Court File No.: CV-22679625-0000

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

MUSLIM ASSOCIATION OF CANADA

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

**AFFIDAVIT OF ANVER M. EMON**
**(Sworn February 3, 2023)**

I, **Anver M. Emon**, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I previously swore an affidavit and prepared a report in this matter, both dated June 13, 2022.

2. The Applicant, the Muslim Association of Canada ("**MAC**"), requested that I review the affidavits served on behalf of the Canada Revenue Agency (the "**CRA**"), specifically the affidavit of Sophie Amberg dated December 22, 2022, the affidavit of Charlene Davidson dated December 23, 2022, and the affidavit of Julianne Myska dated December 23, 2022.

3. I prepared a response to the affidavits served on behalf of the CRA in a response report, dated February 3, 2022. My response report is attached to this affidavit as **Exhibit "A"**.

**SWORN BEFORE ME**: ☐ in person ☒ by video conference

by Anver M. Emon at the City of Toronto, in the province of Ontario before me on February 3, 2023 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits *(or as may be)*

Signature of Commissioner *(or as may be)*
**Rachel Chan LSO# 79331E**

Anver M. Emon

This is **Exhibit "A"** referred to in the Affidavit
of Anver M. Emon, affirmed REMOTELY before me this 3 day
of February, 2023 in accordance with O. Reg. 431/20

A Commissioner for Taking Affidavits

RACHEL CHAN
LSO# 79331E

MUSLIM ASSOCIATION OF CANADA (MAC)

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Response of Dr. Anver M. Emon to
Affidavits of Charlene Davidson, Sophie Amberg,
and Julianne Myska for the Attorney General

## A. INTRODUCTION

1. This response is to the above-named affidavits addressing the audit of the Muslim Association of Canada, and the larger context of national security and financial intelligence within which CRA audits take place under the anti-terrorism financing regime.

2. In preparation for this response, I reviewed the above listed affidavits, considering my research and expertise in related areas. Included in Appendix A is an article I have written in the forthcoming book *Systemic Islamophobia in Canada: A Research Agenda* (Toronto: University of Toronto Press, 2023). The essay, entitled "Moving Muslim Money" is included herein as I will refer to the analysis noted therein. Because the book is due to be released in April 2023, the document is in page proofs form. It is offered herein to ensure the academic rigor of the below responses, and for the convenience of the Court in adjudicating the

underlying dispute. Upon publication of the book in April 2023, I can provide copies to the parties and Court as requested.

3. Before addressing each affidavit in turn, I will outline my general conclusions upon review of the documents:

    a. Nothing in the affidavits rejects the findings I made in my report upon reviewing the AFL and appendices of the MAC audit.

    b. The affidavits address the high-level architecture of the anti-terrorism financing regime, maintaining that from a high-level analysis, the system is facially neutral. However, my initial report on the MAC audit, following my methodology in *Under Layered Suspicion,* analyzed the particularities of the MAC audit. As such, the three affidavits (with limited exception in the case of Juilanne Myska) are non-responsive to the particularities of how the audit operationalizes bias and prejudice in the audit mechanism. The CRA affidavits do not challenge my conclusion that the CRA's anti-terrorism financing regime adversely affects Muslim charities as compared to other types of charities.

    c. Moreover, the affidavits do not respond to the vast factual record in the MAC AFL, the AFL's appendices, and the analysis in my initial report. This demonstrates that the Government's financial intelligence apparatus has resulted in the unequal treatment of Muslim groups, including MAC. I will elaborate on this point in my conclusion, referring in part to my article annexed in Appendix A.

## B. RESPONSE TO AFFIDAVIT OF CHARLENE DAVIDSON

4. Ms. Davidson's affidavit provides an overview of Canada's anti-money laundering/anti-terrorism financing (AML/ATF) regime. The Ministry of Finance has carriage of the regime, which has a whole of government effect (including on the CRA). The regime was developed in light of Financial Action Task Force (FATF) recommendations and guidelines. As explained in my first report, the FATF is a global money laundering and terrorist financing watchdog, which sets international standards and best practices to guide countries tackling illicit financial flows. Ms. Davidson's affidavit aims to show that the policy reflects standard measures to combat terrorism financing, without discriminatory design or import. Pitched at a birds eye level, she explains the regime using general and abstract language to show that the policy is neutral in design and effect.

5. However, the Affidavit does not provide the necessary detail or disclosure to support such a conclusion.

6. In Paragraph 5, Ms. Davidson writes:

> "Canada's AML/ATF framework consists of set of legislative statutes that seek to combat money laundering and terrorist financing while respecting the constitutional division of powers, the *Canadian Charter of Rights and Freedoms*, and the privacy rights of Canadians."

The principal institution that executes the AML/ATF framework, FINTRAC, provides guidance to financial institutions on how to comply with their obligations under the Proceeds of

Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA). But the guidance provided does not explain how or by what means FINTRAC also oversees compliance from a religious freedom or equality lens (*Charter,* ss. 2 and 15). As I address in Appendix A, the AML/ATF regime as articulated under PCMLTFA is premised on subject financial institutions creating a compliance regime under PCMLTFA, s. 9. Those private sector compliance regimes are subject to periodic assessment by FINTRAC. However, the private sector regimes are hidden behind privacy, intellectual property, and national security considerations. As such, they are not subject to democratically representative mechanisms of transparency and accountability. The absence of evidence on these compliance regimes does not support a finding that the AML/ATF regime is non-discriminatory.

Ms. Davidson expends considerable effort both addressing the National Inherent Risk Assessment (NIRA) and limiting its representativeness of Canada's AML/ATF regime. However, in doing so, she fails to address the details, which is often where discriminatory practices arise.

7. For example, in paragraphs 43/48: The 2015 NIRA explains that its risk-based approach (RBA) on terrorism financing was "[b]ased on open source and other available reporting on the potential for Canadians to send money or goods abroad to fund terrorism."[1] She provides in Exhibit H sources used to inform the regime. One reference therein is to David Gartenstein-Ross's edited collection, *Terror in the Peaceable Kingdom,* published by

[1] Emon and Hasan, *Under Layered Suspicion,* 16, quoting the NIRA.

Foundation for Defense of Democracies (FDD). Though self-described as a non-partisan policy institute, FDD receives funding from Anchorage Fund, a foundation that financially supports Islamophobic organizations,[2] and has links with the European Foundation for Democracy, which has a history of defaming Muslims in Europe.[3] Sociologist Christopher Bail identifies the FDD as originally an anti-Muslim fringe organization which has subsequently become mainstream by developing access to powerful figures in American industry and capital.[4] This example in Ms. Davidson's Exhibit H showcases how the discriminatory effect against Muslims is embedded in the very design of the regime.

8. Ms. Davidson raises concerns about a comment I made in my report for this litigation. At paragraph 44: Ms. Davidson criticizes my view that the NIRA's list of 10 groups represents 100% of ALL terrorist financing risk. In response, I would modify my statement to say that, according to the Government of Canada, 100% of the *greatest* risk of terrorist financing comes from groups that map onto Canada's racialized and religious minorities, while 80%—or more, once we consider the "foreign fighter" category—of the *greatest* risk of terrorist financing comes from groups that map onto Canada's Muslim communities. While I appreciate the clarification, it does not undermine my fundamental analysis about the bias

[2] Wajahat Ali et al, *Fear, Inc., The Roots of the Islamophobia Network in America* (Washington D.C.: Center for American Progress, 2011), 21, online: http://cdn.americanprogress.org/wp-content/uploads/issues/2011/08/pdf/islamophobia.pdf?_ga=2.118394057.1148592791.1675281618-1110305257.1675025404

[3] Bridge, "Factsheet: European Defense of Democracy," *Bridge Online* (Washington D.C.: Georgetown University, 2019), online: https://bridge.georgetown.edu/research/factsheet-european-foundation-for-democracy/

[4] Christopher Bail, *Terrified: How Anti-Muslim Fringe Organizations Became Mainstream* (Princeton: Princeton University Press, 2014), 70.

embedded in the NIRA, given the structural bias in the Terrorist Entity List coupled with no evidence of checks against discriminatory regulatory analyses.

## C. RESPONSE TO AFFIDAVIT OF SOPHIE AMBERG, DIRECTOR OF THE REVIEW AND ANALYSIS DIVISION (RAD), CANADA REVENUE AGENCY (CRA)

9. The Affidavit of Ms. Amberg provides an overview of the CRA, its authority under the Income Tax Act, and general features of charities law.

10. In my view, there were several instances where Ms. Amberg overstates certain matters:

    a. Para 5: Ms. Amberg states: "Due to the tax benefits registered charities can receive, the CRA, through its Charities Directorate, is the federal *de facto* regulator of charities in Canada." Technically, that is not correct. Section 92(7) of the Constitution Act allocates jurisdiction to the provinces on "[t]he Establishment, Maintenance, and Management of…Eleemosynary Institutions in and for the Province." Because the Provinces have largely not legislated in this arena, and because charities obtain a tax benefit from the CRA, the Charities Directorate of the CRA is the *de facto* regulator of the charities sector.

    b. Para 19: Ms. Amberg notes that in practice, the Directorate has not used the Charities Registration (Security Information) Act (CRSIA) but instead has used the Income Tax Act to pursue non-compliance where risks of terrorism abuse were present.

    c. Para 21: Ms. Amberg notes that no charity security certificates have been issued to date under the CRSIA (these certificates are signed the Minister of Public Safety and

Emergency Preparedness and the Minister of National Revenue to indicate that they have reasonable grounds to believe that a charity is associated with terrorist groups or activities). This puts into question whether Canada has appropriately rated the vulnerability of its charity sector to terrorist financing

d. **The CRA's Avoidance of the CRSIA.** This is a matter we have addressed in *Under Layered Suspicion.* Ms. Amberg's explanation is that the ITA enables sufficient enforcement of the AML/ATF regime. But recall that the FATF considers the CRSIA part of the reason why Canada has met its obligations under the guidelines. But failure to use the CRSIA also explains the FATF's concern that few assets have ever been frozen on AML/AFT grounds. Importantly, the CRSIA is a much more narrowly calibrated AML/AFT instrument than an audit. Rather than being carried out under the administrative authority of the CRA, it requires the CRA to liaise with the Minister of National Revenue, who based on the evidence, can issue a certificate stating that it is the Minister's opinion that an applicant or registered charity has made or may make resources directly or indirectly available to an entity on the terrorist entities list. Upon issuing the certificate, the Minister files it with the Federal Court and dispatches it to the applicant or registered charity, with notice that the certificate will be heard by the Federal Court. If the Federal Court finds the certificate reasonable, the registered charity will lose its charitable status. The proceedings may be *ex parte* if the judge determines the underlying information cannot be disclosed due to national security considerations. This legislation not only meets FATF requirements, but also provides a narrowly focused analytic framework

that calibrates evidence gathering with Public Safety's terrorist entities list and anticipates a level of due diligence subject to review by the Federal Court.

e. Para 20: Ms. Amberg explains that using the standard administrative processes under the *Income Tax Act*, rather than the *ex parte* processes under the CRSIA, the CRA can be more transparent with organizations under audit. It is true that the CRSIA procedure may be *ex parte*, where the Federal Court determines the underlying information cannot be disclosed due to national security considerations. But it also follows that where the information can be disclosed, the matter need not be *ex parte*. In addition, an *ex parte* proceeding does not mean that there is no oversight — the Minister has an obligation to provide the court with full and frank disclosure in any *ex parte* proceeding. This ensures that the Federal Court has the full context required to assess the certificate. Moreover, Ms. Amberg's use of "transparent" is unclear. On the one hand, the evidence used in the CRA process is public unlike the intelligence anticipated by the CRSIA; but as we show in *Under Layered Suspicion,* the audited organizations are generally not told that they are under review for non-compliance on AML/ATF grounds. As such, they are not always aware of the nature or scope of the audit, as in the case of MAC and others reviewed in *Under Layered Suspicion.*

11. **Failure to Address Factual Record of Disproportionate Impact on Muslim Groups:** Ms. Amberg does not address the factual records effectively. Ms. Amberg writes at para. 37 that the Review and Analysis Division (RAD) selects registered charities based on "an assessment

of risks, not based on any particular faith or denomination." Ms. Amberg, however, does not address the bias reflected in and resulting from the AML/ATF risk matrix. Nor does her statement effectively account for the disproportionate impact that the "assessment of risk" methodology has on Muslim-led charities. The report on CRA audits from the International Civil Liberties Monitoring Group claimed that over 75% of RAD audits concerned Muslim-identified charities. This figure was later confirmed by Geoff Trueman, Assistant Commissioner of the CRA, in his testimony to the Senate of Canada on November 28, 2022, nearly four weeks prior the affirmation date on the affidavit.

12. **Failure to Assess Bias.** In Para 49, Ms. Amberg explains the RAD risk assessment process, including its monitoring report. However, in my view, there are several issues in her analysis that demonstrate that she did not provide due regard to the relevant factual record:

    a. Reliability and Balance: She notes that when examining information that may suggest a charity poses a risk of terrorism financing, the information itself must be "reliable" and any analysis must account for the information's "political and ideological context". But her affidavit does not respond to any of the analyses in my report where I called into question the evidence the CRA used in the MAC AFL and appendices, precisely for their Islamophobic bias, or even the inferences drawn from emails identified by MAC servers as spam.

    b. Accuracy: She writes that several reliable sources of different types are used to corroborate findings. But throughout *Under Layered Suspicion* and my report on the MAC AFL, I found a series of sources cited for saying similar things, which were also

misinformed, biased, or of a particular political persuasion. As I have written elsewhere, the study of Islam and Muslims is subject to a certain politics that reflect disciplinary politics, national politics, regional politics, religious politics and so on.[5] For instance, in Ms. Davidson's affidavit, Exhibit H, we see a set of resources relied upon to inform the NIRA of 2015. But a review of the list showcases a family resemblance among the resources. "Terrorist Financing-related documents" all reflect a family resemblance among sources. *CTC Sentinel*, *Journal of Counterterrorism and Homeland Security, Journal of Money Laundering Control*—all reflect sources and publications that unproblematically adopt a national security focus and speak to professionals in the field. Indeed, *the Journal of Counterterrorism and Homeland Security International* is the flagship journal of the International Association of Counterterrorism and Security Professionals, a professional organization. In other words, the sources that inform AML/AFT policy constitute an echo chamber of ideas; just because Ms. Davidson, Ms. Amberg, and their associates may corroborate claims across such publication venues does not mean the underlying claims are accurate. It just means they coincide with a set of research priorities held by those who are also committed to a particular instantiation of the national security regime.

c. Impartiality and neutrality. Ms. Amberg writes at Para 49 that the analytic process "is not influenced by any interest in the result. It is free of political considerations and

[5] Anver M. Emon, "The 'Islamic' Deployed: The Study of Islam in Four Registers," *Middle East Law and Governance* 11, no. 3 (2019): 347-403.

personal attitudes." Even if it is assumed that it is possible to have a process "free" of any political considerations of personal attitudes, the *effect* of the process is that it has disproportionate, adverse impact on Muslim charities.

## D. RESPONSE TO AFFIDAVIT OF MS. JULIANNE MYSKA

1. Ms. Myska's affidavit is the only one to address the MAC AFL in some detail. Though she takes aim at aspects of my report, her claims and representations do not contradict or undermine my conclusions. In this section I will address Ms. Myska's explanation about the audit and the AFL and conclude by addressing her criticisms of my report.

2. **The Arab Spring of 2011.** Ms. Myska writes in paragraph 23 that a principal concern in the audit was MAC's alleged engagement in activities that "furthered the interests of the Muslim Brotherhood organization and its political party in Egypt, the Freedom and Justice Party." It is important to maintain some perspective on the pro-democracy uprisings during the Arab Spring, which took dramatic effect in Tunisia and Egypt in 2011. The entire world was watching the Middle East at that time, as protesters fought against prevailing dictatorships. Importantly, the Freedom and Justice Party, a political party whose officials also were connected to the Muslim Brotherhood, took power in Egypt following the protests, with a mandate to establish a democratic regime, although it was subsequently overthrown in a violent coup in 2013. Democracy and human rights proponents saw in the Arab Spring the possibility of democratic reform in a region beset by military dictators, authoritarian monarchs, and one-party governments. From North Africa into the Gulf region, the Arab Spring captivated imaginations around the world. The Arab Spring

continues to interest academics, policy makers, charities, and others. It is not unlike the outpouring of support among Canadians across the country for Ukraine, with Canadians sending money to support the war effort against Russian aggression. News accounts of Canadian generosity include stories of Ukrainian Churches in Canada raising funds to send abroad.[6]

3. **Emails:** At Paragraph 25, Ms. Myska suggests that emails sent to MAC officials on the official MAC email address attest to a nexus to the Muslim Brotherhood. While Ms. Myska insists on focusing on emails, she fundamentally fails to address the methodological flaws in her approach. The issue is not whether the emails were received on official MAC emails; rather Ms. Myska uses the emails to bolster what I addressed in my report as the so-called "links analysis" method of financial security (see section C.2 at pp. 47 et seq). Scholarly analysis suggests that such links analysis, whether via emails or other financial data, is tenuous at best, fundamentally flawed at worst.

4. **Paragraph 32:** Ms. Myska states that "A charity that advances the interests of another organization, even if that organization is not a terrorist organization, is not operating exclusively for charitable purposes, which is grounds for revocation under the *Act.*" This may be true, but it is not clear what the standard is for "advancing the interest of another organization". For instance, Canada's various Catholic Churches are in some degree beholden to the dictates of the Vatican. If Catholic priests exchange emails using their Church email accounts with members of the Vatican during Conclave discussing a Papal

[6] One example is the Holy Spirit Ukrainian Catholic Church: https://holyspirit.hsucc.ca/p/32/Help-for-Ukraine

successor, is that evidence of advancing the interest of another organization? If Ukrainian church leaders in Canada exchange emails with members of the Ukrainian Government to discuss how to support that regime's fight against Russian invasion, is that advancing the interests of another organization? It is not clear how many emails and what discussion items constitute "advancement" of another organization? The findings set out in my original report, as well as in *Under Layered Suspicion*, demonstrate that Muslim charities are adversely and disproportionately impacted by the CRA's "facially neutral" processes.

5. **Failure to Address Biased Sources and Assumptions:** I reviewed the sources on the Muslim Brotherhood that the audit team cited in the AFL and its appendices. In my original report on this case, I raised several concerns about those sources, and why they may introduce bias into the analysis. Nowhere in Ms. Myska's affidavit is a response to my claims and concerns. This occurs expressly in paragraph 35 where Ms. Myska refers to the UK internal review of the Muslim Brotherhood. However, I addressed the UK report in my analysis (see page 32) and identify why that report is problematic. Again, Ms. Myska does not address the otherwise valid criticism of the evidence the audit team relied on to make its assessment of MAC.

6. **Who can be conservative**? At paragraph 79, Ms. Myska outlines a series of social media statements attributable to individuals affiliated with MAC that seem "to glorify or encourage violence…or undermine women's rights." In my research in *Under Layered Suspicion* and now in the case of MAC, I have seen this sort of CRA audit analysis under the auspices of the public benefit test. As I addressed in *Under Layered Suspicion,* some readings of Islamic

thought and law reflect conservative world views — as do many other religious groups with conservative values, such as certain Evangelical traditions, Hutterite teachings, and Orthodox Jewish laws. But if this is the standard approach to public benefit analysis, one would expect to see this same sort of analysis applied to preachers, ministers, pundits, rabbis, and others across the religious spectrum. Instead, Muslim charities are disproportionately impacted by the CRA's audit processes.

7. **Who Interprets/Translates Islamic Speech**? Throughout the affidavit, Ms. Myska refers to how the CRA independently interpreted speeches, sermons, and other materials for its analysis. But this begs the question of who interpreted, how did they interpret, and what biases did they bring into the analysis? At paragraph 79, Ms. Myska refers to a sermon of Ahmad Khandil that was independently translated. But it is not clear who did the translation. This is an increasingly important issue given the way in which Islamophobia enters the translation process. As *Toronto Star* reporter Jennifer Yang reported in 2018, there numerous reasons to worry that translations of Islamic sermons and similar speeches may be politically motivated and biased.[7]

## 8. RESPONSES TO MS. MYSKA'S CRITICISMS OF EMON'S REPORT

a. Paragraph 29: Ms. Myska expressly states that the CRA did not find, and the AFL did not claim that MAC was a branch of the Egyptian Muslim Brotherhood, "contrary to the unsupported statement of Dr. Anver Emon". In fairness, the AFL cites

[7] Jennifer Yang, "A Toronto imam was accused of hate-preaching against Jews. But that wasn't the whole story," *Toronto Star,* 7 May 2018. Online: https://www.thestar.com/news/gta/2017/10/22/a-toronto-imam-was-accused-of-hate-preaching-against-jews-but-that-wasnt-the-whole-story.html

considerable material that claims the Muslim Brotherhood is an international organization. It is reasonable to infer that the CRA viewed MAC as a Canadian outpost of the Muslim Brotherhood despite not saying so expressly. I have seen the CRA rely on less substantial evidence to make similar claims about the Islamic Shia Assembly of Canada as a Canadian outpost for the Ahl al-Bayt World Assembly of Iran.

b. Paragraph 36: "Contrary to Dr. Emon's statements at page 11 of his Final Report, the CRA did not represent that the Muslim Brotherhood is a 'single' or 'monolithic' entity." It is true that the CRA made no such formal finding. But at the same time, the AFL cites and relies on evidence that describes the Muslim Brotherhood in such terms. In my view, it is not reasonable for the CRA to rely on such evidence, and then state that it never claimed the very thing that the cited materials say or claim.

c. Paragraph 53: "Dr Emon has taken a portion of the AFL that quotes the preamble to one of MAC's bylaws and mischaracterizes the quote as the CRA's position." That is accurate; it was a clerical error on my part.

d. Paragraph 85. "Dr Emon wrongly claims at page 39 of his Final Report that the CRA relied on a 'single media article' to inquire into MAC's foreign funding, and further that this article was a 'pretext' for the CRA's inquiry into this issue." Instead, she says the AFL referred to two media articles, a 2015 report of the Senate, and testimony of Richard Fadden. The critique is inaccurate, as the text of my report references "examples", of which the media story is one. Moreover the "single media article" I

refer to pertains to the Qatar charity that was the subject of the AFL and is noted at paragraph 84 of Ms. Myska's affidavit. The second media article pertained to the Islamic Shia Assembly of Canada (see AFL, p. 64 n. 336). I have addressed that case thoroughly in *Under Layered Suspicion.* In my view, Ms. Myska's analysis misses the point. The focus on Qatar Charity was embedded within an AML/ATF regime that was already structured in a manner that is biased against Muslims. With this regime already structured in this way, even paltry evidence would raise a red flag. Consider that the Senate report she refers to merely stated: "To promote their own fundamentalist brand of Islam…here in Canada, the committee has heard that wealthy Saudis, Qataris and Kuwaitis are using charities as conduits to finance Canadian mosques and community centres." But funding mosques and community centers is not tantamount to terrorism. Fadden's principal comment was that monies from "these countries" "are directed to religious institutions or quasi-religious institutions." It appears that the CRA has relied on materials that jump from the funding of religious and quasi-religious institutions to terrorism, which suggests a bias that associates certain forms of Islam with terrorism.

# 12 Moving Muslim Money

ANVER M. EMON

Whether domestically or internationally, commercial banks such as the Bank of Montreal, Canadian Imperial Bank of Canada, and the Hong Kong and Shanghai Banking Corporation, as well as online payment systems such as PayPal, offer customers the opportunity to instantaneously move money across borders. This apparently frictionless movement of money stands in stark contrast to the friction that people experience in crossing borders. Canada has a whole federal agency – the Canada Border Security Agency (CBSA) – that enforces "more than 90 acts and regulations that keep our country and Canadians safe" from those who might enter Canada to cause harm (Government of Canada, n.d.a.). Visa requirements, passport controls, and customs declarations are just a few sources of friction to border crossing. Moreover, certain categories of people encounter more friction than others. In the United States, the Trump administration's so-called "Muslim Ban" applied to Muslims by reference to certain Muslim-majority states that purportedly presented security concerns. In Canada, refugees seeking safe haven from conflicts in Syria, Afghanistan, and Egypt encounter friction worldwide as border patrol agencies and policies subject them to a regime of suspicion.

When we juxtapose the movement of money and people across borders, our first impression is that, unlike people, money crosses without friction. But moving money across borders is not frictionless for everyone. Much depends on who is moving it, its destination, and how the private financial sector, conscripted into the War on Terror, flags funds using privately developed software algorithms that report "suspicious transactions" to federal agencies charged with combating money laundering and terrorism financing.

This essay is not interested in the best practices for monitoring the financial activities of criminal organizations. Instead, it explores the

extent to which Canadian law and policy has conscripted the financial sector in the War on Terror, and thereby enabled – through private sector technology and innovation – inordinate, untransparent, and unaccountable surveillance on and economic friction for racialized peoples, in particular Muslim Canadians (Iafolla 2015). My interest in this issue stems in part from research I have conducted with Nadia Hasan that examines Canada Revenue Agency audits of Muslim-led charities (Emon and Hasan 2021). In our report, *Under Layered Suspicion* (2021), we show how the Government of Canada's policies on terrorism financing link 100 per cent of terrorism financing risk to groups that map onto Canada's racial and religious minorities. Within that risk portfolio, though, the Government of Canada associates 80 per cent of all terrorism financing risk in Canada specifically with groups that map onto Canada's Muslim communities. In other words, to the extent risk assessment for terrorism financing is speculative, predictive, and future-oriented, there is a disproportionate adverse focus on Muslims in Canada.

Canada's anti-terrorism financing regime, when examined alongside the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA, S.C. 2000, c. 17), prompts questions about the ways private financial institutions are conscripted into Canada's War on Terror, with limited requirements of public disclosure and accountability. Under the PCMLTFA, Canada's financial institutions are required to report "suspicious transactions" to federal bodies. They are asked to use risk-based assessment models to identify such suspicious transactions. Given the anti-terrorism financing regime in Canada that is facially discriminatory against Muslim Canadians, this essay asks how private banks identify "suspicious transactions," what their risk-based assessment models look like, and the impact these models have on Muslim Canadians. More directly, how might these models engender the "debanking" of Muslims?

"In most countries … banking is the most important part of the financial system," asserts one guide on preventing terrorist financing, written for bank supervisors. "It is key to facilitating domestic and international payments, it serves as the intermediary for depositors and borrowers, and it provides other financially related products and services" (Chatain et al. 2009, 7). It thus follows that exclusion from basic financial services like deposit accounts and electronic payment systems on risk-based metrics has the capacity to create an underclass of citizens who cannot effectively participate in and contribute to the marketplace. If someone is "debanked," they are not simply inconvenienced, they are blocked from making basic, everyday purchases at venues that increasingly no longer accept payment in hard currency.

Much of the existing literature on "unbanked" people focuses on lower-class citizens and the poor who cannot access banks in the first place (Johnston and Morduch 2008; Brown et al. 2013).[1] This essay suggests that another important avenue for research is considering the extent to which anti-terrorism financing policies contribute to private sector "debanking" of Muslim clients on potentially biased risk assessment models, many of which are hidden from democratic scrutiny behind privacy laws and intellectual property protections. There are various intersections between the "unbanked" and the "debanked" when we consider income levels, race, even geographic location. Both raise general concerns about fair and equal access to financial services. But in the case of moving Muslim money, it is worth distinguishing between the two in order to highlight and conceptually clarify the effect of the various epistemologies of anti-terrorism financing regimes on Muslims and their money. For the purpose of this essay, being debanked anticipates the private financial sector itself, which is subject to domestic banking regulations that in turn mark out and police otherwise capable, willing, and existing clients.

Media outlets report cases of conventional banks "debanking" Muslim clients on suspicious grounds. Citibank, for example, was sued for religiously discriminating against a Muslim woman seeking to open a bank account that named her husband as beneficiary (Budryk 2019). Online payment system Venmo was sued when a Muslim Bangladeshi woman tried to use the financial payment service to reimburse her friend for a meal they ate at Al-Aqsa Restaurant in New York. Venmo halted the transaction because the reference to "Al-Aqsa" flagged its security filter system. Al-Aqsa, an Arabic term (literally translating as "the farthest"), is the name of a revered mosque in Jerusalem; the incident suggests that Venmo's algorithms filter and flag transactions related to Islam and/or Arabic terms, in turn discriminating against Muslims (Pereira 2019). On 22 April 2020, US Representative Rashida Tlaib and three of her congressional colleagues sent a letter to three major US banks to denounce the biased practices of the financial services industry adverse to those "banking while Muslim." They wrote, "[w]e have noticed these *de-risking* practices disproportionately impact Muslim Americans and Muslim organizations and charities, despite the

1 To the extent banking institutions preclude the poor from accessing basic financial services on risk-assessment bases – and thus become described as the "unbanked" – scholarly analyses about inclusiveness and access reflect concerns about the exclusionary effect of private sector banks' risk-based metrics.

emphasis by U.S. regulators that such organizations should not be categorically treated as high risk" (Tlaib et al. 2020). These US examples are hardly exceptional (Menendez and Masto 2018).[2] Similar "debanking" practices have also been reported in the UK (Laurie 2014) and Canada. In 2007, the Royal Bank of Canada faced accusations of discrimination when it closed the US-dollar accounts of its customers with dual-citizenship to a handful of countries, many of which are Muslim majority (e.g., Iraq, Iran, and Sudan) (Grant and Dobrota 2007).

Yet to date, the empirical data and analysis on "debanking" in Canada is limited (Iafolla 2015). More robust research in this area is needed in the interest of maximizing both transparent democracy and market participation among willing and able consumers. Government and private sector surveillance of Muslim money within and beyond Canada's borders is hidden from view by private sector protections of privacy, confidentiality, and intellectual property. These mechanisms are structured through legislation and banking regulations, and centrally overseen by Canada's financial investigation unit, FINTRAC. Analysis should thus begin with FINTRAC and its viral effects on Canada's financial sector.

**Financial Intelligence Units and Canada's FINTRAC**

During the Regan era, the US War on Drugs led governments around the world to develop new mechanisms to undermine the production, distribution, and consumption of illicit drugs. One mechanism was to target the proceeds of drugs sales. By 1989, it was estimated that over $300 billion in drug proceeds were laundered through the conventional banking systems in Hong Kong, Europe, and the United States (Emon and Hasan 2021, 15). This use of the conventional banking system prompted the creation of the Financial Action Task Force (FATF) during the 1989 G7 meeting in Paris. It was thought that a multilateral organization would be well placed to create unified global standards to coordinate state action against the proliferation of the drug trade. The standards were designed to help states develop the best practices for domestic financial regulation to prevent the financial sector from laundering the proceeds of the illicit drug trade. Implicit in some of these

2 In fact, in 2018 US Senators Robert Menendez (NJ) and Catherine Cortez Masto (NV) sent a letter to Bank of America CEO Brian T. Moynihan over concerns that their risk assessment policies operated adversely against immigrants, which took shape concurrent with then President Trump's actions against the Deferred Action for Childhood Arrivals Program (DACA or Dreamers).

best-practice standards was a recognition that financial institutions were privy to data on financial transactions that could in turn be interpreted to identify risk-factors corresponding to money-management techniques used by drug cartels.

As a multilateral organization, FATF could only offer best practices and standards because states exercise exclusive jurisdiction over domestic law, including the regulation of their financial sectors and institutions (e.g., banks). If data running through financial institutions were to be interpreted, it would need to be done so either by the banks themselves, by domestic governmental agencies, or some combination of the two. States ultimately created domestic agencies tasked with financial investigation. The first Financial Investigation Units (FIUs) took shape in the 1990s and proliferated thereafter, coinciding with the War on Terror launched by the US after 11 September 2001 (Gleason and Gottselig 2004, ix).

According to the World Bank and International Monetary Fund (IMF), an FIU "is a central national agency responsible for receiving, analysing, and transmitting disclosures on suspicious transactions to the competent authorities" (Gleason and Gottselig 2004). These governmental agencies operate on the presumption that financial services corporations have vital data relevant to combating money laundering and terrorism financing. These public institutions assess relevant data from private financial institutions and coordinate data sharing with relevant domestic police agencies (ix). Central to the function of FIUs is close cooperation with private sector financial institutions. Most of the relevant data on "suspicious transactions" is held by these private financial institutions; there is thus a symbiotic relationship between banks and anti-terrorism law enforcement agencies of the state. The regulatory framework is a crucial link between the public and private sectors; it is the mechanism by which the government conscripts private financial institutions as foot soldiers in the War on Terror.

Canada's FIU is called Financial Transactions and Reports Analysis Centre, or more simply FINTRAC. FINTRAC reports to the minister of finance, who oversees the country's whole-of-government anti-terrorism financing regime. As the Government of Canada explains:

> FINTRAC was created in 2000 pursuant to the Proceeds of Crime (Money Laundering) Act (PCMLA). At the time of its creation, FINTRAC's mandate was to assist in the detection, prevention and deterrence of money laundering by analyzing and assessing financial transactions and other information and making disclosures to police related to money laundering (Government of Canada, n.d.b.).

But in December 2001, after the 11 September attacks, the Canadian Parliament amended the PCMLA, passing the Proceeds of Crime, Money Laundering, and Terrorist Financing Act (PCMLTFA). Under this new legislative regime, still currently in place, FINTRAC's expanded mandate includes terrorism financing – and thereby the regulation and oversight of financial sector compliance with anti-terrorism financing protocols. The PCMLTFA requires financial service providers to disclose "suspicious financial transactions and … cross-border movements of currency and monetary instruments" (PCMLTFA, s. 3). Financial service providers that fall under the ambit of FINTRAC's mandate include banks and payment service providers (e.g., PayPal), among others. Under section 7 of the PCMLTFA, these service providers are required to report to FINTRAC:

> every financial transaction that occurs or that is attempted in the course of their activities and respect of which there are reasonable grounds to suspect that
>
> (a) the transaction is related to the commission or the attempted commission of a money laundering offence; or
> (b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence.

Section 7 is the legislative equivalent of the World Bank's and IMF's "suspicious transaction" concerns. Each financial service institution is required to create "a program" to ensure its compliance under the PCMLTFA, which includes "policies and procedures" by which the financial service institution assesses in the ordinary course of business "the risk of a money laundering offence or a terrorist activity financing offense" (PCMLTFA, s. 9.6(1), 9.6(2)). Failure of any financial service organization to comply with these legislative requirements results in heavy fines. In the event a financial entity violates its section 7 reporting obligations, and is convicted of doing so, it is liable to a maximum fine of 2 million CAD and/or imprisonment for a maximum term of five years (PCMLTFA, s. 75(1)). If the committed violation came at the direction of an officer of a corporation, the PCMLTFA pierces the corporate veil and considers the individual officer a party to the offence (PCMLTFA, s. 78).

Since the PCMLTFA creates a series of obligations (and financial liabilities) on the private sector, FINTRAC offers financial institutions guidance on how to craft a compliance program, devise a risk-based assessment model, and assess its reporting needs. FINTRAC advises financial service organizations to know their clients, appreciate their

geographic location and where they move their money relative to the presence of crime/terrorism, and consider the shifting risk patterns across different foreign jurisdictions. The agency also provides a standardized form – Suspicious Transaction Report – for institutions to complete as part of their reporting obligations on specific transactions (Government of Canada, n.d.b.). The form provides space for the reporting entity to explain why a transaction may have been suspicious. According to the Regulations to the PCMLTFA, a reporting financial entity is required to provide a "[d]etailed description of grounds to suspect that transaction or attempted transaction is related to commission or attempted commission of money laundering offence or terrorist activity financing offense" (PCMLTFA, Schedule 1 Part G). Moreover, where the financial institution believes the transaction relates to the interests of a terrorist group, it must also explain how it "came to know that property in question is owned or controlled by or on behalf of terrorist group of listed person" (PCMLTFA, Schedule 2 Part B).

The flip side of this guidance is that FINTRAC subjects financial institutions and their compliance mechanisms to periodic review (PCMLTFA, s. 62.1). These statutory and regulatory measures show that though the government does not prescribe a particular risk-based assessment model for financial institutions to follow, it nonetheless reviews, evaluates, and thereby knows the various metrics used by different financial institutions that report suspicious transactions related to terrorism financing.

In its formal guidance to financial entities, FINTRAC recognizes that while "[t]there is no standard risk assessment methodology," a financial entity will undertake, among other things, the following in designing its methodology of risk analysis:

- Consider and assess business risks, which includes – "products, services and delivery channels, geography, new developments and technologies, affiliates if applicable," and any other relevant matters.
- Consider and assess clients and business relationships "based on the products, services and delivery channels they use, on their geography, and on their characteristics and patterns of activity."
- For high-risk relationships, put in place "the prescribed special measures."
- High-risk measures are relevant in cases, for example, where the financial entity is connected to high-risk countries, such as those subject to
    - The Special Economic Measures Act (SEMA)

- FATF's list of high-risk countries and non-cooperative jurisdictions
- UN Security Council Resolutions
- The Freezing Assets of Corrupt Foreign Officials Act sanctions (Government of Canada, n.d.b.)

The above regulatory demands are just a few features of Canada's basic training for its institutional draftees in the War on Terror.

Because of their access to data, private sector financial institutions help make possible and give full effect to Canada's anti-terrorism financing regime. But this public-private collaboration in the War on Terror presents serious challenges that future research must undertake in the service of Canadian commitments to democratic accountability, equality, and anti-racism, including efforts to combat systemic Islamophobia.

**Research Challenges**

Economically, the ordinary cost of doing business is now higher given statutory compliance requirements and the schedule of fines in the event of failure (Standing Committee on Finance 2018).[3] Financial institutions must assess these costs in light of their duties to shareholders and profit maximization metrics. As they design their risk-based assessment metrics, it is reasonable to assume that they will prioritize profit maximization and share-holder interests over the liberties and rights of ordinary Canadians. It is likely their compliance measures will be over-inclusive out of an abundance of caution, in light of the statutory scheme of criminal fines and penalties. Cost-based analyses may indicate that over-inclusive measures that result in "debanking" a limited number of clients is less expensive than the statutory fines outlined in the PCMLTFA. Moreover, we can reasonably foresee that their compliance programs will enable existing governmental (and other such metrics) of anti-terrorism financing, which currently facially discriminate against racial and religious minorities, in particular Muslim Canadians.

The number of transactions a financial institution processes on a daily basis is exceedingly large, especially when we include electronic transfer payment services banks increasingly provide. To review these

3 Indeed, various Canadian financial entities complained to Canada's House of Commons about these costs, especially when borne by financial institutions and services that posed little risk of money laundering or terrorism financing.

transactions for purposes of PCMLTFA compliance, financial institutions implement computerized algorithms to flag reportable transactions. Indeed, one of Canada's largest banks, CIBC, hosts an Enterprise Anti-Money Laundering group, which is made up of specialists who use "analytics" and "innovative technologies" to address money laundering and terrorist financing (CIBC, n.d.). Software such as FinScan and ComplyAdvantage promise banks and other financial institutional customers "AI [artificial intelligence] solutions [that] enable suspicious entities and activities to be identified in real time. You can onboard faster, cut your costs, and reduce your risk exposure" (Comply Advantage, n.d.). But while these software packages aim to reduce the cost of compliance to banks and other financial service providers, they raise the possibility of discrimination against groups of consumers who are already subject to over-determinative policing and surveillance logics.

There is abundant literature suggesting that algorithms designed to manage information employ discriminatory metrics on racial and religious grounds, employing what Safiya Umoja Noble terms "technological redlining" (Noble 2018; Eubanks 2018). As analysts of big data and policing suggest, data-driven modes of risk assessment and surveillance have the potential to reproduce and scale up already existing social inequalities (Brayne 2017). Canadian financial institutions are certainly subject to laws and regulations against racial or religious discrimination. However, that does not change the fact that the relevant financial intelligence software is the intellectual property of financial institutions or third-party vendors and thereby shielded from public disclosure requirements. The evidence that might be used to file a claim of discrimination against financial institutions is itself protected by the very legal system that aims to combat discrimination.

In light of the economic incentives that enable discriminatory compliance, and the embedded bias already documented in information management software, FINTRAC would have a complex obligation to Canada, were it to undertake an equity-based review of the underlying technology used to identify suspect transactions. On the one hand, it needs to protect the financial sector from being used to launder the proceeds of crime and to financially support terrorist activities. On the other hand, economic incentives and biases in technology enable overbroad compliance measures that are potentially discriminatory. If FINTRAC were to integrate equity-oriented consumer protection within its mandate, it would have to undertake compliance review processes that also protect ordinary Canadians from violations of their liberties and freedoms as enshrined in the Charter and relevant human rights legislation. But FINTRAC's openly accessible publications or reports do not

indicate that it is cognizant of this discriminatory potential in its regulatory mandate. Its publications presume an audience that is comprised of those already committed to or obligated under the PCMLTFA and its regulatory regimes. While FINTRAC ensures that it takes privacy seriously (Government of Canada, n.d.b.),[4] it does not address how it preserves the equality interests of ordinary Canadians as it oversees financial institutions and their compliance measures, many of which can lead institutions to "debank" individual clients on potentially discriminatory grounds.

## Conclusion

Because the Government of Canada insists that there is no strict method for financial institutions to assess risk, it insures itself against accusations that its anti-money laundering and anti-terrorism financing regime enables systemic biases within the private sector. Moreover, financial institutions and third-party vendors can invoke intellectual property rights to protect their programs from scrutiny even as they are conscripted into the government's War on Terror by virtue of legislation with costly sanctions. In the end, we are left with a financial investigative regime that is effectively immune from accountability. Our financial institutions are both service providers and soldiers, leaving consumers vulnerable to market exclusion in the name of the Wars on Terror and Drugs. In the financial field of battle, Canada's financial institutions use compliance protocols like army field manuals that vary from institution to institution but are undisclosed to the very public at risk of being collateral damage.

This essay raises critical concerns about Canada's conscription of its financial sector into the Wars on Terror and Drugs in the service of core principles of equality, inclusion, and democratic accountability. In doing so, this essay runs against a dominant current of literature written in service of the state and the financial sector conscripted to fight the War on Terror. Canada's financial intelligence regime contributes to a business of privatized national security, which arguably disincentivizes critical enquiry into its discriminatory impact. To support financial institutions in fulfilling their statutory requirements, third-party businesses now offer compliance services for banks. Consulting firms like Protivity provide risk analysis and compliance for financial service providers working in an increasingly complex regulatory environment.

4 See its privacy policy: https://www.fintrac-canafe.gc.ca/atip-aiprp/2011-pp-eng.

Protivity's staff includes former financial institution regulators and compliance officers, and its services promise clients effective compliance programs (Houston, n.d.). Anti-terrorism financing regimes ultimately produce their own economies that make critique of such regimes, let alone critically informed policy reversals, costly to private economic actors and the national economy as a whole. Any future researcher needs to enter this field of study fully aware of this current and its momentum.

Future researchers eager to gain insight into the private sector operation of anti-terrorism financing will need to identify anti-money laundering units within Canada's banks, for instance, and interview willing senior analysts and managers charged with upholding the bank's compliance programs. Computer scientists might deploy a critical race enquiry into the software used to service a bank's anti-money laundering and anti-terrorism financing program. Scholars of law, business, and the financial sector could conduct a series of Access to Information Program requests of government agencies to secure necessary documentation and records to identify the role of private sector institutions in the War on Terror and the metrics they use to identify suspect transactions and customers. The fact that securing such information will be a challenge attests to the democratic *un*accountability of Canada's national security strategies.

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MUSLIM ASSOCIATION OF CANADA
Plaintiff

and

ATTORNEY GENERAL OF CANADA
Defendant

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**AFFIDAVIT OF**
**PROFESSOR ANVER M. EMON**
**(Sworn February 3, 2023)**

**McCarthy Tétrault LLP**
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

**Geoff R. Hall** LS#: 34701O
ghall@mccarthy.ca
Tel: 416-601-7856

**Anu Koshal** LS#: 66338F
akoshal@mccarthy.ca
Tel: 416-601-7991

**Adam H. Kanji** LS#: 78024R
akanji@mccarthy.ca
Tel: 416-601-8145

Lawyers for the Plaintiff, Muslim Association of Canada