security, who allegedly told her that some of her outside activities were incompatible with her official duties. When she disclosed her biweekly attendance at mosque and occasional monetary donations to Muslim charities, she alleged that she was told her security clearance could be revoked for associating with certain individuals or groups in the Canadian Muslim community who were perceived to be adverse in interest to CSIS.²⁸ She claimed she was ordered in writing to cease all associations with two prominent Muslim groups that were described to be "antithetical to CSIS' work".²⁹ The Statement of Defence did not deny these allegations, characterizing "any direction given to Bahira... [as] reasonable, justified and consistent with Service policies."³⁰ As a result of this pressure, Bahira alleged that she diminished her involvement in Muslim religious and social events in order to preserve her career.³¹

Yet, it appeared that modifying her off-work behaviour did not cause the cloud of suspicion to dissipate. Instead, she alleged that she continued to endure constant discrimination, including the denial of opportunities for advancement, regular taunts by colleagues and superiors, and interference in her personal life by superiors solely on account of her religion.³² One particular manager, "William",³³ allegedly told Bahira that he distrusted her on account of her religion because she might one day leave the service and divulge its methods to members of the Canadian Muslim community. When she complained to the Director General, he allegedly rationalized William's comments, suggesting that security threats emanate from second and third generation Canadian Muslims like Bahira. This confirmed to her that the official attitude in the office was that "all Muslims are suspect, and while they will appear to blend in, they could strike at any time."³⁴

Bahira alleged that although she never gave the service any reason to doubt her commitment to the work of the service, her loyalty was not appreciated. In her performance assessment in 2004 – the year she adopted the hijab – William changed one of her supervisor's 4 out of 4 ratings to 1 out of 4 for no reason. Bahira alleged that shortly after that, she was abruptly transferred out of the Counter-Terrorism branch and into Counter-Intelligence, where she had no experience.³⁵ She worried that

²⁸ *Ibid* at para 64.

²⁹ *Ibid* at para 65.

³⁰ Statement of Defence, *John Doe #1, Jane Doe #1, John Doe #2, John Doe #3 and Jane Doe #2 and Her Majesty the Queen in Right of Canada*, Court File No. T-1032-17, Federal Court, Toronto at para 41 [Defence].

³¹ Claim, *supra* note 3 at para 65.

³² *Ibid* at para 54.

³³ Pseudonym used in Claim.

³⁴ Claim, *supra* note 3 at para 63.

³⁵ *Ibid* at paras 66–67.

this created the impression that she had done something wrong and was not trusted by managers.

Bahira's feeling that she was being targeted for differential treatment increased in 2005 when she alleged that she was asked to attend an interview and take a polygraph test.³⁶ While this sort of testing is routine for obtaining or renewing an individual's security clearance, Bahira alleged that her clearance was not up for review until 2007. She was given no reason as to why she was being reviewed two years early. Bahira's interview turned into a 10-hour interrogation about her involvement in the Muslim community. She alleged she was asked about her family, her decision to wear hijab, her prayer habits, and her personal views about the conflict in Afghanistan, suicide bombing, and the Muslim Brotherhood. She believed at the time that the service was looking for a reason to revoke her security clearance and terminate her employment.

In 2005, Bahira filed an unofficial complaint about William and another manager in which she outlined her experience of discrimination and harassment, noting numerous other employees with similar experiences. The service allegedly responded by stating that management had full confidence in the quality of its cross-cultural training.³⁷ These words seemed hollow when a false rumour began circulating that Bahira was "friends" with Omar Khadr's family.³⁸ One colleague told Bahira that she had stopped speaking to her for three years because she believed the rumour to be true.³⁹ It appeared that the only basis for the rumour was the fact that Bahira, like the Khadr family, was Muslim.

Bahira eventually found herself again under William's authority. She alleged that he deliberately stymied her career by routinely dismissing her initiatives and blocking her training opportunities.⁴⁰ She alleged that "anti-Islamic comments and views were commonplace" in the office. One of her colleagues allegedly displayed a cartoon depicting a dog in Arab garb with the caption, "Prophet Mohammed of Islam is a dog and Jerusalem is ours".⁴¹ A supervisor allegedly told her that "Muslim women are inferior" and that then-US President Barack Obama was a member of the Muslim Brotherhood.⁴² She claimed to never have reported these incidents to managers because she had no confidence they would be taken seriously.⁴³

³⁶ *Ibid* at para 69.

³⁷ *Ibid* at para 70.

³⁸ *Ibid* at para 76.

³⁹ *Ibid*.

⁴⁰ *Ibid* at para 79.

⁴¹ *Ibid* at para 55.

⁴² *Ibid* at para 86.

⁴³ *Ibid*.

By late 2016, colleagues began to communicate more openly with one another about discrimination and harassment in the workplace. Bahira had believed in her work, had committed personal sacrifices for the service, but decided she could no longer continue under intolerable conditions that showed little potential for change. In January 2017, Bahira went on sick leave and filed a complaint alleging religious and ethnic harassment.⁴⁴ She never returned to work at CSIS.

(ii) *Alex*

Alex, a gay man with a Muslim spouse, alleged a decade of ongoing homophobic and Islamophobic harassment and ridicule in the Toronto Region CSIS office, where he worked as an Intelligence Officer.⁴⁵ He alleged that members of management frequently demeaned his sexuality in day-to-day communications and made derogatory comments about Muslims, which he took personally on account of having a Muslim spouse.⁴⁶ In a 2014 meeting with all staff present, a manager allegedly joked that Alex “[took] it from behind”.⁴⁷ Managers allegedly even called him names like “fag” or “gay boy” to his face, while one manager said to him, “careful your Muslim in-laws don’t behead you in your sleep for being homo.”⁴⁸

In June 2016, Alex filed a harassment complaint pursuant to CSIS’s internal *Resolution of Harassment Complaints Procedure*. In its Statement of Defence, the Attorney General admitted that Alex brought a harassment complaint for “inappropriate language in informal communications”, and stated that the service appointed an independent third-party investigator who upheld Alex’s complaint.⁴⁹ The outside investigator found that the workplace culture was like an “old boy’s club”.⁵⁰ There was pervasive fear of reprisal for raising discrimination and harassment issues, as managers largely disregarded complaints.⁵¹ The report also found that this culture included regular consumption of alcohol in the office and discriminatory teasing.⁵²

Although the independent investigator’s report into Alex’s complaint is not public, the service provided a copy to Alex, and it is cited at length in the Claim. The investigator interviewed numerous witnesses – other employees at CSIS’ Toronto Region Office – who were reported to have made the following observations to the investigator:

⁴⁴ *Ibid* at paras 92–96.

⁴⁵ *Ibid* at para 13.

⁴⁶ *Ibid* at para 14.

⁴⁷ *Ibid* at para 16.

⁴⁸ *Ibid* at para 15.

⁴⁹ Defence, *supra* note 30 at paras 25–27.

⁵⁰ Claim, *supra* note 3 at para 39.

⁵¹ *Ibid*.

⁵² *Ibid*.

“...there is racism, discrimination and harassment in TR [Toronto Region] and the Service... people get away with disrespecting and bullying minorities” [...]
 “Big fear here is reprisals; peoples’ lives are at risk because of drunken decisions” [...]
 “People are afraid to speak up; like hiding under [a] veil of secrecy and getting away with stuff” [...]
 “The public would be shocked... if they only knew; we keep our own secrets”⁵³

The observations the investigator heard as a result of the interviews conducted into Alex’s complaint would be echoed in a later assessment of the workplace climate at the Toronto Region office, discussed below. None of these allegations were denied in the Defence, and ultimately the CSIS director offered a general public statement that was not a denial and which admitted that the workplace climate needed improvement.⁵⁴

(iii) *Cemal*

Cemal was a Muslim analyst with 22 years’ service with CSIS when he joined the claim. He described the workplace as “hostile and toxic” to Muslims and other minorities. He described his perception that, “it is a deeply ingrained prejudice of distrust for Muslims which has meant that Muslims are used and managed as needed, but are not part of the team.”⁵⁵ Cemal claimed that in the office there was a poster prominently hung depicting the “Ninety-Nine Names of Allah” (holy to Muslims) with a picture of the burning twin towers of the World Trade Center taped to it.⁵⁶ He claimed to have once overheard a supervisor brag that she had rejected job candidates due to their Muslim sounding names, and on another occasion heard a manager tell an employee, “If you don’t like things in Canada, you should return to your country”.⁵⁷

The anti-Muslim tone in the office affected Cemal’s work. In 2006, he alleged that he noticed he was not given access to files, despite the fact that his unit was overloaded. Upon speaking with colleagues, he learned that he was being denied access to certain files because management viewed him with suspicion because he was a Muslim.⁵⁸ He alleged that the cloud of suspicion prevented him from advancing in the ranks of the service, noting that in 22 years of service, he pursued at least 10

⁵³ *Ibid* at para 42.

⁵⁴ Workplace Climate Assessment, *supra* note 4; see also admissions by CSIS Director Vigneault in Matthew Dubé, “Liberals Must End the ‘Old Boys’ Club’ Culture of CSIS” (26 October 2017), NDP Newsroom (website), online: <http://www.ndp.ca/news/liberals-must-end-old-boys-club-culture-csis> [Dubé, “Must End the ‘Old Boys’ Club’ Culture”].

⁵⁵ Claim, *supra* note 3 at para 98.

⁵⁶ *Ibid* at para 99.

⁵⁷ *Ibid*.

⁵⁸ *Ibid* at para 100.

opportunities for advancement and was only ever successful in a single temporary post.⁵⁹ He initially believed that he could be successful if he worked hard and improved, but with time, he noticed employees with considerably less service than him surpassing him in rank. He had spent his entire career in a non-supervisory position.⁶⁰

In 2016, as revelations about CSIS' internal culture were surfacing, Cemal spoke with Alex. He learned from Alex that the Deputy Director General of the Toronto Region, the Toronto Region Deputy Chief of Counter-Terrorism, the Toronto Region Deputy Director General of Corporate Services, and several other Toronto managers, regularly referred to him as "Muslim Brotherhood".⁶¹ Alex also confirmed to Cemal what he had long suspected: sometime in 2007–2010, during a high-profile CSIS investigation, two senior managers allegedly told Alex and other employees that "[w]e cannot trust [Cemal], since he was part of that community and socialized with our targets' friends."⁶²

Cemal alleged that, in December 2016, a senior manager launched an investigation into his work performance and attendance,⁶³ including an audit of Cemal's internet browser history. He claimed that this was highly unusual, invidious treatment. He was aware that there were only two other internet audits conducted in the Toronto Region office and both were Muslim employees.⁶⁴ The investigation left Cemal devastated, and he filed an internal complaint of discrimination.⁶⁵ He could no longer endure the workplace.⁶⁶ Diagnosed with stress, anxiety, and depression, in January 2017, Cemal went on medical leave and never returned to work at CSIS.⁶⁷

(iv) *Emran*

Emran was an analyst of Moroccan Muslim background who worked for CSIS for 12 years, beginning in 2005. Emran alleged that he experienced constant harassment, isolation and ridicule within CSIS throughout his career on the basis of his Arab Muslim background. The claim described his role within CSIS as a paradox: "he is both a necessary tool to CSIS and the work it seeks to do, and at the same time he is

⁵⁹ *Ibid* at para 105.

⁶⁰ *Ibid* at para 113.

⁶¹ *Ibid* at para 119.

⁶² *Ibid* at para 120.

⁶³ *Ibid* at para 122.

⁶⁴ *Ibid* at para 123.

⁶⁵ *Ibid* at para 125.

⁶⁶ *Ibid* at para 121.

⁶⁷ *Ibid* at para 127.

not trusted by many powerful individuals in the organization”, because he fits a profile.⁶⁸

When assigned to a new manager, William (presumably the same William detailed in Bahira’s claim), Emran claimed he immediately faced suspicion because of his ethnic and religious background. He alleged that William persisted in spreading false rumours that Emran was a mole. This had the effect of making his colleagues suspicious of him, and he suffered isolation as a result. Moreover, he claims to have endured repeated taunts and jabs from colleagues and managers, including “Watch out for the Moroccan spy”, “All Muslims are blood thirsty murderers”, and “All Muslims are terrorists”.⁶⁹

On an international posting in 2011, Emran’s new manager, Jeff, was allegedly openly hostile to Muslims and Arabs, making no secret of his contempt for Emran. Near the beginning of his posting, Emran alleged that Jeff told him, “I want you to take care of the liaison with the ‘Sand Monkeys’ because you are one of theirs and you speak their language”.⁷⁰ He claimed that Jeff routinely referred to him and other Arabs and Muslims as “Useless Sand Monkeys”.⁷¹

When he returned to Canada in 2013, Emran reported his claims of harassment but received no support from his superiors. He further alleged that when he encountered two senior managers in an elevator, one said to the other, referring to Emran, “I’m gunna fucking target this guy and the director said he won’t oppose it”.⁷² In the period that followed, Emran alleged that the workplace became increasingly difficult for him to endure. Untrue rumours swirled that he was a “sexual deviant” and was “dangerous”, which he alleged severely impacted his sense of personal security.

In 2014, Emran took off several months for mental health recovery. Returning to work later that year, he alleged that he continued to face hostility from his colleagues and career obstructions from his managers.⁷³ In September 2016, Emran again went on medical leave due to the stress, anxiety and depression caused by his frustration with workplace discrimination and the unyielding cloud of suspicion on account of his Arab and Muslim identity.⁷⁴ In January 2017, after Alex initiated his complaint, Emran claimed that he was contacted by a former supervisor who warned him against filing a complaint, saying, “You will suffer more, believe me. Not the kind of people you want to go against”.⁷⁵ Emran alleged that a manager contacted him

⁶⁸ *Ibid* at para 129.

⁶⁹ *Ibid* at paras 132, 133, 135, 137.

⁷⁰ *Ibid* at para 140.

⁷¹ *Ibid*.

⁷² *Ibid* at para 145.

⁷³ *Ibid* at paras 149–150.

⁷⁴ *Ibid* at para 155.

⁷⁵ *Ibid* at para 156.

multiple times on the same day asking him to return to work, promising there were “promotions coming” and that he would have “his choice of foreign postings”.⁷⁶ Emran never returned to work at CSIS.

(v) *Dina*

Dina was hired as an Intelligence Officer with CSIS in 2001. She is Francophone and claimed to be the first black woman to work at CSIS. She is not Muslim. She alleged that, while she was well nurtured and supported early in her career, she became the subject of sustained harassment and discriminatory treatment by her colleagues, superiors, and subordinates when she assumed supervisory duties. The claim alleged that, from the time she was promoted to supervisor level, her managers treated her with hostility and resentment. She claimed they did everything they could to undermine her authority in the workplace and poison the attitudes of those working under her supervision.⁷⁷ For nearly a decade, Dina battled the stereotype that she did not deserve her job and that she was only promoted as a “token” because of her race.

Dina alleged that the undermining of her authority made her vulnerable to bullying by those she supervised. In June 2016, Dina filed a complaint against one of her subordinates, who had allegedly challenged Dina’s authority, told her that no one likes her, and yelled at her in front of her subordinates.⁷⁸ She alleged that managers encouraged her to drop her harassment complaint and instead to pursue a misconduct investigation, which management subsequently dismissed as unfounded.⁷⁹ She was then moved to a new branch, despite Dina’s concerns that her reputation had been damaged.⁸⁰ Indeed, on arrival at her new job, Dina claimed to have learned that three individuals who were reporting to her had sought a transfer after becoming aware that she would be their supervisor. The harm her managers did to her reputation followed her in this new role.⁸¹ In 2016, she learned that Alex had filed a harassment complaint, which gave her the courage to talk about her own discrimination. She claimed that Alex confirmed her worst fears about her reputation in the workplace. Senior managers in Toronto allegedly openly referred to her as “the problem”.⁸²

Devastated by the revelations that her managers were against her, she realized that she could not continue in her job. In January 2017, she went off work due to the psychological and emotional impact of discrimination. She never returned to CSIS.

⁷⁶ *Ibid* at para 157.

⁷⁷ *Ibid* at paras 160–163.

⁷⁸ *Ibid* at para 167.

⁷⁹ *Ibid* at paras 170–172.

⁸⁰ *Ibid* at para 172.

⁸¹ *Ibid* at para 173.

⁸² *Ibid* at para 175.

CSIS ‘Workplace Climate Assessment’ and public admission

In March 2017, just a few months before the employees’ civil claim was filed, but at a time when the service was aware of the allegations,⁸³ Michel Coulombe announced his retirement from his post as CSIS Director, which he had held since 2013. Prime Minister Trudeau named David Vigneault the new Director. Vigneault had not come up as a spy, but rather had been an executive assistant to the Deputy Minister of the Department of National Defence during the Chrétien Liberal era. He had also worked for the Communications Security Establishment (CSE), CSIS, the Canada Border Services Agency (CBSA) and, most recently, the Privy Council Office.

In the period between the announcement of Coulombe’s retirement and Vigneault’s start date in June 2017, CSIS conducted a workplace climate assessment study into the Toronto Regional Office and Districts.⁸⁴ A climate assessment is an informal and confidential procedure to collect information and reach conclusions about workplace issues without conducting a formal investigation or making orders. The process consisted of anonymous interviews with an undisclosed number of employees and managers from various units and sections within the Toronto region office. While the assessment was not formally linked to the issues raised in the claim, which was commenced one month after the climate assessment was completed, the claim alleges information began swirling in late 2016 (when the claimants learned about each other and began pushing for accountability). Thus, at the time the decision to conduct the workplace climate assessment was taken, CSIS was presumably already aware of general workplace concerns about harassment and discrimination and possessed specific knowledge about the claimants’ allegations. Indeed, by January 2017, all of the claimants were off work on medical leave as a result of the stress of having tried and failed to have their grievances addressed. The workplace climate assessment was conducted between April and June, 2017.

The findings of the report confirmed allegations made by the five claimants. It described a culture of bullying, reprisal, discrimination, and harassment based on religion, ethnicity, sex and sexuality. It noted, for example, that there are “some pockets where jokes and discriminatory comments are still being made with regards to ethnicity and communities being monitored. There is still some bias against women and a general lack of thoughtfulness toward cultural differences and sensitivities.”⁸⁵ The report also noted that career advancement was “solely based on relationships and not competencies or experience”, and many workplace decisions were made during drinking sessions with the “in” group. The report echoed the internal investigation describing the Toronto CSIS office as an “old boys’ club climate” with frequent “yelling, swearing, disrespectful, demeaning, misogynistic, offensive and

⁸³ See Michelle Shephard, “Head of Spy Agency CSIS Admits ‘Retribution, Favouritism, Bullying’ in Workplace” *The Toronto Star* (25 October 2017), online: <<https://www.thestar.com>> (reporting that CSIS was aware of the allegations “months” before the claim was filed) [Shephard, “Head of Spy Agency”].

⁸⁴ Workplace Climate Assessment, *supra* note 4.

⁸⁵ *Ibid.*

inappropriate comments and jokes about employees from other employees but also managers.”⁸⁶

The report was not made public immediately. Thus, the claim filed in July 2017 was the first public glimpse into the allegations of racism, Islamophobia, and homophobia by staff and managers within the service. Canadians had never before heard such details about the inner CSIS culture, though there was some basis to infer as much from the findings of the Arar and Iacobucci inquiries. The day after the claim was filed, two former CSIS employees, Francois Lavigne and Michel Juneau-Katsuya, told the CBC they were not surprised by the allegations in the claim. Lavigne said that in his time with the service, homophobia and discrimination against minorities was rampant, and it was part of the culture to keep quiet when witnessing it. He too said that it works like an “old boys” network: “If you’re part of the group, then you shut your mouth and you don’t say anything.... That’s part of the culture.” Juneau-Katsuya described bias and discrimination within the service as a “systemic problem”.⁸⁷

The September case conference was not reported in the press until October 24, 2017, when the transcript of the case conference was filed in Federal Court. The transcript describes Department of Justice lawyers asserting that the government was attempting to reach a resolution with the claimants.⁸⁸ This might explain why it was reluctant to file a defence. The day after the transcript was released, Vigneault publicly admitted that the service was operating a workplace in which “retribution, favouritism, bullying and other problems” were standard practice.⁸⁹ He did not specifically address the claim, but the implications were clear. Vigneault released a partially redacted executive summary of the workplace climate assessment report that had been completed in June 2017. Both the timing of Vigneault’s admission and the substance of the investigator’s findings provided objective validation of many of the claimants’ allegations, and the claimants credited their case for prompting Vigneault’s public admission. The public safety critic for the federal New Democratic Party (NDP) described the report’s findings as “shocking” and called on the Minister to take “concrete actions” and to “immediately launch a comprehensive and credible investigation into claims of rampant and persistent discrimination within CSIS and the impacts it has on employees’ working conditions, and on the quality of work produced.”⁹⁰

⁸⁶ *Ibid.*

⁸⁷ Shanifa Nasser, “Veil of Secrecy Prevents CSIS Employees from Speaking Out, Say Ex-Officers”, *CBC News* (14 July 2017), online: <www.cbc.ca/news>.

⁸⁸ See Michelle Shephard, “Judge Slams Ottawa for Delays Over \$35-million CSIS Lawsuit Alleging Workplace Islamophobia, Racism, and Homophobia”, *The Toronto Star* (24 October 2017), online: <<https://www.thestar.com>>.

⁸⁹ Shephard, “Head of Spy Agency”, *supra* note 83.

⁹⁰ Dubé, “Must End the ‘Old Boys’ Club’ Culture”, *supra* note 54.

The Defence

The Liberal Party of Canada's 2015 election platform promised to "build a government as diverse as Canada."⁹¹ That promise manifested in the most multicultural and representative House of Commons ever, as well as a Cabinet that aspired to reflect the people it represents. Yet, the new government inherited an antiquated national security intelligence service. The Canadian Human Rights Commission conducted employment equity audits of CSIS in 2011 and 2014.⁹² The 2014 CHRC Report found that visible minorities and indigenous people were under-represented and faced "attitudinal barriers", inadequate support, and a lack of training necessary to advance into management.⁹³ The conclusions were both shocking and predictable: visible minority representation in senior management was nil⁹⁴ at a time when around one in five Canadians was a visible minority.⁹⁵ The report also highlighted that only 17% of senior managers in CSIS were women, a decrease of 13 per cent since 2009. The report pointed to the institutional culture, undervalued minorities and women, and reproduced attitudinal barriers as the reason so few women and minorities were being hired or promoted in the organization. CSIS was evidently one of the least diverse agencies within the public service.

The government's Statement of Defence to the civil claim was sparse, and it avoided getting into the merits of the allegations. It contained blanket denials of the claim, and it restated the official position that CSIS is "committed to providing a healthy and respectful workplace of inclusion, where diversity is representative of its strength."⁹⁶ It alleged that CSIS does not tolerate "harassment, discrimination or bullying under any circumstances" and referenced its *Employee Code of Conduct* and the service's policy on building a *Safe, Healthy and Respectful Workplace*, as indicators of the institutional commitment to inclusion.⁹⁷

⁹¹ Aaron Wherry, "How the Federal Government is Slowly Becoming as Diverse as Canada", *CBC News* (29 December 2017), online: <www.cbc.ca/news>.

⁹² Laurent Bastien, "Watchdog Condemns Lack of Diversity in CSIS Senior staff", *The Globe and Mail* (1 July 2016), online: <<https://www.theglobeandmail.com>> (reporting on records of the two employment equity audits obtained by the newspaper).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ According to the 2011 census, 19.1% of Canadians were visible minorities. See Statistics Canada, National Household Survey, "Table 2: Visible Minority Population and Top Three Visible Minority Groups, Selected Census Metropolitan Areas, Canada, 2011", online: <www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/2011001/tbl/tbl2-eng.cfm>. According to the 2016 census, 22.3% of Canadians were visible minorities: see Statistics Canada, "Immigration and Ethnocultural Diversity Highlight Tables", online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/imm/Table.cfm?Lang=E&T=41&Geo=00>>. It is also worth noting that, according to the 2016 census, more than half of all residents of the Greater Toronto Area cities of Toronto, Brampton, Mississauga, Markham, Richmond Hill, and Ajax were visible minorities.

⁹⁶ Defence, *supra* note 30 at para 1.

⁹⁷ *Ibid.*

While the Attorney General admitted “inappropriate language” was used in informal communications between employees in the Toronto region,⁹⁸ the defence denied that the service “perpetrated or tolerated religious bigotry or religious sensitivity in the workplace”, or that there was a culture of reprisal against those raising complaints.⁹⁹ The Crown pointed out that each plaintiff raised “disparate, unrelated allegations”, and claimed that each had been addressed by the service through appropriate procedures.¹⁰⁰ There were no particulars given as to what the service considered “appropriate” to address the allegations.

Cases that settle out of court do not result in factual findings or public orders. They rarely include admissions of wrongdoing or public apologies. They might impact institutional behaviour, and while there is potential for it to result in internal accountability, none of this is certain, and little is publicly known about CSIS’ internal work. Because details about the terms of settlement are confidential, it is impossible to know whether the settlement was fair to the parties or was in the public interest. Unlike settlements, adjudicated decisions involve a full assessment of facts and produce binding, publicly disseminated conclusions. Damage awards and other forms of compensation are spelled out.

The interests at play in civil cases make it highly unlikely that a case like the CSIS lawsuit would ever reach a trial. There is validity to the argument that confidential settlements concerning actors in the public service are unwarranted in circumstances such as these, where the public interest – and indeed the interests of national security – may demand greater transparency. Presumably, the public interest in the widely reported cases of Arar (\$10 million¹⁰¹), Almalki et al. (\$31.25 million split three ways¹⁰²) and Khadr (\$10.5 million¹⁰³) motivated the decision to dispense with confidentiality over the financial terms of settlement. In the lesser-known case of Benatta, confidentiality was maintained when news of settlement was publicly announced in March 2015.¹⁰⁴

It is worth turning to the facts of these cases to better understand Canadian Muslim experiences with counter-terrorism in the post-9/11 period.

⁹⁸ *Ibid* at para 2.

⁹⁹ *Ibid* at paras 11–12.

¹⁰⁰ *Ibid* at para 3.

¹⁰¹ “Ottawa Reaches \$10M Settlement with Arar”, *CBC News* (25 January 2007), online: <www.cbc.ca/news>.

¹⁰² The Canadian Press, “Liberals Give \$31 Million in Federal Compensation to Three Canadians Tortured in Syrian Custody”, *National Post* (26 October 2017), online: <nationalpost.com>.

¹⁰³ Robert Fife, “Ottawa Pays Out \$10.5-million to Khadr amid Potential Legal Battle”, *The Globe and Mail* (6 July 2017), online: <<https://www.theglobeandmail.com>>.

¹⁰⁴ See Jim Bronskill, “Refugee Sent to US After 9/11 Settles Lawsuit Against Ottawa”, *The Globe and Mail* (9 March 2015), online: <<https://www.theglobeandmail.com>>.

III. Official Misdeeds and Muslim Vulnerability

This part summarizes a legacy of abuse that indelibly coloured the Canadian Muslim experience with, and perception of, counter-terrorism policy and action after 9/11. It contextualizes the opinions of Canadian Muslims and argues that the effect of a war on terror that was seen by many to be a global war on Muslims produced domestic scapegoating that exacted considerable costs. Those costs included heightened social and political vulnerability for Canadian Muslims and their concomitant loss of faith in CSIS.

In 2001, the Canadian security establishment knew virtually nothing about the threats posed by global radical Islamic political movements.¹⁰⁵ CSIS' focus on Muslims was largely spurred by pressure from the US to keep up with its "aggressive approach" in the war on terror.¹⁰⁶ Indeed, from the very beginning, Canada's national security policy and anti-terrorism legislation was shaped by US policy and discourse.¹⁰⁷ Speaking on Parliament Hill three days after 9/11, Prime Minister Chrétien told the US ambassador that the countries' "friendship has no limit", affirming Canada's loyalty, pledging that "we will be with the United States every step of the way."¹⁰⁸ Within two weeks of Chrétien's speech, a British intelligence report outlining the case against al Qaeda was adopted by Canada and the US.¹⁰⁹ Before the end of the year, the United States would adopt the *PATRIOT Act* (signed by the President on October 26, 2001),¹¹⁰ the United Kingdom would enact the *Anti-terrorism, Crime and Security Act 2001* (received royal assent on December 14, 2001),¹¹¹ and Canada's Parliament would pass the *Anti-terrorism Act* (received royal assent on December 18, 2001).¹¹²

When the *ATA 2001* came into force, then-Justice Minister Anne McLellan reassured Canadians that the law "is not a war against any one group or ethnicity but against terrorism" and that "[d]iversity is one of Canada's great strengths and we are

¹⁰⁵ Wesley Wark, "'Worth Repeating Over and Over Again': The Canadian Search for a National Security Strategy" in Kanishka Research Team, *supra* note 23 at 65 [Wark, "Worth Repeating"].

¹⁰⁶ *Arar Inquiry*, *supra* note 9 at 86.

¹⁰⁷ See Roach, *9/11 Effect*, *supra* note 15 at 186, 361; Maureen Duffy, "Discourse of the Other as a Foundational and Continuing Element of Legal Norms in Anti-Terrorism Measures" in Anna Gonerko-Frej and Małgorzata Sokół, eds, *Ideological Battlegrounds – Constructions of Us and Them Before and After 9/11, Volume 2: Perspectives in Language* (Newcastle: Cambridge Scholars Publishing, 2016) 53 at 62 [Duffy, "Discourse of the Other"].

¹⁰⁸ "The Prime Minister's Words", *The Globe and Mail* (15 September 2001), online: <<https://www.theglobeandmail.com>>.

¹⁰⁹ Wark, "Worth Repeating", *supra* note 105 at 66.

¹¹⁰ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*, Pub L No 107 – 56, 115 Stat 272 (2001).

¹¹¹ *Anti-terrorism, Crime and Security Act 2001* (UK), c 24.

¹¹² *ATA 2001*, *supra* note 13.

taking measures to protect it.”¹¹³ Both of these claims would be seriously tested in the weeks and years to come. By late 2001, Canadian Special Forces were in Afghanistan alongside American troops – a secret that only came to light through media leaks.¹¹⁴ As Canada joined the US war in Afghanistan, evidence of anti-Muslim backlash began to appear, prompting then-Finance Minister, Paul Martin, to acknowledge “acts of intolerance within our own country” and to express concern for “[i]ndividuals... targeted because of the colour of their skin or the practice of their faith.”¹¹⁵ In addition to the social ramifications of the war on terror, political leaders at the time failed to realize that the tendency to scapegoat Muslims would take hold within the very institutions that were charged with ensuring national security. While advocacy groups within the Canadian Muslim community complained about CSIS’ over-zealousness, the cascading effects of social stigma, hate crimes, and discrimination accumulated.¹¹⁶

Collusion in Rendition

In the immediate months after 9/11, the RCMP created Project A-O, an investigative unit looking into the activities of Ottawa resident, Abdullah Almalki, who was suspected of being associated with Al Qaeda.¹¹⁷ The project was also tasked with investigating any leads about the threat of a second wave of 9/11 style attacks.¹¹⁸ This investigation ultimately was responsible for the rendition to Syria and the subsequent torture of at least four Canadian Muslim men. In all cases, the trigger was a piece of information later determined to be false or unreliable.¹¹⁹ Moreover, the information on which CSIS and the RCMP operated appeared to be motivated by a hardline “war on terror” mindset.¹²⁰

The most well-known of the cases concerned Maher Arar, a naturalized citizen who, with Canadian assistance, was illegally transferred in 2002 by the US to

¹¹³ Wark, “Worth Repeating”, *supra* note 105 at 68.

¹¹⁴ *Ibid* at 67.

¹¹⁵ *Ibid* at 68.

¹¹⁶ The work of the National Council of Canadian Muslims is particularly notable in this regard. See e.g. “Parliamentary Submission on Canada’s National Security Framework”, submitted to House of Commons Standing Committee on Public Safety and National Security (15 February 2017), online: <https://www.canadiandifference.ca/resources/Muslims_in_Canada/NCCM-Testimony-National-Security-15Feb2017.pdf> (summarizing the organization’s advocacy efforts with respect to Muslim targeting in counter-terrorism). See also Baljit Nagra, *Securitized Citizens: Canadian Muslims’ Experiences of Race Relations and Identity Formation Post-9/11* (Toronto: University of Toronto Press, 2017).

¹¹⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Volume I* (Ottawa: Public Works and Government Services Canada, 2006) at 16, online: <epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf> [*Arar Background Report, Vol I*].

¹¹⁸ *Ibid* at 16–17.

¹¹⁹ *Iacobucci Inquiry*, *supra* note 10 at 109–12, 194, 254, 349–50, 400–01, 442.

¹²⁰ *Ibid*.

Syria, where he was tortured for nearly a year.¹²¹ It was later revealed that false assumptions about his associations within Ottawa's Muslim community had turned an innocent man into a suspected terrorist. Information disclosed in the course of the public inquiry implicated Canadian officials in poor intelligence work and the production of misinformation.¹²²

Even after Arar returned to Canada, the Commission of Inquiry found that some government officials leaked information to the media, seeking to portray Arar as someone who had been involved in terrorist activities.¹²³ The RCMP were found to have leaked false information to portray Arar as someone who was never tortured and had gone to Syria voluntarily.¹²⁴ Arar was later cleared of any association with terrorism, and received a multi-million dollar settlement and an official apology from the Prime Minister.¹²⁵ Even so, the damage had been done and the spectre of official suspicion followed him.¹²⁶ The Inquiry noted that the leaks of false and damaging information about him "contributed to his ongoing difficulty in finding gainful employment in his field."¹²⁷

The Commission of Inquiry paid special attention to harm caused by mere allegations of suspected "Islamic extremist" and "jihadist". It warned that such terms invite findings of guilt by association.¹²⁸ The Inquiry found that the investigation's "major shortcoming was that, with few exceptions, the officers assigned to Project A-O... lacked experience and training in conducting national security investigations and in addressing human rights and cultural sensitivity issues that might arise in such investigations."¹²⁹ The Report recommended clear, written policies against profiling because "race, religion or ethnicity... may expose [individuals] to investigation."¹³⁰ The findings showed how a series of inter-dependent decisions across jurisdictions, without any meaningful mechanism for fact-checking or internal review,¹³¹ could

¹²¹ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Factual Background, Vol 2* (Ottawa: Public Works and Government Services Canada, 2006) at 503, online: <www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf> [*Arar Background Report, Vol 2*]; *Arar Inquiry*, *supra* note 9 at 54–59

¹²² *Arar Background Report, Vol 1*, *supra* note 117 at 13–14, 324–25.

¹²³ *Ibid* at 46–47.

¹²⁴ *Ibid* at 46–47, 60.

¹²⁵ "Harper's Apology 'Means the World': Arar", *CBC News* (26 January 2007), online: <www.cbc.ca/news/>.

¹²⁶ *Arar Background Report, Vol 2*, *supra* note 121 at 485–90.

¹²⁷ *Ibid* at 492.

¹²⁸ *Arar Inquiry*, *supra* note 9 at 336–37.

¹²⁹ *Ibid* at 17.

¹³⁰ *Ibid* at 356. See also Roach, *9/11 Effect*, *supra* note 15 at 63–76 (discussing United Nations' Security Council's counter-terrorism resolutions, and how their formulations and focuses can improve the protection of human rights).

¹³¹ *Arar Inquiry*, *supra* note 9 at 120–21.

combine to produce grave consequences. For example, the Commission concluded that Arar and his wife had been incorrectly flagged by security agencies as “Islamic extremists” with links to al Qaeda, despite no factual basis for this link.¹³² In the war on terror, false information could morph into fact, and then be reproduced uncritically through secret information-sharing. This pattern repeated itself in numerous cases.

Former Supreme Court Justice Frank Iacobucci was appointed to lead a Commission of Inquiry into the conduct of Canadian officials in the cases of falsely fingered terrorists, Abdullah Almalki and Muayyed Nureddin, who were tortured in Syria, and Ahmad Abou El-Maati, who was tortured in Syria and Egypt. The Inquiry found that the unlawful treatment of these men was caused by an intelligence overreaction based on conjecture and associational suspicions. For example, the report noted with criticism that “CSIS did not describe Mr. Elmaati as a person “*suspected*” or “*believed*” to be involved in the Islamic extremist movement, but a person *involved* in the Islamic extremist movement.”¹³³ In the case of Almalki, the report found the RCMP had described him as an “Islamic extremist” with ties to al Qaeda “without taking adequate measures to ensure that it was accurate, reliable or properly qualified.”¹³⁴

A less known rendition case is that of Benamar Benatta, an engineer and former military pilot who fled political upheavals in Algeria in search of a better life in Canada.¹³⁵ He arrived at Niagara Falls on September 5, 2001, where he claimed asylum, and was detained for further questioning. On September 11, 2001, he was questioned by US authorities and then unlawfully transferred across the Canada-US border in the middle of the night. In US detention, he spent time in solitary confinement, was shackled, beaten, accused of being complicit in 9/11, and subjected to conditions described by the United Nations as akin to torture – all on the basis of misinformation provided by agents who, knowing their information was false, later allegedly tried to cover up their misconduct.¹³⁶ After five years in detention and never having been charged with a crime,¹³⁷ Benatta was set free to return to Canada where he was permitted to continue his claim for refugee status, which was ultimately

¹³² *Ibid* at 24.

¹³³ *Iacobucci Inquiry*, *supra* note 10 at 351 [emphasis added]. Justice Iacobucci also noted that “While I recognize that the weeks following 9/11 posed unprecedented challenges for those involved in national security investigations, it is precisely this environment that made a factual assertion about someone’s involvement in the Islamic extremist movement particularly serious at this time.”

¹³⁴ *Ibid* at 402.

¹³⁵ “Benamar Benatta” (24 March 2017) *Center for Constitutional Rights* (website), online: <<https://ccrjustice.org/benamar-benatta>>.

¹³⁶ *Ibid*; *Benatta v Canada* (16 July 2007), Toronto 07-CU-3366BPD3 (SCJ) (Statement of Claim) at paras 117–27 (the specific allegations were never proven in court as a result of a 2015 settlement of the claim) [*Benatta Claim*].

¹³⁷ Benatta was detained for 1772 days; *ibid* at para 89.

successful.¹³⁸ In 2007, Benatta filed a civil law suit against Canada, which was settled in 2015 for an undisclosed amount.¹³⁹

Finally, the most notorious case is that of Omar Khadr. In May 2015, Khadr was released on bail – a free man after 13 years. The former child soldier and US “enemy combatant”¹⁴⁰ captive had been convicted of “murder” in the death of an American soldier in a firefight in Afghanistan. Khadr spent a decade in detention at Guantanamo Bay, Cuba, where the US maintains a prison considered by experts to exist in a “legal black hole”.¹⁴¹ In 2008, the Supreme Court of Canada unanimously upheld a Federal Court of Appeal judgment ruling that the government had breached Khadr’s section 7 *Charter* rights by failing to turn over records related to his time in US captivity.¹⁴² The government argued that turning over the documents would imperil national security, but the facts suggested that Canada was trying to cover up misdeeds. Indeed, after the Court ordered the government to turn over the records, it ruled that CSIS’ interrogation of Khadr at Guantanamo Bay violated “the most basic Canadian standards” for treating youth criminal suspects.¹⁴³ Despite this ruling, the Conservative government maintained that Khadr was a convicted murderer who should remain in prison, and delayed his release by several years.¹⁴⁴ In 2013, Khadr filed a civil suit seeking \$20 million in damages arising from Canadian cooperation in the violation of his constitutional rights.¹⁴⁵ In 2017, the Attorney General issued a formal apology and settled to pay Khadr \$10.5 million in compensation.¹⁴⁶

Good Muslim/Bad Muslim

The legacy of Canada’s counter-terrorism failings and constitutional breaches is one that has cost Canadians millions in legal settlements and has exacted social costs too. The 2015 change in government was welcomed by many as a step towards rebuilding

¹³⁸ “Canadian Involvement in Benamar Benatta’s Ordeal Cries Out for Review” (18 April 2007), *Canadian Council for Refugees* (Press Kit), online: <ccrweb.ca/sites/ccrweb.ca/files/static-files/eng/media/pressreleases/benattapresskit.pdf>.

¹³⁹ *Benatta Claim*, *supra* note 136.

¹⁴⁰ The concept of “enemy combatant” is controversial. Critics maintain that it was invented by the United States to facilitate the improper treatment of detainees in violation of international law. See Kate Frisch, “‘During War, the Law is Silent,’ or Is It?: Examining the Legal Status of Guantanamo Bay” (2016) 15:1 *Richmond J Global L & Bus* 73 at 77–78. See also Richard Jackson, “Security, Democracy, and the Rhetoric of Counter-Terrorism” (2005) 1:2 *Democracy & Security* 147 at 156, DOI: <10.1080/17419160500322517> [Jackson, “Security”].

¹⁴¹ See Frisch, *supra* note 140 at 78.

¹⁴² *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

¹⁴³ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44.

¹⁴⁴ Alex Neve, “Canada Must Bring Khadr Home Without Further Delay”, *The Globe and Mail* (25 July 2012), online: <<https://www.theglobeandmail.com>>.

¹⁴⁵ Fife, *supra* note 103.

¹⁴⁶ *Ibid.*

trust between the government and the public. In particular, the hope was that a new government would refocus counter-terrorism efforts and reduce the perception that Muslims were being singled out for special and unfair scrutiny. Yet, the inherent paradox of Canada's position with respect to national security remained: Canada could not offer both unconditional loyalty to the United States,¹⁴⁷ whose aggressive war on terror gave the appearance of a war on Muslims,¹⁴⁸ while at the same time maintaining Canada's mosaic approach to multiculturalism and commitment to *Charter* rights, such as religious and expressive freedoms, and equality.¹⁴⁹ The inevitable cost of this failed balancing act was heightened minority vulnerability, or scapegoating.

Linguistic analyses of American counter-terrorism policy and rhetoric in the years after 9/11 demonstrate that political macro-discourse produced assumed associations between terrorism and Islam,¹⁵⁰ deepening the "us" versus "them" dichotomy between "ordinary citizens" and Muslims.¹⁵¹ One scholar describes the "casting out" of Muslims from western law and politics in the years after 9/11.¹⁵² The factual record shows that in the first 15 years after 9/11, the Canadian Muslim population paid a higher cost on the whole for national security than any other group. The Iacobucci inquiry noted that in the early 2000s, CSIS had six priority areas, one of which was terrorism, and which was focused "primarily" on religious extremism¹⁵³ (i.e. Islamic extremism). The Arar Commission Report observed that, "[g]iven the tendency thus far of focusing national security investigations on members of the Arab and Muslim communities, the potential for infringement on the human rights of innocent Canadians within these groups is higher."¹⁵⁴ Indeed, Kent Roach notes that "the focus on intelligence create[s] an environment... more conducive to running the risk of false positives, by which people [are] wrongly identified as terrorists on the basis of their associations, politics, religion... as opposed to false negatives".¹⁵⁵

Evidence suggests that even logically flawed political rhetoric can manipulate popular opinion into implicitly consenting to national security measures

¹⁴⁷ It turned out there were at least some limits to Canada's friendship, as Chrétien demonstrated in 2003 when Canada went with the world and stood against the US invasion of Iraq. That was a decision with broad geopolitical implications and with overwhelming support internationally. However, when it came to national security at home and in border relations with the US, Canadian policy remained strongly tethered to its powerful southern neighbour.

¹⁴⁸ Jackson, "Constructing Enemies", *supra* note 20 at 400. The perception that the US is at war with Muslims has only ratcheted up since the November 2016 election of Donald Trump as US President.

¹⁴⁹ See Faisal Bhabha, "Tracking 'Terrorists' or Solidifying Stereotypes? Canada's *Anti-Terrorism Act* in Light of the *Charter's* Equality Guarantee" (2003) 16 Windsor Rev Legal Soc Issues 95.

¹⁵⁰ Jackson, "Constructing Enemies", *supra* note 20 at 404; Cap, "Follow-ups", *supra* note 19 at 549–55.

¹⁵¹ Cap, "Follow-ups", *supra* note 19 at 556.

¹⁵² See Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2007).

¹⁵³ *Iacobucci Inquiry*, *supra* note 10 at 64.

¹⁵⁴ *Arar Inquiry*, *supra* note 9 at 324.

¹⁵⁵ Roach, *9/11 Effect*, *supra* note 15 at 44.

that cause the “fracturing of long-standing constitutional rights protections”.¹⁵⁶ Constitutional norms can slip away with the tacit endorsement of majoritarian will. The perception of aggressive counter-terrorism assuages public anxiety about public safety,¹⁵⁷ but requires the public to be indifferent to rights violations. Research shows that, in fact, rights violations are largely ineffective – if not counter-productive¹⁵⁸ – at controlling violence.¹⁵⁹ Feeding public fear serves the function of justifying unmitigated deference to security agencies.¹⁶⁰ Rights violations that are, or are perceived to be, an ordinary function of the system of law enforcement can drastically undermine public confidence in the rule of law and the administration of justice. However, maintaining the appearance of necessity can mitigate the adverse impact to the rule of law and public confidence in the administration of justice caused by minority rights violations. The harm that flows may not be perceptible to those who do not experience it. For example, while strengthening borders can translate into a real risk of exclusion or discriminatory scrutiny for some, it may only mean the inconvenience of removing shoes in airport security screening for others.

A decade after the al Qaeda attacks on the US, in 2011, Prime Minister Harper told the CBC that “the major threat is still Islamicism”,¹⁶¹ despite the fact that there had never been an incident of Muslim terror in Canada. This marked Canada’s wholesale embrace of “fear-inducing and hyperbole-rich American political discourse on ‘porous’ United States borders in need of constant ‘securing’ and ‘smartening up’ against Islamist terrorism”.¹⁶² According to one columnist, Harper’s ideology was

¹⁵⁶ Duffy, “Discourse of the Other”, *supra* note 107 at 57. See also Chaïm Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (Notre Dame: University of Notre Dame Press, 1969) at 63–170.

¹⁵⁷ Hendrik Hegemann & Martin Kahl, “Constructions of Effectiveness and the Rationalization of Counterterrorism Policy: The Case of Biometric Passports” (2015) 38:3 *Studies in Conflict & Terrorism* 199 at 204–05 (describing how symbolic action can be effective to “soothe the public’s nerves and to demonstrate the state’s capacity to act” but that this “means that the actual prevention of attacks is no longer the crucial benchmark”). See also Stuart Macdonald, “The Unbalanced Imagery of Anti-Terrorism Policy” (2009) 18:2 *Cornell JL & Pub Pol’y* 519 at 526 (In response to Posner and Vermeule’s question as to why a government would adopt a policy that restricts liberty but does not improve security, the author provides the example of the British Prime Minister and Home Security wishing to dismiss any perception that the government is not adequately safeguarding its citizens from terrorist attacks) [Macdonald, “Unbalanced Imagery”].

¹⁵⁸ See Akil Awan in Marie Gillespie, “Security, Media and Multicultural Citizenship: *A Collaborative Ethnography*” (2007) 10:3 *European J of Cultural Studies* 275 at 289.

¹⁵⁹ Jackson, “Constructing Enemies”, *supra* note 20 at 396.

¹⁶⁰ See Richard Jackson, “The Politics of Threat and Danger: Writing the War on Terrorism” (Paper delivered at the British International Studies Association, University of Warwick, 20–22 December 2004) [unpublished].

¹⁶¹ “Harper Says ‘Islamicism’ Biggest Threat to Canada”, *CBC News* (6 September 2011), online: <www.cbc.ca/news>.

¹⁶² Srdjan Vucetic, “Canadian Muslims in the United States Media” in Kanishka Research Team, *supra* note 23 at 112.

“strengthening those waging a cultural war against Muslims and Islam across North America and Europe.”¹⁶³

Prime Minister Harper’s rhetoric, rooted in the “good Muslim/bad Muslim” frame, contributed to intense public discourse about Muslims. The toxic impact was exacerbated by the fact that digital readership of news media dramatically increased starting in 2010, with user comments often perceived as being part of news stories and playing an increasingly influential role in shaping public opinion.¹⁶⁴ Analyses of user comments illustrate how the perception of Muslims constituting a threat within western civilization was propagated. The combination of media stories filtering Canadian Muslims through the security lens and online user-generated content tended to produce false and misleading information about Muslims, which in turn led to greater stigmatization.¹⁶⁵

The war on terror discourse was a centerpiece of the Harper government’s political platform. In the war on terror, enemy values were known to be rooted in idiosyncratic interpretations of core Islamic texts. On the surface, all believing Muslims were thus potential terrorists. “Islamofascism”, political Islam, or even simply “Islam” came to be blurred and portrayed as the enemy.¹⁶⁶ Although all Muslims were not necessarily terrorists, those who shared ideas or beliefs with terrorists, even if not inclined to violence, were still terrorist sympathizers and could potentially provide moral support to terrorism or be eventually radicalized.¹⁶⁷

These implied categories of “us” and “them”, “good Muslim” and “bad Muslim”,¹⁶⁸ suffered from terrible over-breadth and lack of precision. These categories came to be crucial to the counter-terrorism narrative as well. The political discourse that constructed the distrustful and violence-prone Muslim was generally amplified in media reporting.¹⁶⁹ Islam itself became the subject of intense debate, often by non-experts who shrouded their contempt for Muslim people in vitriol against an abstracted

¹⁶³ Haroon Siddiqui, “Harper on ‘Islamicism’: PM’s Rhetoric Stokes Fires of Division”, *The Toronto Star* (12 September 2011) A23.

¹⁶⁴ Elke Winter & Ivana Previsic, “Debating Citizenship Revocation in Public Discourses: Who Was It All About?” in Kanishka Research Team, *supra* note 23 at 89.

¹⁶⁵ *Ibid* at 89.

¹⁶⁶ News reports have revealed that, for years, courses about Islam for US military officers and FBI officials included teaching that “Islam is the enemy”. See “US Military Course Taught Officers ‘Islam is the Enemy’”, *The Guardian* (11 May 2012), online: <<https://www.theguardian.com>>.

¹⁶⁷ See Phil Gurski, *The Threat from Within: Recognizing Al Qaeda-Inspired Radicalization and Terrorism in the West* (Lanham, MD: Rowman & Littlefield, 2015) (describing a spectrum of radicalization that begins with belief in Islam).

¹⁶⁸ See Mahmood Mamdani, *Good Muslim, Bad Muslim: America, The Cold War, and the Roots of Terror* (New York: Pantheon Books, 2004).

¹⁶⁹ Winter & Previsic, *supra* note 164 at 89 (citing sources arguing that “the media have been complicit in the stigmatization [*sic*] Canadian Muslims via framing them predominantly in the context of terrorism, violence and security threats”).

“Islam”,¹⁷⁰ as if the religion could be maligned without impacting its followers. A 2006 public opinion poll found that 65 percent of Canadians were concerned that too many immigrants were not adopting “Canadian values”.¹⁷¹ Muslims were seen to reside outside the “common framework of ‘discursive citizenship’ based on a set of shared national values and were therefore in need of ‘cultural rehabilitation’ through the inculcation of Western values.”¹⁷² Any Canadian Muslim who appeared not to fit the mould of a “good Muslim” (that is, one who has been culturally rehabilitated) was presumed to be a “bad Muslim” (that is, one who sympathizes with extremism) and therefore a potential security threat. This binary in public discourse was equally reflected in government policy making with respect to counter-terrorism.

Costs and Benefits: Security vs. Scapegoating

The cost-benefit analysis in counter-terrorism law and policy is often described as a rights-security binary.¹⁷³ However, as Wark argues, the metaphor of the “scales of justice”, with rights on one side and security on the other, suggests a dangerous “zero-sum game: more rights means less security; more security means less rights.”¹⁷⁴ While the dominant discourse readily accepts the rights-security binary, the disparate impact of such balancing forces vulnerable minorities to carry the burden of less rights, while accepting no guarantee of more security. With the costs of security disproportionately allocated, it is unsurprising that faith in fairness and the rule of law among Canadian Muslims is depressingly low.¹⁷⁵

There is a common presumption that counter-terrorism is an inherent good – it protects “us” (whom we know) from “them” (whom we fear).¹⁷⁶ This presumption can only be defended in the most abstract sense. In truth, counter-terrorism rationales can be distorted to justify virtually any measures up to and including the wholesale

¹⁷⁰ See e.g. Mark Steyn, *America Alone: The End of the World As We Know It* (Washington: Regnery Publishing, 2006). The author posited that Europe faced an existential threat from Islam as a result of Muslim immigration and high birth rates, which would create a “successor population” within Europe, leaving America alone in an illiberal world. Excerpts from the book caused a well-reported controversy after being published in 2006 in *Maclean’s*. See Khurram Awan et al, “Maclean’s Magazine: A Case Study of Media-Propagated Islamophobia” (CIC Report, Society for Academic Freedom and Scholarship, 2007), online: <www.safs.ca/issuescases/cic/Report_on_Macleans_Journalism.pdf>.

¹⁷¹ Michael Adams, *Unlikely Utopia: The Surprising Triumph of Canadian Multiculturalism* (Toronto: Penguin Canada, 2008) at 94.

¹⁷² Jasmine Zine, ed, *Islam in the Hinterlands: Exploring Muslim Cultural Politics in Canada* (Vancouver: UBC Press, 2012) at 7.

¹⁷³ See Roach, *False Security*, *supra* note 15. See also Macdonald, “Unbalanced Imagery”, *supra* note 157 at 533–39.

¹⁷⁴ Wesley K Wark, *National Security and Human Rights Concerns in Canada: A Survey of Eight Critical Issues in the Post-9/11 Environment* (Ottawa: Canadian Human Rights Commission, 2006) at 2.

¹⁷⁵ Lenard & Nagra, *supra* note 23 at 31–34.

¹⁷⁶ Piotr Cap “Towards the Proximization Model of the Analysis of Legitimization in Political Discourse” (2007) 40:1 *J of Pragmatics* 17 at 29; see also Duffy, *Turning the Kaleidoscope*, *supra* note 12 at 193–96; Jackson, “Security”, *supra* note 140 at 153.

suspension of rights of innocent citizens in democratic countries.¹⁷⁷ Governments tend to defer to the security agencies, and the public tend to defer to government policy choices when it comes to counter-terrorism. The cases and examples surveyed in this article suggest that high deference to the security agencies comes at a cost.

While counter-terrorism strategies facially appear to be the product of rational choices, based on facts and reason, research reveals the reality that such decisions are usually driven by the exigencies and the politics of crisis.¹⁷⁸ Considering that “the environment of crisis is the medium in which most, if not all, counterterrorism decisions are made”, it follows that political control and oversight of such decisions and actions diminishes during crisis.¹⁷⁹ Even experts and policy makers can be expected to act irrationally when making counter-terrorism choices. This is because crisis produces uncertain information, unstable decisions, and unintended consequences.¹⁸⁰ Citing the 1970 FLQ crisis as an example, and using organizational behaviour theory to analyze the state’s response to terrorism, Munroe observes that in the “climate of stress, fatigue, and uncertainty, exceptional powers were *sought* by the police as a way... to legalize operations either contemplated or already taking place, rather than being *chosen* by Cabinet from a range of policy options.”¹⁸¹ The danger of police-driven policy when there is limited oversight and review is diminished accountability.¹⁸² The result is that, “[d]ivergent forces in one’s own state machinery... become uncontrollable, exactly when control is most necessary.”¹⁸³

As Wark notes, the intelligence failures regarding the nature and quality of threats revealed on 9/11 created a crisis in the intelligence community that set processes in place that have determined the course of counter-terrorism efforts over the last 15 years.¹⁸⁴ Evaluating the benefit of those efforts is a difficult task. How does one count the number of possible crimes averted? There are “severe limits of

¹⁷⁷ See e.g. Stuart Macdonald “Understanding Anti-Terrorism Policy: Values, Rationales and Principles” (2012) 34:2 Sydney L Rev 317 at 322–26. See also HD Munroe, “The October Crisis Revisited: Counterterrorism as Strategic Choice, Political Result, and Organizational Practice” (2009) 21:2 Terrorism & Political Violence 288 at 298. For example, in Canada, the *War Measures Act* was in force from 1914 to 1988. National security was used to intern and dispossess German, Ukrainian, and Japanese Canadians during two world wars. It was also invoked in October 1970 after radical Quebecois nationalists kidnapped a foreign trade commissioner and Quebec’s Minister of Labour, Pierre Laporte, who they later murdered. Soldiers were deployed in the streets of Ottawa and Montreal and nearly 500 people were detained in the province of Quebec – most were ultimately released without charge.

¹⁷⁸ Munroe, *supra* note 177 at 301–02.

¹⁷⁹ *Ibid* at 301.

¹⁸⁰ *Ibid*.

¹⁸¹ *Ibid* at 299.

¹⁸² See also Andrea Wright “Fit for Purpose? Accountability Challenges and Paradoxes of Domestic Inquiries” in Hans Born, Ian Leigh & Aidan Wills, eds, *International Intelligence Cooperation and Accountability* (Abingdon, Oxon: Routledge, 2011) at 170.

¹⁸³ Munroe, *supra* note 177 at 301.

¹⁸⁴ Wark, “Worth Repeating”, *supra* note 105 at 65.

knowability” when it comes to counter-terrorism effectiveness.¹⁸⁵ Nonetheless, governments must be “seen as doing something”; so, they perform “security theatre”.¹⁸⁶ This often includes cultivating a climate of crisis and building constructions of “evil” and “war” that justify strong action, even if it is not rational or evidence-based.¹⁸⁷

From the public’s perspective, the tendency is to take it as a given that the government is in charge and the security agencies deliver some measure of security.¹⁸⁸ Defining what security specifically entails is an elusive task. Thus, trust becomes an essential element in the relationship between a democratic citizenry and the security establishment, especially given the balancing act between liberty and security. In democracies, studying official errors and misdeeds can only cure anti-democratic institutional practices if it leads to greater accountability. While democracies have limited tolerance for abuses of authority, abuses do happen and governments must be seen to be taking responsibility to assure the public that the abuses will not be repeated. Scholarly research and commission findings have highlighted that the siloed nature of information sharing within national security agencies and deficiencies in the relationships between review and oversight bodies and security agencies are in need of reform.¹⁸⁹ Public reporting and democratic accountability operate together to maintain the appearance of transparency as well as providing a meaningful opportunity not only for internal review, but for the public to be aware of how systemic operational problems are being managed.

The costs of human rights violations by the state are difficult to quantify. In addition to tens of millions of dollars paid out to victims, Canada’s global reputation and domestic rule of law both suffer. Public inquiries and court rulings expose the facts of abuse but do nothing, in and of themselves, to change the institutional culture that produces abuse. No individual from within CSIS or the RCMP has ever been publicly held to account for the abuses.¹⁹⁰ Nor is there any publicly available information indicating that there has ever been disciplinary action within those agencies for actions leading to rendition and torture. Indeed, some of the Canadian

¹⁸⁵ Hegemann & Kahl, *supra* note 157 at 200–01.

¹⁸⁶ Bruce Schneier, *Beyond Fear: Thinking Sensibly about Security in an Uncertain World* (New York: Copernicus Books, 2003) at 13.

¹⁸⁷ Hegemann & Kahl, *supra* note 157 at 205.

¹⁸⁸ Richard Jackson & Gareth Hall, “Talking about Terrorism: A Study of Vernacular Discourse” (2016) 36:3 *Politics* 292 at 301–02.

¹⁸⁹ See Roach, *False Security*, *supra* note 15 at ch 11–12; Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy* (Ottawa: Public Works and Government Services Canada, 2010) at 28, 78, 110, 189, 193–96.

¹⁹⁰ In December 2006, Prime Minister Harper announced that RCMP Commissioner Zaccardelli had resigned from his post after he was exposed for having lied under oath to the Arar Commission and political pressure on the government mounted. Prior to the discovery of the potential perjury, the Commissioner had consistently insisted he would not resign over the Arar affair. Commissioner Zaccardelli’s resignation led to the appointment of the first ever civilian commissioner of the national police force. “RCMP Commissioner Giuliano Zaccardelli”, *CBC News* (6 December 2006), online: <www.cbc.ca/news2/background/rcmp/zaccardelli.html>.

officials who leaked inaccurate information that permanently damaged Maher Arar's reputation were themselves later promoted.¹⁹¹

Notwithstanding the government's significant settlements and public apologies, the lack of internal accountability projects a culture of impunity in Canadian security agencies that reinforces the concerns raised by Canadian Muslims' experiences. Without addressing the underlying conditions, there is no reason to expect change. There is currently no mechanism other than public pressure to compel the political action necessary to reform CSIS and the RCMP. As a result, rights violations should be expected, and the lack of trust among Canadian Muslims is likely to remain as long as national security operations focus on that community.¹⁹²

The lack of meaningful transparency and accountability in Canada's security agencies was a major issue in the public deliberations concerning the *ATA 2015*, as analysts worried that the security agencies were being strengthened without adequate public oversight and without external policy advice,¹⁹³ contributing to the echo chamber problem within security circles. The lack of external influence or oversight of security operations appeared to disregard the key recommendations of the Arar Commission and others. This left internal failings, illegal action, and abuses of authority to come to light only as a result of extraordinary accountability measures, such as public inquiries, independent investigations, and court trials. These venues, which do not have the authority to implement reform, have served to expose national security abuses to the public. While lifting the veil on official misconduct is valuable, the lack of meaningful follow-up and the continued perception of impunity for illegality has no doubt been the biggest contributor to waning trust and worsening vulnerability for Canadian Muslims.

IV. Experiences of Canadian Muslims with counter-terrorism

Until very recently, there were only anecdotal reports about the perspectives of ordinary Canadian Muslims in relation to Canada's counter-terrorism strategy. In 2016, Lenard and Nagra published ground-breaking research with the support of Canada's Department of Public Safety, evaluating the impact of counter-terrorism measures on the Canadian Muslim community.¹⁹⁴ Their study reveals high levels of distrust and fear of Canada's national security agencies within the community most affected by counter-terrorism investigations. The findings are consistent with similar studies in other jurisdictions.¹⁹⁵ This calls attention to the extent to which the public

¹⁹¹ Glen McGregor & Ian MacLeod, "RCMP Rewards Officers Involved in the Arar Case", *Ottawa Citizen* (28 September 2006) A1.

¹⁹² *Arar Inquiry*, *supra* note 9 at 357–58.

¹⁹³ Roach, *False Security*, *supra* note 15 at 3.

¹⁹⁴ Lenard & Nagra, *supra* note 23.

¹⁹⁵ See e.g. Aziz Z Huq, Tom R Tyler & Stephen J Schulhofer, "Mechanisms for Eliciting Cooperation in Counterterrorism Policing: Evidence from the United Kingdom" (2011) 8:4 *J Empirical Leg Stud* 728;

discourse and policy have caused the Muslim population in the west to be “securitized” – that is, viewed primarily through a security-threat lens.¹⁹⁶ The result of securitizing entire communities is that securitized populations live in fear of state officials, and face considerable social stigma and marginalization.¹⁹⁷

The researchers surveyed some 100 Muslim community leaders across Canada in September 2015.¹⁹⁸ They found that Canadian Muslims have a strong sense that they are under official suspicion. Individuals expressed concern with being targeted by counter-terrorism measures and complained that their communities experience disadvantage as a result of the interference in private and public life caused by scrutiny and stigma perpetuated by government policy.¹⁹⁹ They found that Canadian Muslims are fearful to freely engage in legitimate, constitutionally-protected expressive activity. Even ordinary acts, like googling a subject of interest or attending a public lecture, are regarded as potentially incriminating if misconstrued.²⁰⁰ There has also been a chill in charitable donations due to heightened scrutiny of Muslim charities under broad criminal definitions of terrorist financing, leading one respondent to conclude: “I have become less likely to contribute my money to [even] mainstream Muslim organizations.”²⁰¹

The researchers also found that, as a result of inadequate institutional transparency and oversight, Canadian Muslims are hyper-aware of their communities’ vulnerability to anti-terrorism excesses and breaches by state officials.²⁰² Nearly a decade after the Arar Commission’s revelations, Canadian Muslim perceptions of anti-terrorism suggests that little was done to address or mitigate that community’s legitimate fears of false or malicious targeting. Beyond individual rights violations, respondents worried about the long-term impact of marginalization and religious stigma on Muslim youth.²⁰³ Systemic rights violations that appear to occur with impunity can severely undermine trust between the state and minority communities. Some respondents drew the link between rights violations and radicalization. One interviewee stated, “Harper says he is trying to protect Canada from terrorism, but he’s

Adrian Cherney & Kristina Murphy, “Policing Terrorism with Procedural Justice: The Role of Police Legitimacy and Law Legitimacy” (2013) 46:3 *Austl & NZ J Crim* 403.

¹⁹⁶ See Duffy, *Turning the Kaleidoscope*, *supra* note 12 at 225–31 (culmination of how the discourse of the “terrorist Other” fuels “securitization” in the UK immigration system).

¹⁹⁷ See Gillespie, *supra* note 158 (discussing various ways in which mainstream post-9/11 discourse is being experienced and analyzed by British Muslims. The author proposes “shifting securities” as a way of mediating subjective and dialogic communication to negotiate politics of fear).

¹⁹⁸ Lenard & Nagra, *supra* note 23 at 15.

¹⁹⁹ *Ibid* at 16.

²⁰⁰ *Ibid* at 24.

²⁰¹ *Ibid* at 25.

²⁰² *Ibid* at 28–37.

²⁰³ *Ibid* at 26.

bringing terrorism to Canada by adopting these policies which marginalize minorities and encourages people to join terrorist groups.”²⁰⁴

Respondents described a heightened vulnerability not only with respect to official scrutiny, but also in terms of social exclusion and hate crimes that result from public discourse aligning Muslims with terrorism.²⁰⁵ Canadian Muslims raised the concern that official counter-terrorism discourse legitimizes and invites anti-Muslim discrimination.²⁰⁶ Canadian Muslims brace themselves for “backlash” attacks and vandalism when stories of international terrorism hit headlines.²⁰⁷ Notwithstanding the subjective experiences of discrimination against Muslims, Bahdi’s review of human rights tribunal decisions across Canadian jurisdictions found little success for complaints of anti-Muslim discrimination.²⁰⁸ She grimly concludes that “the human rights system may be failing people, particularly those who face discrimination in the workplace, just as they need it the most.”²⁰⁹

Lenard and Nagra drew special attention to the experiences of Canadian Muslims with the investigative strategies of CSIS, highlighting major concerns about targeting and surveillance. Respondents reported that CSIS recruited community members to spy on one another, routinely questioned community leaders, and put mosques under monitoring.²¹⁰ In particular, respondents indicated that CSIS engaged in unethical practices, such as taking advantage of refugees, and harassing them to become CSIS informants. Some reported CSIS showing up to question them in an intimidating manner: at home, at night, in front of their kids, at work.²¹¹ Respondents said the “traumatic” visits caused “stress, panic and embarrassment”.²¹²

The aftermath of 9/11 was not the first time Canadian Muslims came under CSIS scrutiny. CSIS had previously experimented with a community interview program during the first Gulf War of 1990-91, seeking to gather information from

²⁰⁴ *Ibid* at 27.

²⁰⁵ *Ibid* at 23.

²⁰⁶ *Ibid* at 23.

²⁰⁷ *Ibid* at 24.

²⁰⁸ Reem Bahdi, “Human Rights Tribunals May Be Failing Arab, Muslim Workers Post-9/11”, *The Lawyer’s Daily* (17 October 2017) (LexisNexis).

²⁰⁹ *Ibid*; see also Lenard & Nagra, *supra* note 23 at 21. The respondents in Lenard and Nagra’s study also expressed the view that the negative portrayal of their communities was deliberately designed for a broader political purpose of justifying the expansion of state power. In other words, they believed that Muslims were a convenient scapegoat because fear of Muslims was easy to drum up. According to one interviewee, “when you come to think about it, the threat of terrorism is relatively very, very, minor compared to other threats... I think there is that exaggeration of the threat, internal and external threat, personally speaking... If you look at the budget that is being released. There is more and more (funding) for security and then cuts to health and social services”, Interviewee 12 from Montreal (Professor, Female).

²¹⁰ Lenard & Nagra, *supra* note 23 at 38–40.

²¹¹ *Ibid* at 40.

²¹² *Ibid*.

within Canada's Arab population.²¹³ The program was highly controversial and "revealed the extent to which security investigations could impact on community perceptions and generate a sense of unwarranted and divisive targeting."²¹⁴ That CSIS essentially revived the practice a decade later suggests either that the service's directors did not know its recent history or did not worry about alienating entire ethnic or religious communities. Those interviewed by Lenard and Nagra reported that even though CSIS interviews were "voluntary", individuals felt coerced into cooperating. An imam from Montreal stated that "many Muslims feel that if you don't actually speak with security intelligence agencies or representatives of security intelligence agencies, it may cast suspicion on you."²¹⁵ Another respondent, a human rights lawyer in Ottawa, opined that, "the political leaders of our community feel if [they] don't step up... they'll become a target or a suspect. So in order to allay suspicion they will do what they need to do to help CSIS."²¹⁶

It is thus not surprising that over the same period of time that Canada strengthened its alignment and cooperation with US counter-terrorism policy and objectives, the Canadian Muslim population experienced significant insecurity in Canadian society. Muslim vulnerability to false accusations, erroneous suspicion, wrongful investigation, and discrimination is well documented.²¹⁷ Muslims living in North America could not seem to shake the persistent suspicion that they and their institutions were sympathetic to, if not complicit in, threats against the west. Part of the problem was the framing of the conflict: the US and Canada had both characterized the nature of the terrorist threat not only in terms of violence, but also in terms of values.²¹⁸

It is precisely this kind of divisive discourse that galvanized Canadian Muslim political participation in the 2015 election. Scholars note that "political mobilization is a direct response to the degree of threat and discrimination that a group experiences."²¹⁹ Two post-election surveys reported voter turnout of nearly 8 in 10 among Canadian Muslims, significantly exceeding, for the first time in history,

²¹³ See Yasmeeen Abu-Laban, "On the Borderlines of Human and Citizen: The Liminal State of Arab Canadians" in Jenna Hennebry & Bessma Momani, eds, *Targeted Transnationals: The State, the Media, and Arab Canadians* (Vancouver: UBC Press, 2013) 68 at 77.

²¹⁴ Wark, "Worth Repeating", *supra* note 105 at 64.

²¹⁵ Lenard & Nagra, *supra* note 23 at 41–42.

²¹⁶ *Ibid* at 41.

²¹⁷ Environics Institute, *Survey of Muslims in Canada 2016: Final Report* (April 2016), online: <https://www.environicsinstitute.org/docs/default-source/project-documents/survey-of-muslims-in-canada-2016/final-report.pdf?sfvrsn=ffb85533_2> [*Survey of Muslims in Canada 2016*]. See also Wark, "Worth Repeating", *supra* note 105.

²¹⁸ Wark, "Worth Repeating", *supra* note 105 at 66. Also see Jackson, "Constructing Enemies", *supra* note 20 at 406–14.

²¹⁹ Melissa Finn & Bessma Momani, "Voting in Controversy: A Critical Analysis of the Canadian Arab Youth Vote in the 2015 Federal Election" (2017) 11 *Can Political Science Rev* 61 at 74.

Canada's overall voter turnout rate of 68.5 per cent.²²⁰ In a study of Canadian Arab youth, researchers found that Canadian counter-terrorism strategy and election rhetoric was perceived to promote Islamophobia and caused Arab youth to feel "racialized and securitized".²²¹ This had the effect of undermining the tendency in this demographic to be politically apathetic, and increased their interest in engaging with politics. Greater political engagement by Muslims and Arabs, especially among young people, increased exposure to politicians and policy makers and brought more focused attention to the perspectives of Canadian Muslim civil society.

It appeared that an opening was presented by the Trudeau government's commitment to making representation and diversity a government priority.²²² While Trudeau maintained the previous government's approach to national security broadly speaking, it shifted to a very different public discourse about the nature of the threats and what is acceptable in combatting terrorism. The question that remained unanswered is this: What influence, if any, does a change in political leadership and discourse have on the attitudes and manner in which the individuals within the agencies charged with counter-terrorism perform their duties? The answer to this question remains to be seen.

V. Legislating Reform

This article has thus far argued that, immediately after 9/11, Canada adopted a counter-terrorism strategy that produced errors and misjudgements leading to Canadian complicity in torture abroad, as found by two commissions of inquiry. The subsequent failure to meaningfully address root causes and implement recommendations for national security reform produced a generation of Canadian Muslims that felt deeply distrusted by, and were deeply distrustful of, the agencies in charge of preventing terrorism. Research summarized above indicates that the agencies continue to suffer from a lack of credibility within Muslim communities, frustrating cooperation and perpetuating the social vulnerability of members of that community. The allegations contained in the 2017 civil claim against CSIS appear to corroborate concerns that CSIS's internal culture produces bigotry and bias in operations, raising the likelihood that it will continue to engage in discriminatory and illegal action. This bodes ill for future effectiveness in Canadian counter-terrorism, which requires functioning, trusting relationship-building with stakeholder communities.

Indeed, in 2012, the Conservative government released Canada's first new national security policy in nearly a decade, emphasizing for the first time the idea of citizen partnership in fighting terrorism.²²³ Government, CSIS, and the RCMP all

²²⁰ *Survey of Muslims in Canada 2016*, *supra* note 217 at 12.

²²¹ Finn & Momani, *supra* note 219 at 75–76.

²²² Jessica Murphy, "Trudeau Gives Canada First Cabinet with Equal Number of Men and Women", *The Guardian* (4 November 2015), online: <<https://www.theguardian.com>>.

²²³ Wark, "Worth Repeating", *supra* note 105 at 74.

seemed to embrace a “community policing” model – the idea that the key to national security prevention lies within the targeted (i.e. Muslim) communities.²²⁴ This was consistent with the traditionally conservative American response to terrorism, namely that citizens should take ownership of the security burden through a “responsibility to act”, which includes a duty to actively cooperate with the authorities – by reporting on neighbours, for example – to help root out security threats.²²⁵ Maintaining a high degree of trust within communities is essential to the success of this kind of policing. The problem was that neither the Harper government nor Canada’s national security agencies had sufficient credibility within Canadian Muslim communities to build a cooperative relationship.²²⁶ For Canadian Muslims, the federal government and the national security establishment were not just tainted by past errors and miscarriages of justice; the prime minister himself was widely perceived to be openly hostile to Canadian Muslims,²²⁷ while objectively doing little if anything to address the community’s sense of vulnerability and isolation.

When the *ATA 2015* was introduced as Bill C-51 on January 30, 2015, it had received virtually no public input. It was the product of an opaque government policy-making process,²²⁸ and appeared to be driven by an ideological response to global events. Prime Minister Harper said that the “government understands that extreme jihadists have declared war on us, on all free people, and on Canada specifically”, and pledged not to “privilege the so-called rights of terrorists and others who would harm Canadians over the rights of law-abiding citizens.”²²⁹ Indeed, the new law appeared to have been designed primarily to give CSIS the power to act with greater latitude, while giving the government more freedom to share information across agencies and departments. Because the government presented the proposed legislation as a necessary and urgent response to global Islamic extremism, it was understood that Canadian Muslims would be most significantly impacted.

²²⁴ “Community Policing” (30 September 2015), *RCMP* (website), online: <www.rcmp-grc.gc.ca/ccaps-sppca/index-eng.htm>; see also *Arar Inquiry*, *supra* note 9 at 324, 327, 357–58.

²²⁵ Wark, “Worth Repeating”, *supra* note 105 at 75.

²²⁶ See Faisal Kutty, “Muslims Hold Key to Fighting Terror”, *The Toronto Star* (25 April 2013) (Kutty argues, “...the government must understand that the majority of Muslims, who are neither secular nor ultra-orthodox, hold the key to any serious and productive bridge-building. If government agencies believe they can win the ‘war on terror’ by undermining front-line soldiers, they had better think again”).

²²⁷ When Omar Khadr was released on bail after 13 years in detention, his lawyer Dennis Edney speculated as to why the government had worked so hard to keep the former child soldier behind bars, saying, “Mr. Harper is a bigot. Mr. Harper doesn’t like Muslims.” See “What Omar Khadr’s Lawyer Said: ‘Mr. Harper is a Bigot’”, *The Toronto Star* (7 May 2015), online: <<https://www.thestar.com>>.

²²⁸ Tufyal Choudhury, “The Experience of Canadian Muslim Civil-society Organizations and Activists in Influencing and Shaping Counter-terrorism Legislation and Policy” (2017) Canadian Network for Research on Terrorism, Security and Society (TSAS) Working Paper No 17-03 at 6–9 (observing, “The entire legislative process was completed in less than six months, from the publication of the Bill at the end of January to the granting of Royal Assent in mid-June 2015. The scope for public debate was hampered by the meagre information provided by the government on the proposed legislation”).

²²⁹ Jenny Uechi, “Harper Announces Increased CSIS Powers to Combat Terrorism”, *The Vancouver Observer* (30 January 2015), online: <<https://www.vancouverobserver.com>>; “Prime Minister Stephen Harper Announces Anti-Terrorism Measures to Protect Canadians”, Office of the Prime Minister, Press Release (30 January 2015), online: <https://cacr.ca/index.html?asst_id=688>.

At the same time, Bill C-51 raised alarm bells across a spectrum of interests, from gun owners to First Nations.²³⁰ It was roundly criticized by legal experts and advocacy groups for its confusing complexity and the expected chilling effect on constitutional rights.²³¹ It created the new offence of advocating or promoting the commission of terrorism offences *in general*, which was viewed as a potentially dangerous incursion on free speech. This moved beyond the traditional categories of criminal speech – incitement, conspiracy, threats, and counselling – to potentially capture speech far removed from any connection to terrorism. It created unprecedented new “kinetic” powers for CSIS to use in threat reduction and disruption. It authorized virtually any action by CSIS agents, with the only explicit limitation being actions which lead to “death, bodily harm, the perversion of justice or violation of sexual integrity” or which violate core international human rights.²³² The law even authorized Federal Court judges to issue warrants permitting CSIS to violate the *Charter* and to ignore local laws in foreign operations. The law left the contentious no-fly list in place with inadequate redress for falsely listed individuals, estimated to number around 100,000, including many children.²³³ It also lowered the evidentiary bar for law enforcement officers wishing to detain individuals suspected of planning to commit a terrorist act. The law broadened the definition of “threats to the security of Canada” well beyond the existing definition of “terrorist activities”, which many feared could include any form of advocacy or protest that was not authorized by law. Pipeline protestors and “Occupy” demonstrators would be turned into “terrorists”.

In July 2015, the Canadian Civil Liberties Association (CCLA) and Canadian Journalists for Freedom of Expression (CJFE) brought a legal challenge arguing that the law would chill expressive freedom, threaten privacy, authorize illegal police action, and was lacking effective oversight.²³⁴ While the Trudeau Liberals had supported legislating the *ATA 2015*, the new prime minister promised to consult with the public and with civil society to revisit some of the legislation’s more “problematic” aspects.²³⁵

²³⁰ Choudhury, *supra* note 228 at 10.

²³¹ See “An Open Letter to Members of Parliament on Bill C-51” (23 February 2015) (signed by over 100 law professors), online: <www.documentcloud.org/documents/1678018-open-letter-on-bill-c-51.html#document/p1>.

²³² *ATA 2015*, *supra* note 16, s 12.2(1).

²³³ The figure of 100,000 is described as a “conservative estimate” by the group #NoFlyListKids’ online: <www.noflylistkids.ca>.

²³⁴ “CCLA & CJFE Mounting Charter Challenge Against Bill C-51” (21 July 2015), *Canadian Civil Liberties Association* (website), online: <<https://ccla.org/ccla-and-cjfe-mounting-charter-challenge-against-bill-c-51/>> (announcing legal challenge to the law by the Canadian Civil Liberties Association and Canadian Journalists for Free Expression).

²³⁵ Prime Minister’s Mandate Letter to Minister of Public Safety (November 2015), online: <pm.gc.ca/eng/minister-public-safety-and-emergency-preparedness-mandate-letter>, cited in Craig Forcese & Kent Roach, “Righting Security: A Contextual and Critical Analysis and Response to Canada’s 2016 National Security Green Paper” (2016) Ottawa Faculty of Law Working Paper No 2016-39 at 3, n 2, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849261> [Forcese & Roach, “Righting Security”].

In September 2016, the government released a discussion paper, *Our Security, Our Rights*,²³⁶ and the Minister for Public Safety engaged in country-wide consultations to discuss proposed amendments to the *ATA 2015*. Critics continued to worry that the approach outlined in the *Green Paper* remained tethered to the C-51 mindset. The federal Privacy Commission complained that the “tone of the Government’s discussion... focuses heavily on the challenges for law enforcement and national security agencies”, while downplaying concern for democratic rights, privacy, and freedom of expression.²³⁷

When Bill C-59,²³⁸ or the *National Security Act, 2017*, was introduced in June 2017, it was welcomed as an improvement over the *ATA 2015* in a few respects: the “advocating or promoting” provision was revised into a more traditional “counselling” offence;²³⁹ the power of CSIS to break the law was further circumscribed; and, the evidentiary threshold for detention without charge when it comes to preventing a terrorist act was raised from “likely” to “necessary”.²⁴⁰ It also, importantly, proposed to create a new National Security and Intelligence Review Agency (NSIRA), which would operate as an integrated oversight body. This was one of the key recommendations from the Arar Report that had been ignored for more than a decade. According to Wark, Bill C-59 was to be commended for its proposal to “redraw the entire landscape of national security review and accountability”.²⁴¹ For Roach, Carvin, and Forcese, though not a perfect solution, “compared to C-51, C-59 does try to balance new security powers with new oversight and review regimes. It draws security powers into closer orbit around the rule of law, while increasing the prospect that when these powers are used they will be subject to independent scrutiny.”²⁴²

Notwithstanding improvements, those concerned with privacy and civil liberties worried that, at its core, Bill C-59 would still legitimize anti-democratic conduct, including mass surveillance, state-sponsored hacking, data-mining, the use of information obtained through torture, and racial and religious profiling. Meanwhile, it maintained CSIS’ ability to physically disrupt threats. It also continued to authorize detention without charge, which could include denial of the right to counsel or appeal for *habeas corpus*, contrary to the rule of law, the *Charter*, and Canada’s international

²³⁶ *Our Security, Our Rights: National Security Green Paper, 2016* (Ottawa: Government of Canada, 2016).

²³⁷ Privacy Commissioner of Canada, News Release (27 September) online: <https://www.priv.gc.ca/en/opc-news/news-and-announcements/2016/nr-c_160927/>, cited in Forcese & Roach, “Righting Security”, *supra* note 235 at 3.

²³⁸ *An Act Respecting National Security Matters National Security Act*, 1st Sess, 42nd Parl, 2017 (third reading 19 June 2018).

²³⁹ *Ibid*, s 150(a)(xii.81), amending s 83.221 of the *Criminal Code*.

²⁴⁰ *Ibid*, s 146(3)(b), amending s 83.3(4)(b) of the *Criminal Code*.

²⁴¹ Wesley Wark, “Liberals’ Bold Bill C-59 Would Redraw the National Security Landscape” (21 June 2017), *University of Ottawa Faculty of Social Sciences Centre for International Policy Studies* (blog), online: <www.cips-cepi.ca/2017/06/21/liberals-bold-bill-c-59-would-redraw-the-national-security-landscape/>.

²⁴² Kent Roach, Stephanie Carvin & Craig Forcese, “We Need Real, Honest Debate on Bill C-59”, *The Globe and Mail* (December 4, 2017), online: <<https://www.theglobeandmail.com>>.

treaty obligations.²⁴³ Even the proposed oversight agency suffered deficiencies.²⁴⁴ In an open letter delivered to key government ministers in September 2017, a group of individuals and civil society organizations, including Amnesty International, the Canadian Civil Liberties Association, the Canadian Muslim Lawyers Association, and PEN Canada, expressed their disappointment that C-59 was “not the fundamental change needed to undo C-51’s legacy, nor to fully realize and respect that human rights must sit at the core of our national security framework.”²⁴⁵ Dozens of experts and civil society actors appeared at the House Standing Committee on Public Safety and National Security (SECU) calling for a more substantial overhaul of the *ATA 2015*. On April 25, 2018, the standing committee adopted the Bill with only minor amendments and, on May 3, 2018, presented the Bill to the House of Commons.

VI. Conclusion

Canada’s current counter-terrorism strategy, *Building Resilience Against Terrorism*, is premised on a “fundamental belief that countering terrorism requires partnerships”, not only within and across government agencies, but also with civil society and citizens,²⁴⁶ which is described as an essential tool in the Prevent strand of the strategy. Establishing and maintaining citizen partnership in counter-terrorism “requires law enforcement and CSIS to develop strong capabilities in community engagement, including the enhanced language and cultural awareness skills needed to engage with diverse Canadian communities.”²⁴⁷

If trust and cooperation with targeted communities are seen to be a necessary precondition to effective security, cooperation also offers the benefit of potentially bolstering counter-radicalization and re-integration efforts. On the other hand, aggressive counter-terrorism investigations (such as home visits, spying on mosques, etc.) can cast a wide net of suspicion and treats members of the targeted communities not as partners, but as objects of fear and subjects of investigation. Profiling communities also fans the flames of bigotry and exposes a vulnerable population to greater discrimination. Given the facts surveyed in this article, it appears that the

²⁴³ Roach, *False Security*, *supra* note 15 at 73. See also Ryan Patrick Alford, “Bill C-51: A Threat to the Rule of Law?” (2016) 36 NJCL 113.

²⁴⁴ See Canadian Bar Association, *Bill C-59 – National Security Act, 2017* (Ottawa, January 2018), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=af8ac20b-0d2a-4249-a743-0ba351012c54>>; and Canadian Civil Liberties Association, *Submission to the Standing Committee on Public Safety and National Security Regarding Bill C-59, An Act Respecting National Security Matters* (January 2018), online: <<https://ccla.org/cclanewsites/wp-content/uploads/2018/01/2018-01-17-Written-submissions-to-SECU-re-C-59.pdf>>.

²⁴⁵ “Open Letter on Bill C-59 National Security Reform” (19 September 2017) at 2, *Amnesty International Canada*, (website), online: <<https://www.amnesty.ca/sites/amnesty/files/Open%20Letter%20on%20Bill%20C%2059%20National%20Security%20Reform.pdf>>.

²⁴⁶ Public Safety Canada, *Building Resilience Against Terrorism: Canada’s Counter-terrorism Strategy* (Ottawa, Government of Canada, 2013) at 4.

²⁴⁷ *Ibid* at 16.

Canadian security establishment – in particular, CSIS – remains institutionally incapable of fulfilling its mandate without first repairing its approach to dealing with Canadian Muslims. The track record of official Islamophobia presents an internal crisis in Canadian counter-terrorism that requires prioritization and policy attention. The lack of trust not only perpetuates Canadian Muslim insecurity and social exclusion, but it also diminishes the potential effectiveness of Canada's national security strategy, negatively affecting all Canadians.

It seems likely that, as long as Canadian counter-terrorism priorities remain tethered to post-9/11 counter-terrorism discourse that posits Islam and Muslims as primary threats, the burdens of social exclusion and unfair vulnerability will continue. It remains a structural paradox that Canadian Muslims are presumptively expected to shoulder a higher cost for security while simultaneously being equally vulnerable to terror attacks. The rise of militant white supremacist groups, along with increased attacks against Muslims,²⁴⁸ including the January 2017 Quebec City mosque massacre,²⁴⁹ bring this paradox into sharper focus. The reality that Canadian Muslims are more often victims than threats highlights the imperative to bring evidence-based, rationally-grounded, and culturally competent ethical and legal perspectives to the leadership and ranks of Canada's national security institutions. The legacy of abuse presents too extensive a record to ignore any longer.

²⁴⁸ See Canadian Centre for Justice Statistics, *Police-Reported Hate Crime in Canada, 2016*, by Maxime Gaudet, Catalogue no 85-002-X (Ottawa: Statistics Canada, 25 April 2018) at 8, Chart 4; Canadian Centre for Justice Statistics, *Police-Reported Hate Crime in Canada, 2015*, by Ben Leber, Catalogue no 85-002-X (Ottawa: Statistics Canada, 13 June 2017) at 6, Chart 3. Comparing the most recent 2016 statistics of hate crimes against Muslims to the 2014 data reveals a 40% increase in just two years.

²⁴⁹ On January 29, 2017, Alexandre Bissonnette shot dead six men attending a mosque in Quebec City. He told police the attack became his obsession after a 2016 terrorist attack in Nice, France, and that the last straw came with Prime Minister Trudeau's pledge to welcome refugees being turned away from the United States following President Trump's travel ban on visitors from mainly Muslim countries. See Les Perreux, "Quebec Mosque Shooter Told Police He was Motivated by Canada's Immigration Policies" *The Globe and Mail* (13 April 2018), online: <<https://www.theglobeandmail.ca>>.