NATIONAL COUNCIL OF CANADIAN MUSLIMS
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NCCM POLICY PAPER

CBSA OVERSIGHT BILL

OCTOBER 2020

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ABOUT NCCM

The National Council of Canadian Muslims (NCCM) is an independent, non-partisan and non-profit organization that protects Canadian human rights and civil liberties, challenges discrimination and Islamophobia, builds mutual understanding, and advocates for the public concerns of Canadian Muslims.



RESEARCH TEAM



Mustafa Farooq is the Chief Executive Officer of the National Council of Canadian Muslims (NCCM). A lawyer by profession, Mustafa completed his Juris Doctor at the University of Alberta and Osgoode Hall (York University) and later earned his Master of Laws (LLM) at UC Berkeley in California.

Mustafa was also a visiting scholar at Osgoode Hall Law School researching countering violent extremism policy in Canada. His book entitled *Law, Politics, and Countering Violent Extremism* (Routledge) is forthcoming.



Dr. Nadia Hasan is the Chief Operating Officer of the National Council of Canadian Muslims. She has a PhD in Political Science from York University. Dr. Hasan has a diverse background in teaching, project management and the non-profit sector. Dr. Hasan also has several years of experience working on policy and programs at Canadian think tanks and NGOs and she has taught university courses in South Asian studies, religion and gender.

Her doctoral research focused on Muslim women's organizations and the practice of Islam in Canada and Pakistan.



Zakariyya Muhammad is a Summer Policy Intern for the National Council of Canadian Muslims. He is a political science student at the University of Toronto.

ENDING THE PROBLEMS OF "FLYING WHILE MUSLIM": WHY EFFECTIVE CBSA OVERSIGHT IS IMPORTANT



EXECUTIVE SUMMARY

There are very few Canadian Muslims who can't relate – or know someone who relates - to the challenge of "flying while Muslim".

We at the National Council of Canadian Muslims (NCCM) are very familiar with these challenges.

From young Muslim six-year olds appearing on Canada's No Fly List, to Muslims facing additional screening purely on the basis of their religious backgrounds, to problems at the border based on where their parents were from, NCCM has heard countless stories over the last two decades about the challenges of flying while Muslim.

That is why **one of our key battles over the last two decades has been in calling for oversight over the Canadian Border Service Agency (CBSA)**. CBSA Officers are the officers you meet at a port of entry at land or when you are flying into an airport internationally.

Unfortunately, the issues of racism and Islamophobia at the CBSA are well-documented. While the CBSA has historically denied that racial profiling occurs, a growing body of research in the area has made it clear that the CBSA routinely engages in racial profiling.

Most recently, a CBC access-to-information request revealed over 500 allegations of misconduct by CBSA officers filed between 2018-2019.

That’s why it's so important for us to get CBSA oversight right.

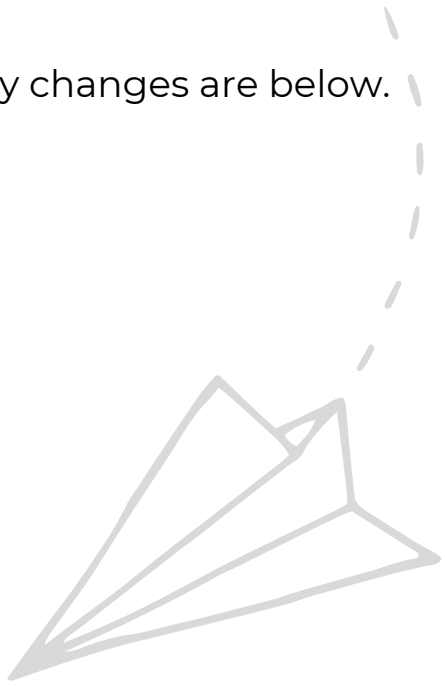
Before Parliament was prorogued, Bill C-3 promised oversight over the CBSA, the very thing NCCM has been advocating for over the last two decades. However, there were key changes that need to be made for the legislation to do what it has to do.

Now that a CBSA Oversight Bill will be re-introduced, we have an opportunity to fix key problems at the outset.

The days where CBSA officers can theoretically racially profile Canadians without any external oversight must end. **External oversight must be real, must pack real consequences for misconduct, and must pass.**

Critically, none of our suggested policy suggestions hamper the ability of CBSA agents to ensure border security. Rather, they simply ensure that racial discrimination is not active on the border.

Our suggested policy changes are below.



RECOMMENDATIONS

Based on our analysis of Bill C-3, *An Act to amend the Royal Canadian Mounted Police Act and the Canada Border Services Agency Act and to make consequential amendments to other Acts*, ["CBSA Oversight Bill] tabled in Parliament, we provide the following recommendations:

A. WIDEN THE SCOPE

Recommendation 1: Make sure that the oversight body (which was going to be the same oversight body over the RCMP) is empowered and effective.

Recommendation 2: Ensure that CBSA Officers who engage in misconduct in an off-duty capacity can be investigated by the oversight body.

Recommendation 3: As complainants may be afraid to file complaints to the oversight body, ensure civil society organizations have standing to make complaints.

Recommendation 4: Ensure that the oversight body can hear complaints regarding CBSA policies and procedures.

B. ACCOUNTABILITY MEASURES

Recommendation 5: Require the CBSA to implement the recommendations made by the Public Complaints and Review Commission (PCRC).

Recommendation 6: Clarify the remedies and penalties available.

C. ELIMINATING RACIAL DISCRIMINATION AT THE BORDER

Recommendation 7: Develop a clear workplan and require regular reviews to be submitted to Parliament on steps taken to change the culture of discrimination and harassment at the CBSA.

Recommendation 8: Implement language in the Act around zero-tolerance for racial discrimination at the CBSA. Currently, while there is a policy active against racial discrimination at the CBSA, there exists no "zero-tolerance" provision in legislation.

WHAT IS THE CBSA?

The Canada Border Services Agency (CBSA) is a federal law enforcement agency founded on December 12, 2003. This agency ensures Canada's security by facilitating and overseeing international travel and trade across Canada's border. The CBSA carries out these responsibilities by utilizing approximately 14,000 employees, including over 6,500 uniformed CBSA officers who provide their services at approximately 1,200 points across Canada. The CBSA oversees 117 land-border crossings and 13 international airports.

The official legislative duties of the CBSA are as follows:

- Administering legislation that governs the admissibility of people and goods, plants and animals into and out of Canada;
- Detaining those people who may pose a threat to Canada;
- Removing people who are inadmissible to Canada, including those involved in terrorism, organized crime, war crimes or crimes against humanity;
- Interdicting illegal goods entering or leaving the country;
- Protecting food safety, plant and animal health, and Canada's resource base;

- Promoting Canadian business and economic benefits by administering trade legislation and trade agreements to meet Canada's international obligations;

- Enforcing trade remedies that help protect Canadian industry from the injurious effects of dumped and subsidized imported goods;

- Administering a fair and impartial redress mechanism;

- Promoting Canadian interests in various international forums and with international organizations; and

- Collecting applicable duties and taxes on imported goods.

The CBSA controls an impressive intelligence program, which it utilizes to assist in its decision making. The information is collected from a wide array of sources. Some of the information acquiring methods include collaboration with international intelligence partners, covert surveillance, and the utilization of informants.

The Agency turns the information it collects into intelligence by using automated risk analysis, analytical tools, and risk management. This allows it to work toward its objective of balancing security concerns with the need to facilitate the flow of people and goods. The Agency seeks to manage risks through a number of means; including the collection and analysis of intelligence information; the use of detection tools; the analysis of indicators and judgment of front-line officers; and random checks.

Prior to 2006, CBSA officers were unarmed. This changed however, when in 2006 the government initiated the CBSA Arming Initiative. Furthermore, CBSA in 2006 received 101 million dollars from the federal budget to equip CBSA officers with side arms. Along with arming Border Security Officers, this policy allowed CBSA officers to arrest (without a warrant) and detain individuals at the border, for violations and infringements unrelated to customs laws.

Every individual entering Canada, as well as their goods, are subject to examination by CBSA officers. The method of examination may be anywhere as mild as a few inquiries or include a search of the vehicle, goods, luggage, phones, devices, in depth questions and as far as a strip-search. The method and severity of examination and inspection is based on the opinion and personal discretion of the CBSA officers themselves. Along with this, CBSA officers hold authority to confiscate any goods or items they deem “obscene” or in conflict with customs laws and legislation.

Does the CBSA Engage in Racial Profiling?

For many years, the CBSA has argued that the CBSA does not engage in racial discrimination, either as a pattern or systemically.

This is simply inaccurate.

Firstly, the lived experiences of many Canadian Muslims tell us this is categorically false. In a paper by Aazadeh Madani, she interviews numerous individuals to discuss how they faced racial profiling at the border.[1]

Furthermore, other sources confirm systemic issues at the CBSA.

The 2019 Fall Report of the Auditor General of Canada to the Parliament of Canada **confirms massive systemic issues** at the CBSA in **terms of discrimination and harassment**, as does the Diversity Equity and Inclusion Audit of the CBSA that was tabled to Parliament in March 2020.

Academic analyses also point to systemic issues at the CBA. In a study by Pratt and Thompson, the authors explore the ambiguity surrounding the very meaning of racial profiling at the border.[2] They noted that the vague definition of racial profiling might be the source of the problem; it has led to the increased acceptance of nationality-based criminal profiles and a furthering of the practice of racialization while simultaneously continuing to deny the existence of racial profiling.

1. Aazadeh Madani. "Security, Race, and Risk in the Post 9/11 Era: An Examination of the Experiences of Racialized Populations at the Canadian Border," [Masters Thesis, SFU, 2009]
2. 2008, Chivalry, 'Race' and Discretion at the Canadian Border The British Journal of Criminology, Vol. 48, Issue 5, pp. 620-640, 2008

While the Office of the Auditor General (OAG) made a recommendation to the CBSA to, "develop and implement comprehensive strategies to address harassment, discrimination, and workplace violence," the response of the CBSA seemed to clearly indicate, in some ways, that the message wasn't received.

The CBSA responded by noting that the implementation strategy "will build on key elements *that have already been* implemented...". In other words, nothing to see here - the problems are already being fixed.

Never mind that two-thirds of the CBSA workforce identified organizational culture as a significant problem. Never mind that over a third thought that complaints around racism or discrimination would result in reprisal.

Exhibit 1.1—In a survey, employees expressed concerns about reprisals, civility and respect in the workplace, and organizational culture

Canada Border Services Agency

Employee concerns	Respondents in agreement
If an employee in my workplace was affected by harassment, discrimination, or violence from another employee or management, the employee would fear reprisal as a result of making a complaint.	2,136 of 6,090 (35%)
Civility and respect are serious or significant concerns.	3,355 of 6,090 (55%)
Organizational culture is a serious or significant concern.	4,013 of 6,090 (66%)

Source: 2019 Fall Report of the Auditor General of Canada

This is precisely why real oversight - accompanied by a plan for implementing change - must happen.

We cannot simply accept the notion that discriminatory profiling while "Flying While Muslim" remain a systemic fact.

Change must happen.

The Introduction of Oversight Bills

The **CBSA currently has no independent, external civilian oversight. Rather, their chain of command and agency inspection end with the president of the CBSA.**

This is highly unusual, as the majority of policing agencies in Canada have some semblance of independent oversight bodies. Due to this deficiency, complaints about conduct and the service provided by CBSA officers are handled internally. If an individual is dissatisfied with the results of an internal CBSA investigation, there is currently no mechanism for the public to request an independent review of these complaints.

This exact shortcoming within the CBSA led to the conception and creation of Bill C-98, which was the first attempt at at CBSA oversight bill. However, it did not pass the Senate before the fall election in 2019.

After that, Bill C-3 was introduced. Bill C-3, *An Act to amend the Royal Canadian Mounted Police Act and the Canada Border Services Act and to make consequential amendments to other Acts,* proposed to establish an independent review and complaints function overseeing the CBSA within the Civilian Review and Complaints Commission (CRCC), which currently provides that function for the Royal Canadian Mounted Police (RCMP). It died on the order paper, however, when Parliament was prorogued.

To reflect these new responsibilities, the CRCC would have been renamed the Public Complaints and Review Commission (PCRC). Bill C-3 would have also legislated a framework for the handling of serious incidents involving CBSA personnel. This would have included giving the PCRC the responsibility to track and publicly report on serious incidents (e.g. death, serious injury, Criminal Code violations) involving the CBSA.

As mentioned previously, the CBSA has the authority to arrest (without a warrant) and detain individuals at the border, for violations and infringements unrelated to customs laws.

The first part of Bill C-3 sought to allow the PCRC to review, upon its own initiative or at the request of the Minister, any non-national security activity of the CBSA. PCRC reports would have included findings and recommendations on the: adequacy, appropriateness, sufficiency or clarity of CBSA policies, procedures and guidelines, CBSA's compliance with the law and ministerial directions, reasonableness and necessity of the CBSA's use of its powers. However, in accordance with Bill C-3, the PCRC would not have had the authority to review, uphold, amend or overturn enforcement, trade or national security decisions made by the CBSA. This would only focus the PCRC's screening and overseeing authority on the CBSA's non-customs related actions and issues.

In terms of the complaints regarding the CBSA, Bill C-3 ensured that the PCRC would be able to receive and investigate complaints from the public concerning the level of service provided by the CBSA, as well as the conduct of CBSA officials. This would have been a two-stage process. First the complaint would be referred to CBSA itself for the initial investigation and scrutiny. If an individual had not been satisfied with the CBSA's handling of a complaint, they could ask the PCRC to review it. At the conclusion of a PCRC investigation, the review body would have been able to report on its findings and make recommendations as it sees fit. The President of the CBSA would have been required to respond, in writing, to the PCRC's findings and recommendations.

Furthermore, Bill C-3 sought to tackle the issue of detention-related complaints by allowing the PCRC to accept complaints from detainees held in CBSA facilities concerning the conduct and the services provided by CBSA employees.

To ensure that detainees held on behalf of CBSA in provincial/territorial (P/T) facilities have access to a similar mechanism, Bill C-3 would have included new additions which specify that the CBSA is only permitted to enter into detention agreements with P/T authorities if the P/T has an independent complaints mechanism in place (except in urgent and temporary circumstances).

To further aid and empower the PCRC to be equipped to oversee the CBSA, Bill C-3 looked to increase the reach and resources available to the PCRC. The National Security and Intelligence Review Agency (NSIRA), established in 2019, is an independent agency with the responsibility for complaints and reviews relating to national security and intelligence activities, including those relating to the RCMP and CBSA. Provisions in Bill C-3 would facilitate collaboration, information-sharing and cooperation between the PCRC and NSIRA.

To further build on PCRC's relations with other existing bodies, Bill C-3 obliged the PCRC to not consider complaints that can be dealt with by other organizations such as the Canadian Human Rights Commission (CHRC), the Office of the Commissioner of Official Languages, or the Office of the Privacy Commissioner of Canada. If the PCRC were to receive these types of complaints, it would have to refer the complainants to the appropriate body. However, since the CHRC could only receive complaints from individuals lawfully in Canada, the PCRC would accept complaints about the conduct and the service provided by CBSA employees from foreign nationals that involve allegations of discrimination.

As mentioned previously, the CBSA retains its own information-acquiring resources and operations. Bill C-3 would have accredited the PCRC to have access to any information that the CBSA possesses, with certain narrow exceptions such as cabinet confidences and sensitive commercial information while it is performing investigation relating to complaints against the CBSA.

Even though these steps and progressions created by Bill C-3 are integral in the reformation and betterment of CBSA, it simply is not enough. Bill C-3 did not reach far enough.

Bill C-3 continued to allow room for CBSA to go unanswered for racially motivated actions and misconduct based on discrimination. There have been numerous cases of CBSA going forward with intense examinations and questioning of racially profiled individuals crossing the border. Even more concerning is that the misconduct can continue to go unchecked without any repercussions, changes, or adjustments.

As previously mentioned, CBSA agents hold the right to determine the intensity of their examination by their own discretion and accord. This has led to many families being mistreated simply due to their visible minority status.

We as Canadians must champion for change, so that future Canadians do not have to associate crossing the border with systemic discrimination and the CBSA.

That is precisely why certain very specific adjustments must be brought in before a new CBSA oversight bill is brought in. The recommended policy/legislative amendments are as follows:

CHANGE 1: A BROADER MANDATE FOR INVESTIGATING COMPLAINTS

Bill C-3 proposed section 33(1), which stated that

> "Any individual may make a complaint concerning the conduct, in the exercise of any power or the performance of any duty or function under Part 1, of any person who, at the time that the conduct is alleged to have occurred, was an officer or employee of the Agency."

Furthermore, Section 33(2) stated that the Commission may refuse to deal with the complaint if, in its opinion the complaint is from an individual who

> (i) is not the individual at whom the conduct was directed, (ii) is neither the guardian, tutor, curator or mandatary — under a protection mandate — of the individual at whom the conduct was directed nor a person who is appointed to act in a similar capacity on behalf of the individual,
> (iii) did not see or hear the conduct or its effects as a result of not being physically present at the time and place that the conduct or its effects occurred,
> (iv) has not been given written permission to make the complaint from the individual at whom the conduct was directed, or
> (v) has not suffered loss, damage, distress, danger or inconvenience as a result of the conduct.

Recommendation 1: Make sure that the oversight body (which was going to be the same oversight body over the RCMP) is empowered, and effective.

As has already been made clear in this paper, Bill C-3 set out a legislative apparatus where the same oversight body over the RCMP (CRCC) would be expanded to become an oversight body over the CBSA, and be renamed the PRCC.

Much ink has been spilled by experts in studying the flaws and deficiencies over the current systemic issues that make the CRCC currently ineffective, which we will not fully review. The recent hearings before a parliamentary committee on systemic racism in policing already sufficiently canvasses many of the systemic barriers that make the CRCC currently ineffective.

These include but are not exclusive to:

- The process being excessively bureaucratic;
- The CRCC being too slow, to the point of essentially being inert;
- A focus on individual acts of potential RCMP officer racism, rather than looking at systemic issues; and
- Insufficient resourcing of the CRCC.

These issues can largely be solved through one of two ways if the new CBSA Oversight Bill is to actually serve its mandate. If the new Bill still looks at the expansion of the CRCC into the PRCC, we urge **the drafters to implement all of the changes submitted at the parliamentary committee on systemic racism to the new oversight body.**

Alternatively, if a new oversight body will be created over the CBSA, it must be sufficiently empowered and be required to respond swiftly and effectively.

Recommendation 2: Ensure that CBSA Officers who engage in misconduct in an off-duty capacity can be investigated by the oversight body.

These respective sections in Bill C-3 omit many possibilities of misconduct that PCRC should be able to investigate. It is recommended that the PCRC have the power to investigate a wide range of complaints, including from different sources. The PCRC must be able to investigate all allegations of misconduct and wrongdoing, including:

- Off-duty conduct,
- Conduct that occurred outside of Canada, and
- Investigations of officers who are no longer employed (i.e. retired or resigned).

This must encapsulate not only the conduct of a CBSA employee or officer, but also with respect to an omission, practice, policy, or procedure of the CBSA. It must further include complaints by an employee (or former employee) of the CBSA. This would allow for investigations that may bring to light systemic issues within the workplace of CBSA.

Recommendation 3: As complainants may be afraid to file complaints to the oversight body, ensure civil society organizations have standing to make complaints.

Complaints from both individual complainants and third parties, including non-governmental and public interest organizations, are critical. Section 33(2) seemed to suggest that complaints from civil society organizations may be denied. The CBSA deals with vulnerable individuals who may face barriers such as language, unfamiliarity with Canada's legal system, or uncertain legal status in Canada. These individuals may also be afraid that they will face deportation or negative repercussions if they file a complaint. Complainants may also not be in the country, which may hinder their ability to submit a complaint. Further, third parties and public interest organizations may be able to identify patterns of systemic or recurring problems with CBSA practices that would require further attention.

Recommendations 2, 3, and 4 have support from other jurisdictions. In New Zealand, for example, a person can complain "that he or she has, or may have, been adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency." An employee, or a former employee, may also complain that he or she has, or may have, been adversely affected by any act, omission, practice, policy, or procedure of an intelligence and security agency if all established internal remedies have been exhausted or the Director-General of the relevant intelligence and security agency agrees in writing.

Recommendation 4: Ensure that the oversight body can hear complaints regarding CBSA policies and procedures.

As has been brought forward by the Canadian Association of Refugee Lawyers and the BCCLA, the new oversight body must "have the power and resources to conduct proactive assessments of CBSA policies and practices to ensure they respect the rights of people with whom CBSA interacts".

If we look at the distinction between NSICOP and NSIRA, we may arrive at the need for some level of oversight that is constantly looking at policy review. The National Security and Intelligence Committee of Parliamentarians (NSICOP) has a mandate to review the legislative, regulatory, policy, administrative and financial framework for national security and intelligence in Canada, as well as departmental activities related to national security and intelligence. NSICOP reviews will tend to be more strategic than those of NSIRA, which undertakes detailed reviews of specific activities with a strong emphasis on legal compliance. In this case, there is now, under new legislation, a focus on broader policy review questions. Something similar must be brought forward into the CBSA realm.

The most straightforward solution would be to mandate the new oversight body with specific powers to conduct proactive assessments of CBSA policies and procedures - including, for example, the general conduct of the CBSA at hearings before immigration boards, or detention practices involving minors.

This is a critical area that cannot be ignored.

CHANGE 2: ACCOUNTABILITY MEASURES

Recommendation 5: Require the CBSA to implement the recommendations made by the PCRC

Bill C-3 was not clear on how officers who violate the law, code, policies, or procedures will be held accountable. It was only clear that the PCRC can examine evidence, call witnesses and write a report. Under Bill C-3, there was no requirement for the CBSA to implement the recommendations made by the PCRC. If the President of the CBSA decides not to act on any findings or recommendations set out in the report, he or she must simply include in the response the reasons for not acting as such. This is not sufficient to ensure that officers will be held to account.

Recommendation 6: Clarify the remedies and penalties available

Further, the Bill was silent on the issue of remedies and corrections for complainants. It is our position that the PCRC's findings should be enforceable and lead to meaningful legal consequences. The PCRC should have the power to order remedies, especially in cases of officer misconduct. After investigating a complaint and finding it to be well-founded, the PCRC must be able to order correction and make binding remedial orders, which could involve the payment of monetary compensation.

The PCRC should also have the power to impose disciplinary measures/penalties against CBSA officers who have violated laws or policies, such as fines, suspension, or termination of employment. It should also have the power to require changes to operational policies and procedures and be able to oversee the CBSA to ensure that necessary changes are implemented or that adequate preventative measures are in place. This would ensure accountability and effectiveness of the PCRC. The purpose of the PCRC would be lost if its recommendations are not enforceable and redress/remedies were left at the discretion of the CBSA.

CHANGE 3: ENSURING MEANINGFUL PROGRESS TO ELIMINATE SYSTEMIC RACISM AT THE BORDER

Recommendation 7: Ensure that the PCRC prepare, publish, and undertake an annual work programme

It is recommended that we follow New Zealand's approach in that the PCRC should prepare, publish, and undertake an annual work programme. Prior to the beginning of the financial year, the PCRC should draft a proposed work programme for that year and consult with the Minister on that proposed work programme. The PCRC should then, having regard to the Minister's comments, finalize the annual work programme and publish it online. The annual work programme can include mandatory and discretionary inquiries or reviews the PCRC plans to undertake for the year and would enhance transparency on the type of work/reviews the PCRC is undertaking.

Bill C-3 lacked explicit elaboration on the regularity and mandatory natures of reviews and inspections of the CBSA by the PCRC.

A minimum number of audits or reviews should be mandated in the legislation. We recommend that an external body conduct a mandatory Diversity, Equity, and Inclusion audit every five years, which would critically and honestly assess programs, policies, procedures and practices across CBSA regarding diversity, equity and inclusion to strengthen and coordinate its approach. The recent NSICOP review studied issues of diversity, equity, and inclusion at the CBSA, revealing that minorities are consistently underemployed at the CBSA. We must ensure that these types of reviews are done regularly.

We also recommend that the PCRC conduct reviews at least annually and complete unscheduled audits of the effectiveness and appropriateness of any policy, procedure, guideline or compliance systems relating to the operational activities of the CBSA, including CBSA's use of its powers and its compliance with the law.

The Bill proposed section 56, which stated that:

> All of the findings and recommendations that are contained in the Commission's final report under subsection 52(2) or 55(3) are final and are not subject to appeal to or review by any court.

We recommend that complainants who are unsatisfied with the PCRC's findings or resolution of their complaint should be able to seek review first internally within the PCRC, after which they should have the opportunity to seek judicial review in the Federal Court. The opportunity for judicial scrutiny and the ability to seek review of the disposition of a complaint should be a feature of this process as it would ensure that the PCRC is also held accountable for the way it conducts the investigations and reports its findings.

These changes are absolutely essential to the reformation and improvement of the CBSA.

Recommendation 8: Zero-Tolerance For Racial Profiling at the Border

Finally, while the CBSA does have a policy against racial profiling within the CBSA, it is necessary and important to install language around zero-tolerance for racial profiling within legislation.

In the same way that Occupational Health and Safety caselaw in Alberta, for instance, made clear that harassment on the worksite could not be accepted, resulting in changes to the *Occupational Health and Safety Act* in 2017 that enshrined harassment as unacceptable within legislation. It also required workplaces to develop plans to combat and deal with harassment.

The new rules are as follows:

- defined workplace harassment and violence in all forms, including domestic and sexual violence
- required employers to investigate incidents of violence and harassment and take corrective action
- required employers to develop separate violence and harassment prevention plans
- required review of plans at least one every 3 years
- required employers to advise workers of treatment options if harmed by violence or harassment; and
- workers were entitled to wages and benefits while attending treatment programs.

By enshrining a prohibition on racial profiling at the border in the CBSA Act, legislators will send a strong message that we need to see further systemic changes to CBSA praxis at work at the border.

CONCLUSION

At the end of the day, our country is one that is for all of us.

We have to work hard to keep it that way.

Our policy positions set out clear and common-sense recommendations that we think the majority of Canadians will agree with, and that we urge all parties to adopt.



To
Canada
Vers le
Canada
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U.S.A.
Vers le
É.-U.
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