

# **ADDENDUM TO INSECURITY AND HUMAN RIGHTS:**

## **CONCERNS AND RECOMMENDATIONS WITH RESPECT TO BILL C- 51, THE *ANTI-TERRORISM ACT, 2015***

*SUBMITTED TO THE STANDING SENATE COMMITTEE  
ON NATIONAL SECURITY AND DEFENCE*

30 APRIL, 2015

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INTERNATIONAL**



**Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.**

**Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.**

**We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.**

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Amnesty International's concerns and recommendations with respect to Bill C-51, as outlined in our attached submission<sup>1</sup> to the House of Commons Standing Committee on Public Safety and National Security, remain current and pressing. As such, our recommendations are, with one slight change, the same. We have also included in this brief an overview of our concerns and recommendations with respect to the changes proposed in Bill C-51 to the *Immigration and Refugee Protection Act*.

## 1. Amendments to Bill C-51

Amnesty International has considered the amendments made to Bill C-51 following the Bill's review by the House of Commons Standing Committee on Public Safety and National Security. Three of the amendments touch on issues Amnesty International highlighted in the organization's submission to the House of Commons Standing Committee. The changes do not, unfortunately, alleviate any of the concerns Amnesty International has highlighted.

### a) Lawful protest

In our submission we highlighted our concern that only protest, dissent, and advocacy that is "lawful" is protected from the new Canadian Security Intelligence Service's (CSIS) threat reduction powers, which are tied to the existing definition of threats to the security of Canada found in the *Canadian Security Intelligence Service Act (CSIS Act)*, and the new information sharing powers laid out in the new *Security of Canada Information Sharing Act*, which are linked to a widely-expansive definition of threats to the security of Canada. We noted that this unduly restrictive requirement would run counter to the rights to freedom of expression, association and assembly, which do not only protect "lawful" protest.

The Bill has been amended to remove the qualification of lawfulness from the new *Security of Canada Information Sharing Act*.<sup>2</sup> However there was no similar amendment to remove that requirement from the description of protest, dissent and advocacy that would be exempted from the new threat reduction powers.

As such, Canadian law now treats three areas in which the question of protest and dissent arises in conjunction with national security and terrorism, in three different ways:

- The proposed *Security of Canada Information Sharing Act* would exempt "advocacy, protest, dissent and artistic expression" from activities considered to undermine the security of Canada;<sup>3</sup>
- The *CSIS Act* excludes "lawful advocacy ,protest or dissent" from its definition of "threats to the security of Canada";<sup>4</sup> and

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<sup>1</sup> Amnesty International, *Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, the Anti-Terrorism Act*, 2015 (9 March 2015) online: <[http://www.amnesty.ca/sites/default/files/amnesty\\_international\\_brief\\_regarding\\_bill\\_c-51.pdf](http://www.amnesty.ca/sites/default/files/amnesty_international_brief_regarding_bill_c-51.pdf)>.

<sup>2</sup> s 2 of the proposed *Security of Canada Information Sharing Act* as contained in Bill C-51, *Anti-Terrorism Act, 2015*, 2nd Sess, 41st Parl (Reprinted as Amended by the Standing Committee on Public Safety and National Security) [*Amended Security of Canada Information Sharing Act*].

<sup>3</sup> *Ibid.*

<sup>4</sup> *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s 2 [*CSIS Act*].

- The *Criminal Code of Canada*'s definition of "terrorist activity" excludes "advocacy, protest, dissent or stoppage of work that is not intended to result" in death or serious bodily harm, endanger a person's life or cause a serious risk to public health or safety.<sup>5</sup>

There are three notable differences. Two statutes do not require the protest activity to be lawful, one does. One explicitly protects artistic expression, two do not. (That this applies only to artistic expression and not also to other forms of expression, which might or might not be included in protest or dissent, is confusing and of concern.) One expressly extends to work stoppages, two do not. Amnesty International urges that each of these areas adopt the same, consistent exemption dealing with protest and dissent. As such, section 2 of the *Security of Canada Information Sharing Act*, section 2 of the *CSIS Act* and section 83.01 of the *Criminal Code of Canada* should be amended to exempt advocacy, protest, dissent, artistic and other expression, and work stoppages from the definition of threats to the security of Canada and of terrorist activity.

### **b) Information sharing**

There has been one change made to the provision that authorized wide, virtually unchecked, sharing of information, essentially authorizing the further disclosure of shared information to "any person, for any purpose."<sup>6</sup> That provision now reads as follows:

For greater certainty, the use and further disclosure, other than under this Act, of information that is disclosed under subsection 5(1) is neither authorized nor prohibited by this Act, but must be done in accordance with the law, including any legal requirements, restrictions and prohibitions.<sup>7</sup>

While this change is somewhat more moderate than the previous 'any person, for any purpose', it does not alleviate the concern that the *Security of Canada Information Sharing Act* would remarkably allow almost limitless information sharing across government and beyond, on the basis of the most expansive definition of activities that "undermine security of Canada" found in Canadian law. This new system has virtually no safeguards to ensure that inaccurate, inflammatory or irrelevant information is not shared, and suffers from the same deficiency in review and oversight that exists across the entirety of Canada's national security laws and activities. Amnesty International continues to call for this section of the Bill to be withdrawn.

### **c) No "law enforcement" powers for CSIS**

Amnesty International has detailed a range of serious concerns with respect to the new threat reduction powers that are being granted to CSIS. Only one amendment has been made to this section of the Bill, clarifying that nothing in these new powers "confers on the Service any law

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<sup>5</sup> *Criminal Code of Canada*, RSC 1985, c C-46, s 83.01.

<sup>6</sup> s 6 of the original proposed *Security of Canada Information Sharing Act* as contained in Bill C-51, *Anti-Terrorism Act, 2015*, 2nd Sess, 41st Parl (First Reading, 30 January 2015).

<sup>7</sup> Amended *Security of Canada Information Sharing Act*, *supra* note 2, s 6.

enforcement power.”<sup>8</sup> There is no definition provided as to what is considered to constitute a ‘law enforcement power’.

Regardless, this change does not address the many serious concerns about these new threat reduction powers. If anything the concern is about the possibility of actions being taken that do not at all constitute ‘law enforcement’ and may even violate the *Canadian Charter of Rights and Freedoms (Charter)* and other Canadian laws or foreign laws. It is not preoccupying that CSIS agents would be likely, for instance, to carry out a lawful arrest in the manner that police officers would, with the corresponding right of the detained person to consult counsel. Rather, the concern is that there would be action taken to summarily apprehend, detain and sequester an individual outside of a lawful process. The threat reduction powers should be withdrawn from the Bill and only reintroduced in a manner that fully conforms to Canada’s international human rights and *Charter* obligations.

## **2. Proposed amendments to the *Immigration and Refugee Protection Act***

Bill C-51 proposes changes to the *Immigration and Refugee Protection Act* which would increase the secrecy and unfairness of national security-related immigration proceedings, including the immigration security certificate process and hearings before the Immigration and Refugee Board.

Amnesty International has on many occasions, going back to 1997<sup>9</sup>, highlighted that significant restrictions on access to evidence and a meaningful ability to challenge and cross-examine witnesses in national security-related immigration proceedings fall short of international requirements governing fair trials. We have underscored the particular importance of ensuring fair proceedings in such cases given that the individuals concerned are frequently facing the possibility of being deported to countries where they are at risk of torture or other serious human rights violations. Over the years many UN human rights experts and bodies have called on Canada to bring Canada’s immigration laws into conformity with international standards.<sup>10</sup>

The Supreme Court of Canada has on one occasion found the immigration security system violated the *Charter*<sup>11</sup> and, more recently has upheld the system due to the introduction of Special Advocates who bring greater procedural fairness to the process.<sup>12</sup> Amnesty International and UN

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<sup>8</sup> Bill C-51, *Anti-Terrorism Act, 2015*, 2nd Sess, 41st Parl (Reprinted as Amended by the Standing Committee on Public Safety and National Security), clause 42, proposed new s 12.1(4) of the *CSIS Act*.

<sup>9</sup> See Amnesty International, *Amnesty International Report 1997 – Canada* (1 January 1997) online: <<http://www.refworld.org/docid/3ae6agff30.html>>.

<sup>10</sup> E.g. UN Committee against Torture, *Concluding Observations of the Committee against Torture: Canada*, 48th Sess, UN Doc CAT/C/CAN/CO/6 (25 June 2012) at para 12 [Committee against Torture]; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, 85th Sess, UN Doc CCPR/C/CAN/CO/5 (20 April 2006) at para 14; UN General Assembly, *Report of the Committee against Torture*, 25th-26th Sess, UN Doc A/56/44 Supp No. 44 (13-24 November 2000; 30 April – 18 May 2001) at para 58; UN Commission on Human Rights, *Report of the Working Group on Arbitrary Detention – Addendum: Canada*, 62nd Sess, UN Doc E/CN.4/2006/7/Add.2 (5 December 2005) at paras 84-86, 91.

<sup>11</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

<sup>12</sup> *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37.

bodies have nonetheless noted that despite the role played by Special Advocates, the system does not meet international fair trial requirements.<sup>13</sup>

Bill C-51 restricts the access that Special Advocates have to evidence in national security-related proceedings. This is highly problematic. The role played by the Special Advocate is the very basis of the Supreme Court of Canada's recent judgement that the immigration security certificate process complies with the *Charter*. That finding of *Charter* compliance was premised on the requirement that the Special Advocate be given full access to all evidence brought forward by the government. The amendments would deny Special Advocates access to information that a judge agrees is not directly relevant to the allegations that have been made against the individual concerned. In particular, information that "does not enable the permanent resident or foreign national to be reasonably informed of the case made by the Minister"<sup>14</sup> does not have to be disclosed to the Special Advocate. Any information that is withheld from the Special Advocate would not be relied upon by the Judge in his or her decision and would be returned to the Minister.<sup>15</sup>

These changes introduce new levels of complexity, uncertainty and unfairness to the role played by Special Advocates. Notably, Special Advocates have expressed clear objection to the changes.<sup>16</sup> Given that the Supreme Court of Canada has relied on their role in upholding the current system, Amnesty International urges the government, Members of Parliament and Senators to pay close attention to concerns Special Advocates raise about their access to information.

There has been no explanation offered for this change. It is deeply troubling to imagine why information would be provided to the judge, not shared with the Special Advocate, not relied upon by the judge in the decision and, at the end of the day, returned by the judge to the Minister. It leaves an impression of somehow indirectly seeking to influence judges and leaves open a real possibility of that unintentionally happening.

The proposed restrictions on access to information for Special Advocates under the *Immigration and Refugee Protection Act* should be withdrawn from the Bill.

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<sup>13</sup> E.g. The UN Committee against Torture has expressed concern that Special Advocates are unable to adequately conduct cross examinations or seek evidence independently; that individuals named in security certificates are limited in knowing the case against them and in their ability to communicate with the Special Advocate; that the length of detention under the regime is indeterminate; and that information obtained from torture has been used as evidence against individuals subject to security certificates: see Committee against Torture, *supra* note 10 at para 12; The UN Human Rights Committee has also requested submissions on "specific steps taken to ensure that *Special Advocates* can seek evidence independently and can properly represent their clients" for Canada's upcoming review as to its compliance with the *International Covenant on Civil and Political Rights* in July 2015: See UN Human Rights Committee, *List of issues in relation to the sixth periodic report of Canada*, UN Doc CCPR/C/CAN/Q/6 (21 November 2014) at para 15.

<sup>14</sup> Clause 57 of Bill C-51, proposing new section 83(1)(c.1) of the *Immigration and Refugee Protection Act*.

<sup>15</sup> Clause 57 of Bill C-51, proposing new section 83(1)(j) of the *Immigration and Refugee Protection Act*.

<sup>16</sup> Louise Elliot, "Bill C-51 defies key rulings on security certificates, lawyers say" *CBC News* (25 February 2015) online: <<http://www.cbc.ca/news/politics/bill-c-51-defies-key-rulings-on-security-certificates-lawyers-say-1.2973772>>; Tonda MacCharles, "Senior lawyers join calls for change to Tories' terror bill" *The Star* (12 March 2015) online: <<http://www.thestar.com/news/canada/2015/03/12/senior-lawyers-join-calls-for-changes-to-tories-terror-bill.html?referrer>>.

## OVERVIEW OF AMNESTY INTERNATIONAL'S RECOMMENDATIONS

### **1. The following proposals in Bill C-51 should be withdrawn in their entirety and only reintroduced in a form that conforms to international human rights requirements:**

- a) Unprecedented new powers granted to CSIS officers to act to reduce security threats considering that :
  - i) These new powers are based on an existing and overly-broad definition of "threats to the security of Canada" extending far beyond the definition of terrorist activities under Canadian law. Among other concerns, this definition only excludes such advocacy, protest or dissent that is lawful, raising the likelihood that a wide range of protest activity that may not be lawful in the sense of being officially authorized, but is not criminal, would be susceptible to interference and disruption through these new powers;
  - ii) The proposed legislation provides no description of the particular measures that officers would be allowed to take to reduce threats, nor does it limit the scope of their power to undertake these actions. Bill C-51 only explicitly excludes CSIS agents from acting in ways that would lead to death, bodily harm, perversion of justice or violation of sexual integrity and does not protect other internationally guaranteed human rights such as the prohibition on torture and ill-treatment, deprivation of liberty, right to privacy and freedom of expression;
  - iii) The Bill authorizes Federal Court judges to issue warrants approving CSIS activity that violates the *Charter* and permitting CSIS agents to act in disregard of local law in countries where they are operating; and
  - iv) These powers are entrusted to security and intelligence officials who do not have the specific training, command structures, accountability or public transparency required of law enforcement agencies.
- b) New criminal offence of advocating or promoting the commission of terrorism offences "*in general*", which has the potential to both violate and cast a chill on freedom of expression, and has not been demonstrated to be necessary over and above existing offences of directly inciting, threatening, counselling or conspiring to commit terrorist activities.
- c) Expanded powers to detain a person on the basis of a recognizance with conditions which significantly lower the threshold of suspicion and increase the maximum time for holding an individual in police custody without charge.
- d) Expansive information sharing across government departments and agencies in the *Security of Canada Information Sharing Act* which:

- i) is based on the most far-reaching and vague definition and enumeration of acts that “undermine the security of Canada” ever adopted in Canadian law; and
  - ii) lacks clear safeguards to address well-documented examples of serious human rights violations, including torture and other ill-treatment, that have been caused or facilitated by Canadian law enforcement and security officials sharing unreliable, inaccurate or inflammatory information domestically and internationally.
- e) Appeal procedures in the *Secure Air Travel Act* which apply the minimal standard of review of ‘reasonableness’ before a Federal Court judge and do not ensure that a listed individual has meaningful access to the full information and accusations against him or her which would make it possible to mount an effective .
  - f) Provisions which would restrict the access of Special Advocates to evidence in security-related immigration proceedings.

**2. Bring clarity and consistency to provisions protecting protest and dissent.**

Amend relevant provisions in the *Criminal Code of Canada*, the *CSIS Act* and the *Security of Canada Information Sharing Act* (if it is adopted by Parliament) which exclude protest and dissent from being categorized as a terrorist activity or a security threat such that it applies to: “advocacy, protest, dissent, artistic and other expression, and work stoppages.”

**3. Establish robust oversight and effective review of agencies and departments engaged in national security activities. In particular,**

- a) Develop a model of integrated, expert and independent review as proposed by Justice Dennis O’Connor in his 2006 Arar Inquiry report;
- b) Ensure that all agencies and departments engaged in national security activities are subject to review and oversight;
- c) Ensure that all review and oversight bodies and processes have sufficient powers and resources to carry out their work effectively; and
- d) As part of an overall system of review and oversight, institute a robust system of parliamentary oversight of national security in Canada.

**4. Address outstanding cases and concerns with respect to national security and human rights. Specifically,**

- a) Adopt a legislated human rights framework for Canada’s national security program;



- b) Promptly redress unresolved cases involving security-related human rights violations implicating Canadian officials;
- c) Carry out and make public a full assessment of past cases and existing laws, tools and resources in the area of national security before considering expanded powers and other reforms; and
- d) Commit to implementing outstanding national security-related recommendations that have been made to Canada by a range of UN human rights experts and bodies dealing with intelligence-sharing and torture, deportations to torture, immigration security certificates and a number of individual cases.

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