

June 19, 2017

## Impending National Security Legislation: A “New Road Map” to Update Canada’s National Security Framework

By: Michael Nesbitt

Legislation Commented On: *Anti-terrorism Act, 2015*, [SC 2015, c 20](#)

Government Report Commented On: [Protecting Canadians and their Rights: A New Road Map for Canada’s National Security](#), SECU Committee Report, May 2017, 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session

### Introduction/Overview

At some point soon, [possibly as early as Tuesday, June 20<sup>th</sup>](#), the government will table legislation that would make significant changes to Canada’s national security framework. It will do so, at least in part, to fulfill the Liberal Government’s election promise to respond to the *Anti-terrorism Act, 2015*, commonly known as Bill C-51.

What the government might do or how broad the legislation might be is unknown at this point, though [signs point to it being a fairly hefty legislative package](#). It’s also unknown whether the various issues that have been floated regarding amendments to Canada’s national security framework will be legislated in one fell swoop, or whether a larger Act will be followed by further amendments as they are studied over the months and years to come.

Right now, the government would seem to have two recent sources—two Liberal government-led studies—upon which it might base all or some of its legislative proposals. (There is a [third document](#), but it is highly focused and deals only with one—albeit highly controversial—aspect of Bill C-51, that being information sharing within the government. See the *Security of Canada Information Sharing Act*, [SC 2015, c 20, s 2](#). Admittedly this is a topic upon which pending government legislation will have something to say, but this post will reserve comment until that day comes.)

The first source is the “[What We Learned](#)” document produced by Public Safety Canada in response to its Fall 2016 public consultations and accompanying report, entitled “[Our Rights, Our Security: National Security Green Paper, 2016](#)”. The idea behind the initial “Green Paper” and public consultations was to set out the challenges facing Canada in the realm of national security and seek public feedback on government priorities and responses. More specifically, the process was an attempt to solicit the public’s input on how best to “[find an appropriate balance between the actions it takes to keep Canadians safe and the impact of those actions on the rights we cherish](#).” “What We Learned” was an amalgamation of the public’s thoughts on these topics.

The problem with relying on the “What We Learned” document is that it contains no real recommendations. It is also based on public *wants*—as provided mostly electronically—rather than expert opinion on what Canada *needs*. But most of all the public’s response as detailed in the “What We Learned” document was framed in the negative: it [gave greater insight into what the public did not want](#)—what the government should not do—as opposed to what the government might actively do. My best guess is that this document still provides the best insight into what the government will do, but only at a very general level (it will focus on government transparency and review, but protect rights, etc.). Fortunately, we shall find out soon enough. In the meantime, it does not provide much detail on what precisely should be done to improve Canada’s national security framework and how it should be done.

As a result, this post will focus on the second source upon which the government might draw to base its legislative proposals: the Standing Committee on Public Safety and National Security (SECU) May 2017 report, entitled, “[Protecting Canadians and their Rights: A New Road Map for Canada’s National Security](#)” (the SECU Report). Unlike the public consultation, the SECU Report was produced by an expert Parliamentary Committee after studying the issues and speaking with both the public and experts who testified at locations across the country. It also provides 41 recommendations that come from the Liberal members of the Committee. As a result, it is the better source to analyze in terms of clarifying the problems with the existing national security framework and the potential solutions—at least as seen by this government.

This post will evaluate some of the more contentious recommendations found in the SECU Report, particularly those that seek to amend or draw back provisions of the *Anti-terrorism Act, 2015* with a view to explaining the issues in advance of future Parliamentary debate. It will also evaluate the scope of those recommendations and what has been left for Parliament to decide—what details, in other words, remain to be clarified by the impending Parliamentary legislation. And keep in mind, the devil will be in the details.

In the end, while this post maintains that the SECU Report should by and large be lauded as a general source of inspiration for future Parliamentary legislation, everything said at this stage is very much contingent on future Parliamentary action.

Note that I will make no effort to canvass all of the controversies surrounding Bill C-51 and related Acts of Parliament. If you are interested in this, Professors Craig Forcese and Kent Roach published a remarkably timely—and still relevant—[book on the topic](#). (It’s still available for purchase.) Craig Forcese has also offered his usual insightful, erudite quick-take on the SECU report [here](#), which is more than worth the read. With that as background, let us now tackle the SECU Report.

## **Overview of the SECU Report**

The SECU Report contains the SECU Committee’s recommendations for Parliament on improving Canada’s national security “framework”, which includes the federal laws, institutions and practices put in place by government to keep us all safe. The idea was not just to look at Canada’s criminal laws, but at the powers of existing institutions and whether new bodies or institutions are needed to complement, replace, oversee or review what already exists.

The Report's recommendations are divided along partisan lines. The majority Liberal members of the Committee offered the 41 recommendations contained in the Report, some of which will be discussed below. The Conservative Committee members issued a three-page "dissenting report". Generally, this dissenting report lauded the merits of Bill C-51 and discouraged revisiting its solutions. Notably the dissent does not speak meaningfully—or at all—to the numerous recommendations made by the majority of Committee members that have nothing to do with Bill C-51, or that otherwise sought to fill numerous gaps left by that legislation. Finally, the NDP Committee members offered a one-page "supplementary opinion". Consistent with NDP party policy and electoral promises, the NDP's "supplementary opinion" can be seen as the inverse of the Conservative dissent: it advocates for the complete repeal of Bill C-51 and opposes any measures seeking to tweak rather than repeal the changes the Bill implemented.

The majority recommendations—Liberal—have now been presented to Parliament for consideration. They cover a lot of ground, some of which I will get into in this post. Generally, these recommendations address a number of the Bill C-51 controversies as well as numerous new and long-standing issues in Canadian national security law and practice—like our insufficient whole-of-government review of national security institutions (see below). But the recommendations are also very short on detail—and, again, the devil is in the details.

Indeed, the Report has punted much to Parliament, which it would seem will have to fill in the blanks without the benefit of studied opinions—or at least any studied opinions collected or provided publicly. In part, this bird's-eye view approach is in keeping with the nature of such a Report. [Its terms of reference were so broad](#) that the initial Report likely had to narrow down the focus for Parliament before it could ever hope to get into the nitty-gritty details. Moreover, with partisan wrangling, which appears to have taken place, the ability to produce anything with great detail was likely further limited. Still, the result means that the specifics of pending government legislation will have largely been filled in without the benefit of any studied opinions and expert advice about which the public is aware.

To this point, the Report covers enough ground that, even if done in half measures and piecemeal fashion, we know we could be in store for the most substantial overhaul of Canada's national security laws and practices since our response to September 11, 2001 (see the *Anti-terrorism Act, SC 2001, c 41*), or at least since Bill C-51. When the legislative amendments to Canada's national security framework are eventually tabled, do not be fooled: consultation took place and reports were issued, but the details will be determined not by these sources but by government priorities.

### **The Importance of the SECU Report**

Before going any further, I must state my opinion that the SECU Committee should be lauded for undertaking a cross-Canada tour to listen to experts, citizens, and interest groups, and for taking this process seriously. In particular, each member of the Committee should be commended for their work. It was my strong sense that Committee members performed their duties with integrity during the process, truly listened to and engaged with the "witnesses", and really got to know the topic on which they were asked to report.

In general, the composition of the Committee was also beyond reproach. These were highly qualified, committed, tireless workers touring the country listening to a range of often

contentious opinions and, more often than not, hearing criticism that did not apply to them. By way of example, allow me to single out two members.

- (1) Liberal MP Marco Mendicino is a lawyer and former Crown Prosecutor who has worked on anti-gang, terrorism and wiretap cases over a long career. He knows more about these national security issues--and particularly the [Criminal Code's "terrorism" regime](#)—than most people in Canada. More to the point, he's seen the implications of Canada's national security legislation in practice, including in his dealings with the [Toronto-18 terrorism prosecution](#).
- (2) Likewise, Conservative MP Erin O'Toole was a commissioned officer in the Canadian Air Force before becoming a lawyer; he has also been the national security critic for the Conservative party. He knows Canada's national security laws—and in particular Bill C-51—about as well as anyone.

Again, these are just two of the members. In sum, we had the [right people](#) on this Committee.

So my first and overriding reaction to the SECU Report is one of gratitude. Thank goodness that the SECU Committee undertook this process with the seriousness that it did and let us hope that Parliament takes the issues raised in the SECU Report with the same sincerity and thoughtfulness. Thank goodness that there is now a Report on which Parliament might act that is not a harried reaction to a recent national trauma.

The SECU Report lays bare the urgency that exists for Canada to get this legislative process right; our national security laws and institutions are primed for an update and we will all be safer for it, but it must be done slowly, cautiously, deliberately, and with public input. Threats and actors are changing with technology and the times and now is an ideal—if overdue—time to respond and update.

I should also mention that not everything or even most recommendations in the SECU Report had to be groundbreaking. Many necessary amendments for Canada's national security framework are already known, or the problems and potential solutions are understood. The [Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182](#) (2010) and the [Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar](#) (2006) both offered a plethora of important, thoughtful recommendations and/or insights that might help to improve—or help us think about how to improve—Canada's national security framework. But for the most part these insights have remained in the realm of academics, not acted upon or studied seriously by Parliament. Let us hope that too is about to change.

### **How I Long For Dissent but not “Partisan” Dissent**

Before getting into the gritty substance of the SECU Report allow me to offer one final procedural note that seems particularly apt as Parliament looks ready to debate new national security legislation. Because of the long-overdue nature of the SECU Report, because national security is an area where you can really use dissenting voices to make sure all considerations are on the table, and because the members of the SECU Committee were so highly qualified for the job, the fact that the final Report broke down along partisan lines seems an opportunity missed. Allow me to explain—and express my (naïve?) hope that this is not repeated in Parliament.

If there is anything we can all agree on, surely the importance of keeping Canadians safe and building sustainable institutions that meet modern needs and respond to modern threats is one such thing? Of course the details regarding how to do this will differ across party lines as they should between virtually all people. Balancing security and individual rights and liberties is hard. So is finding the right balance between giving government agencies the powers they really need to keep us all safe and ensuring that those powers are overseen, that the relevant government agencies remain responsive and responsible to the people, that they act effectively (not politically), efficiently (not unduly bureaucratically), and that they enforce their powers democratically (not in authoritarian fashion).

So admittedly national security brings a great deal of controversy and with it, in the political arena at least, partisanship. Why then would partisanship in this SECU Report be anything but expected and, perhaps, encouraged? The answer is that, if what I have said so far is accurate, then most reasonable people can all agree that the government should do its level best to keep us all safe and that it should act as democratically as possible in doing so, respecting our legal limitations and institutions. At a broad level, most will be in some general agreement with that assertion. How to manage those tensions between rights and security, between safety and adequate checks on government power, is where the real debate lies.

But remember that SECU Report did not, in many cases, get into much detail. Where these details exist—for example with respect to the terrorism “speech crime” discussed below—then we should expect disagreement, though that should be contrasted with partisanship. But it is hard to imagine how new institutions, long-called for and pre-existing in all our Five-Eyes partners (the long-standing intelligence sharing alliance, which in addition to Canada includes UK, US, New Zealand & Australia)—for example institutions that would do whole-of-government review of national security responses to ensure both their legality and their efficiency/effectiveness—would be so controversial as to prevent a general declaration of agreement on principle. If the SECU Report is any indication, the majority party will propose legislation, the opposition will oppose whatever it is on principle, and Canada will be the worse for it. Again, we do have great people in Parliament. Let us hope we get to see them debate the issues on their merits and, where appropriate, come together to keep us all safe.

### **Specific Recommendations in the SECU Report**

With all of that out of the way, let’s then have a look at some of the more interesting—and likely controversial—recommendations found in the SECU Report with a view to what it will mean for Parliament down the road.

#### ***What the SECU Report Still Misses***

First and foremost, there is an ongoing blind spot in Canada’s national security framework. That is, Canada has a striking tendency to focus on threats as they are now, with the result that planning and institution-building is reactive rather than proactive.

Let me put this in perspective. CSIS’s [threat assessments](#) have focused on (al-Qaida) inspired terrorism first and foremost. Understandably so. They also focus on foreign espionage, chemical, biological, radiological and nuclear weapons (CNBR), and other long-standing security threats,

but to a more limited degree. By way of contrast, the United States produces [much longer, more detailed public reports and threat assessments](#) that focus on a much longer list of threats (see Statement for the Record, “Worldwide Threat Assessment of the US Intelligence Committee”, 26 February 2015, [available online](#)). To the US, terrorism is increasingly not just “jihadist-inspired”, but includes extremist right wing groups; economic concerns and natural resource limitations are considered (see page 9); and climate change is identified as a threat multiplier (see pages 11 & 12). The US Department of Defence [likewise considers climate change a threat multiplier](#) and has started contingency planning, as has the [North Atlantic Treaty Organization \(NATO\)](#). Climate change does not bear mention in any CSIS threat assessments. For Canada, the future, as they say, is unwritten.

So it is no surprise that most of Bill C-51 dealt with current problems with a focus on addressing Canada’s reaction to jihadist-inspired terrorism and provided little institutionally to update an antiquated system to give the Canadian agencies what they need for a shifting, modern threat environment. And, while the SECU Report did focus on updating institutions or creating new bodies that might help Canada evaluate the efficiency of its national security reactions going forward, its thinking about latent—non-terrorism related—threats remains largely dormant.

To be fair, the SECU Report was largely backward-looking because any forward-looking elements might be best dealt with after the details of each proposal are ironed out – details which, again, the Report largely stayed away from. Moreover, the SECU Report did at least advert to the need to plan Canada’s national security framework not just around responses to terrorism, but the threats of tomorrow as well (see for example pages 5-7 for references to witness testimony on the need to plan for health pandemics, climate change, and a variety of other threats). However, the Recommendations did not follow through.

Let us hope as we move to correct some of the holes in the existing system, Parliament takes the next step to study future and emerging threats and makes subsequent institutional and legal changes necessary to at least begin the process of ensuring we are prepared regardless of what emerges in the years to come.

### ***The SECU Report’s Recommendations on Oversight and Review of Canadian Institutions***

Canada has an oversight and review [problem](#) (see [Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “A New Review Mechanism for the RCMP’s National Security Activities”](#) (2006) (Arar Inquiry)). As compared to our Five-Eyes allies, Canada’s national security apparatus is under-developed and outdated. Perhaps nowhere is this more salient than with respect to our oversight and review bodies and procedures. Of course, [Bill C-22](#), which will create a new “National Security and Intelligence Committee of Parliamentarians”, will pass into law the new Parliamentary review body. While an excellent start, that will not be enough on its own. Greater work is needed to ensure departments that have no oversight—the Canadian Border Services Agency (CBSA) and Global Affairs come to mind—become more accountable; and there is a need to ensure greater efficiency across—as opposed to only within—each of the various agencies dealing with national security matters.

To simplify things a little, there have generally been two options put forward with respect to beefing up Canada’s review and oversight of national security operations. First, the [Arar Inquiry recommended “statutory gateways”](#) between existing review bodies, meaning that the review

bodies could follow the evidence, even if its investigation led into the purview of another government agency (see Arar Inquiry, especially at Chapter VI, *Review of National Security Activities: The Canadian Experience*). As it stands, a review body like the Security Intelligence Review Committee (SIRC), which reviews CSIS’s activities, is limited to just that: a review of CSIS’s activities. Even if its concerns about, say, CSIS use of metadata might flow into the work of the CSE, SIRC cannot currently follow that lead—though expect this to be one of the changes with the government’s new national security legislation.

Second, we might go the route of a “super-SIRC” that would be responsible for doing the type of review work done by the SIRC, only for the whole of government.

As [Craig Forcese has noted](#), the SECU Report offers language in support of both (see Recommendations 7-10, pages 38-39), without much detail as to how all of that extra bureaucracy would function.

So here we have a great example of the SECU Report moving in the right direction by promoting a solution long known to a problem long recognized. But the solution is bare: the question remains what route Canada should take—the first or second—or whether it can or should combine the options. Of course, who would do the work, how it would be financed, its precise powers and terms and reference, whether it would be an oversight or review body, whether it will have powers of subpoena, its ability to see all top-secret materials, and all sorts of other crucial details remain. It’s a solution without a road map.

So, we should first laud the SECU Report for tackling the review/oversight problem—something Bill C-51 shied away from—and for recommending that Parliament finally address the issue. At the same time, when it gets into these thorny issues Parliament will find little guidance in the Report. Another study, looking very practically at how the available options would work, how much they would cost, and whether they are all feasible, is likely required. We shall see what Parliament thinks soon enough, but the details will be new to all of us.

### ***CSIS “Threat Reduction” and Bill C-51***

Put briefly, prior to Bill C-51 there had been a strict divide between policing powers, which was the purview of police agencies like the Royal Canadian Mounted Police (RCMP), and “intelligence” agencies like CSIS, which gathered intelligence but did not act “kinetically” to disrupt or make arrests. The original divide was institutionalized in the *CSIS Act*, [RSC 1958, c C-23](#), upon the recommendation of the *Commission of Inquiry Concerning Certain Activities of the RCMP* (Freedom and Security under the Law (Ottawa: Supply and Services, 1981)) (the McDonald Commission).

The Commission recommended the separation of duties—or powers—in part due to widespread illegalities in the 1970s—and the perception that having one body with both intelligence and policing powers contributed meaningfully to the illegality. So, for instance, it was thought that the police had started to act extra-legally to disrupt when their “intelligence” indicated that they should do so, rather than take the more burdensome and time-consuming route of collecting evidence of the sort usable in criminal trials. The easy way out led not only to shortcuts and eventually wrongful behavior; it also arguably led to a less safe security environment where criminal activities were periodically “disrupted” but the criminals were not imprisoned. The

Band-Aid was used because it was easier and, frankly, probably more fun than disciplining the criminals. Best therefore to remove the incentive for our “evidence-gathering” institutions to fall back on “intelligence”; best to force those enforcing the law to act within it rather than in the shadows.

With little debate in Parliament on the merits of such a sea change, Bill C-51 integrated within CSIS the power to act kinetically (see section 12.1 of the *CSIS Act*). Despite the fact that this was a rather abrupt change to institutional policy brought about with little public consultation or investigation, this integration was not the most controversial aspect of CSIS’s newfound powers. What was most controversial was the associated powers for CSIS to act not just kinetically but also “unlawfully” or even in breach of the *Charter* in engaging in disruptive activities.

I have covered this latter issue in more detail both in [my testimony before the SECU committee](#) and in even more detail in a [forthcoming paper](#). For those of you interested in a broader discussion of CSIS’s threat reduction—or new-found “kinetic”—powers, I encourage you to see those previous works or that done by Craig Forcese and Kent Roach in their book, [False Security: The radicalization of Canadian anti-terrorism](#) (Toronto: Irwin Law, 2015).

But let me say that my commentary, both in the article and before the SECU Committee, focused first and foremost on the *Charter*-infringing powers of CSIS’s new threat reduction regime. This was done purposely, for it seemed the most obviously problematic grant of authority, perhaps in all of Bill C-51. The SECU Report seems to agree with the premise, quoting favorably the various concerns with CSIS’s authority to breach any *Charter* right so long as it sought a warrant authorizing the behavior. In the end, the SECU Report recommends the removal of this power (see Recommendation 11)—but only the *Charter*-infringing power. One would therefore expect the proposal of a legislative amendment to be coming to the *CSIS Act* to remove that same grant of power.

But I—and perhaps others—purposely did not get into much detail about the authority’s grant of power to conduct “unlawful” activities. On the one hand, if one presumes that CSIS needs disruptive powers (admittedly a big presumption), one can see why they would have to have the power to be unlawful: stopping someone suspected of harboring weapons from boarding a train could be an unlawful detention and we can probably all agree that we would like CSIS agents do so if necessary. On the other hand, one would think that if an agency wanted the grant of authority to conduct unlawful activity they would publicly make the case for it, including by pronouncing what particularly they wanted to do and why. CSIS never really did so. Ideally, CSIS would even release its legal opinion or portions thereof to help explain why it thinks this added power would itself be lawful or even constitutional, but Canadian government departments have a long history of protecting their legal opinions (“solicitor-client privilege”), which as an aside has always struck me as an unnecessarily absolutist position. Sometimes, the client would be better served by releasing that opinion, especially where the client’s (government’s) client (citizens of Canada) is better served by seeing the legal opinion.

In any event, it appears that the SECU Committee intends for the Government to keep the authority for CSIS to engage in disruptive and indeed “unlawful activities”, though with some newfound limitations. These limitations would include the requirement to “exhaust all other non-disruptive means of reducing threats” (Recommendation 12); that CSIS obtain a warrant and

Ministerial approval (Recommendation 13); that CSIS produce a quarterly report on its disruptive activities (Recommendation 14); and so on.

This might be the right framework or maybe it is not. We do not really know. There has been no meaningful justification for the “unlawful” activities so there is little to respond to and debate. The same might be said about the grant of kinetic powers more broadly. I am open to the idea, but would love to hear what the RCMP think, about whether there is a better way to integrate operations that would maintain the previous power divide, or more simply what particularly the government had in mind in terms of “unlawful activities”. Likewise a quarterly report seems useful, but it hardly substitutes for independent oversight—or maybe it would, and the demand for a quarterly report is far too onerous. Could a twice annual report suffice? As a former bureaucrat, my initial sympathy goes to the low-level employee tasked with producing drafts of these four reports per year. Again, we do not know because there was little debate at the time of Bill C-51, little information in the SECU Report, and now it is likely that the powers will be maintained by new Liberal government’s legislation with, at least thus far, no elucidation of the details.

Again, I am open—even sympathetic—to the need to allow CSIS to act kinetically, but I am also uncomfortable with any government department being granted broad new powers without being forced to make the case in detail first. Businesses are not generally granted loans without business plans. Law students generally cannot submit a paper without an outline and plan of action. Why should a government department be given a pass at the preparatory and justification stage? I say this not just to ensure the protection of Canadian civil rights. I say this because all products are better when the ideas and plans are challenged publicly and rigorously. It might annoy the bureaucrats, just as it annoys me when my writing is edited, but I also know the product always ends up the better for it. Needless to say, the SECU Report does not assuage my concern much because it does not take up the cause. We will soon see what Parliament does with this.

### *Speech Crime*

Bill C-51 introduced a new “speech crime” into the *Criminal Code*’s terrorism regime, which was codified in [section 83.221](#). It reads:

83.221 (1) Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general — other than an offence under this section — while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

The term “terrorism offence” is then defined in section 2 of the *Criminal Code*.

As part of the *Terrorism Law and Policy Lab* here at the University of Calgary, Faculty of Law (more on the class can be found [here](#)), students were asked to identify three controversies with respect to Bill C-51 and write an ABlawg post—in the way of providing advice for the Government—on how that controversy might be dealt with. Students were given free rein: they

could support the Bill C-51 provision, amend it, overturn it, whatever they wished so long as their conclusions flowed from their research.

In the end, one of the three groups wrote on the speech crime provision. The resulting ABlawg post can be found [here](#). I note this because its findings are consistent with the SECU Report, at least in part.

In this post, the students agreed that there was a need to amend the speech crime provision because, as worded, it offends *at least* the free speech protections provided by section 2 of the *Charter* and cannot be saved by section 1 of the *Charter*. However, the students disagreed on how—or perhaps whether—to save the provision.

In essence they came down as the Liberals and NDP did in the SECU Report: half the group, like the Liberals, thought the provision should be amended to be made less broad; the other half of the group, like the NDP who wrote the “supplementary” opinion, saw no salvaging of the provision and recommended a complete repeal of section 83.221. (Note too the Conservative position as expressed in its “dissent”: it not only favoured leaving section 83.221 as is, but was also particularly enthusiastic about the merits of the new (and to be fair untested) crime.)

To be clear: both positions espoused by the students are justifiable and both have merit—reasonable minds can disagree. I encourage you to read the students’ ABlawg post if you want to see what our next generation of lawyers thinks, where the controversy lies, and what they make of the respective arguments. I will not rehash this debate here.

But I do want to clarify one common misconception: Even the “repeal” position taken by half of the students in the University of Calgary Law group and also by the NDP is not arguing that there is no space for criminalizing certain types of speech. Rather, it is just arguing that everything you could want out of such a speech crime is already covered elsewhere in the *Criminal Code*, with I would add greater clarity—which is a boon for prosecutors—and a proven track record of case law that can be used to guide future police actions and prosecutorial cases.

So we already have “hate crimes” (section 319 of the *Criminal Code*), counselling any crime is already a criminal offence (see section 22 of the *Criminal Code*), facilitation of a terrorist offence is already an independent crime (see sections 83.19 and 83.191), “invit[ing] a person to provide...property or financial or other services” is already a crime (section 83.03, 83.04), participating in a terrorist group or offence is already a crime—which includes providing a skill or expertise, recruiting, facilitating someone to commit an offence, and so on (section 83.18)—“instructing” someone to carry out terrorism is already an offence (section 83.22), “aiding and abetting” any crime is already an offence (see section 21), and the list goes on. What then does another charge of advocating or promoting a terrorist offence add? Is advocating and promoting different than any of counselling, aiding, facilitating, instructing, providing advice or expertise, participating in, and so on? In the result, even the repeal position is not arguing for no criminalization of terrorist speech, merely that the new provision as worded does little but to add redundancy and confusion to the *Criminal Code*.

The upshot is that the SECU Report—majority opinion—recommends amending but keeping the terrorist speech crime while making it less broad (Recommendations 19 and 20). My own view is that the provision is redundant—it is covered by hate speech and other provisions in the *Criminal*

*Code*—but one can see why a government would want to make a special point of singling out terrorist speech.

Still, the government is in the process of removing redundant crimes from the *Code* right now in order to ensure there are fewer confusing provisions and clutter (see Bill C-51, [An Act to Amend the Criminal Code and the Department of Justice Act and to make other Consequential Amendments](#), 42<sup>nd</sup> Parliament 1<sup>st</sup> Sess.). The left hand would see terrorist speech stay in the *Criminal Code* to make a political point, while the right hand would see it go to simplify the albatross that has become the *Criminal Code*. Expect new legislation to follow the lead of the left hand.

### ***Terrorism Peace Bonds under Section 810.011 of the Criminal Code***

First, let us be clear that “peace bonds” are not new to the *Criminal Code*, even if they are relatively new in the context of terrorism (they are called 810 orders “in the business” because they are found in and around section 810 of the *Criminal Code*). They have a fairly well-worn place in Canadian criminal law. What does this mean? It means that the question with respect to terrorism peace bonds is not one of the legality of a peace bond practice, but whether the precise regime set-up in new section 810.011 of the *Criminal Code* for the specific terrorist peace bonds fits the bill.

So what is the controversy with terrorist peace bonds? Well, under the well-worn process, a police officer (or theoretically any citizen) can lay a peace bond if she “fears on *reasonable grounds* that another person *will* commit an offence” (emphasis added). Bill C-51 changed the “will” to “may”. In other words, the provision became: you can get a peace bond if someone thought someone else maybe might commit a terrorist offence, including the speech crime. On those grounds, harsh conditions—including house arrest—can be imposed.

The other key concern is that (“regular”) peace bonds tend to be issued with respect to people who have been charged with an offence, or have served time and are exiting prison—in other words, people about to be tried for a serious offence or who have been found guilty of committing an offence. Terrorist peace bonds tend to be laid on people who have neither been charged nor convicted of an offence and, based on Canada’s practice to date, never will be. So we have not only lowered the standard for obtaining the peace bond, but we have done so in a context where, in practice, the threat is purely prospective.

The SECU Report recognizes the need for peace bonds, but also that the threshold for obtaining one was probably unduly lowered. Unfortunately, the recommendation then unduly raises the threshold beyond even the original language: it proposes replacing the “may” not back to “will” but with a “balance of probabilities concept” (Recommendation 18). The “balance of probabilities” burden is a high one—it’s the standard that a plaintiff is required to meet, in court, to successfully sue another person. The result is likely to turn the peace bond process into a trial process, which, given the purpose of peace bonds—and the evidence that likely exists—could very well result in the terrorism peace bond tool fading into oblivion.

While there is much to be concerned about re: the use of terrorist peace bonds, they serve a purpose and have a place in our *Criminal Code*. With one caveat. Just use the regular section 810 language! We shall see what Parliament does.

## Conclusions

There are 41 recommendations in the SECU Report, many of them addressing—or at least recommending that Parliament address—longstanding issues in Canadian national security law and practice. For this reason, the SECU Report is a welcome relief. Canada is relatively underdeveloped and outdated with respect to our national security institutions, laws and policies. It does a disservice to Canadians and our government agencies charged with protecting us if this is allowed to continue. We should all be looking forward to some advances.

Moreover, the fact that our national security laws are also being developed through a more meditative, data-driven process that takes the time to study the issues and call on experts and the public for their input is to be commended most highly. But given the amount of work to be done, and the lack of clarity in the details to date, we can only hope that this continues to be the practice. One piece of legislation addressing Canada’s national security framework will not be enough. This needs to become an ongoing process—and not one that proceeds in fits and starts in response to terrorist attacks or times of peace.

So much has been left to Parliament to figure out—and given that many of the SECU Report’s recommendations have been around for so long in some form, Canadians may be excused for not holding their breath. This SECU Report is overwhelmingly laudable, but it is also less a “Road Map” than agreement on certain trip destinations. The map itself has been left to be determined once those destinations are approved by our representatives in Parliament. And while the process thus far—including most significantly the consultations and study—are to be applauded, it is now time for Parliament to start providing the details. The devil will most certainly be in the details.

---

This post may be cited as: Michael Nesbitt “Impending National Security Legislation: A ‘New Road Map’ to Update Canada’s National Security Framework” (19 June, 2017), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2017/06/Blog\\_MN\\_SECU.pdf](http://ablawg.ca/wp-content/uploads/2017/06/Blog_MN_SECU.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

