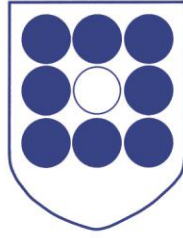


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Brief to the Standing Committee on Public Safety and National Security regarding *Bill C-44, An Act to amend the Canadian Security Intelligence Service Act and other Acts (Protection of Canada from Terrorists Act)*

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## **A) Canadian Civil Liberties Association (CCLA)**

The Canadian Civil Liberties Association (CCLA) is a national, non-profit, non-partisan and non-governmental organization supported by thousands of individuals and organizations from all walks of life. CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. CCLA's major objectives include the promotion and legal protection of individual freedom and dignity. For the past 50 years, CCLA has worked to advance these goals, regularly appearing before legislative bodies and all levels of court. As a defender of fundamental rights, and an organization deeply committed to ensuring oversight and accountability of our government institutions, we make submissions to this Committee to express our concerns about certain aspects of Bill C-44.

## **B) Bill C-44: *Amending the CSIS Act***

The Bill before the Committee amends the *Canadian Security Intelligence Service Act* in order to expand CSIS's powers to engage in intelligence activities outside of Canada and increase the protection afforded to human sources that provide CSIS with information. It is clear that the amendments are being made in light of a series of court decisions that interpreted CSIS powers and the powers of courts to grant warrants in a manner that places limits on the ability of CSIS to engage in intelligence gathering activities outside of Canada.

Although the proposed Bill seeks to expand CSIS powers, it does nothing to address the significant gaps in oversight and accountability that have been the subject of substantial commentary by numerous Royal Commissions. These Commissions have engaged in in-depth studies and made detailed recommendations to address gaps related to issues of national security and Canada's intelligence agencies. The absence of provisions to address this issue is, in the CCLA's respectful view, fatal to the Bill.

## **C) Powers to Engage in Activities Outside of Canada**

Bill C-44 proposes changes to ss. 12, 15 and 21 of the *CSIS Act* to provide that CSIS (the "Service") may perform its duties and functions within or outside Canada. These changes appear to be designed to address decisions recently rendered by the Federal Court and the Federal Court of Appeal which articulated limitations on the Court's ability to grant a warrant for activities carried on outside of Canada which may violate international law or the domestic laws of the country where the activities would take place.

In *X (Re)*,<sup>1</sup> the Federal Court and Federal Court of Appeal held that CSIS breached the duty of candour owing to the Court in seeking and obtaining Domestic Interception of Foreign Telecommunications and Search Warrants ("DIFTS warrants"). The Service failed to disclose

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<sup>1</sup> 2013 FC 1275; aff'd 2014 FCA 249

that CSIS, through the assistance of the Communications Security Establishment Canada (CSEC) would be tasking the intelligence agencies of foreign countries (in particular, Canada's "Five Eyes" partners: the United States, the United Kingdom, Australia and New Zealand) with conducting surveillance on Canadians abroad. Both Mosley J. of the Federal Court, and a three-judge panel of the Federal Court of Appeal, concluded that the *CSIS Act* does not authorize the Federal Court to issue a warrant that would empower CSIS to engage in activities in another country that might violate the domestic laws of that country.

The changes proposed in Bill C-44 appear designed to address the outcome of this case head on. In particular, the Bill would amend s. 21 to add the following new subsection:

(3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.

CCLA appreciates that investigating threats to Canada may require the gathering of intelligence outside of the country. However, authorizing the Federal Court to provide CSIS with a warrant without regard to any other law creates a number of problems. First, this provision might be interpreted as allowing for the violation of international human rights law. This harms Canada's reputation as a rights-respecting nation, and might be interpreted as inviting other countries' intelligence agencies to violate Canadian law or to ignore the human rights of visiting Canadians. In addition, intelligence collected in violation of the laws of the country where it takes place may be an ineffective way of gathering reliable and actionable intelligence that could lead to a successful prosecution. A further significant concern is that involving the intelligence agencies of foreign partners in Canada's national security efforts creates a heightened danger for Canadians. We have already seen the tragic consequences for innocent Canadians when CSIS operates abroad and/or when CSIS relies upon information from foreign partners without appropriate safeguards or caveats. The case of Maher Arar highlights the dangers with information sharing in very stark terms. Once our intelligence agencies share information with partners it cannot be recovered or controlled. Foreign countries may do what they like with it and the consequences for Canadians could be very serious.

As discussed further below, Canada's national security and intelligence agencies are increasingly working in an integrated fashion. In light of this reality, the absence of an integrated oversight body has caused a deficit in the accountability framework. Expanding the Service's powers without addressing this deficit is, in CCLA's view, unacceptable.

#### **D) Protection of CSIS Informants**

Bill C-44 also contains provisions designed to protect the identity of human sources that provide information to the Service. The scope of the new privilege for CSIS informers is quite broad. It is significant that the Supreme Court of Canada, in *Canada (Citizenship and Immigration) v.*

*Harkat*<sup>2</sup> held that there was no class privilege for CSIS human sources while noting that, in the security certificate context, there remained mechanisms to protect the identity of sources. In addition, former Supreme Court of Canada Justice Major, in his role as Commissioner of the Inquiry into Air India, recommended against extending informer privilege to CSIS sources.

CCLA is pleased to see that there is an innocence-at-stake exception built into the Bill so that, where an individual faces prosecution for an offence, he/she may be able to ascertain the identity of the source. However, the identity of human sources may be of significance for individuals subject to security certificates or facing immigration proceedings and the Bill may not adequately address the due process rights that such individuals are owed. CCLA is particularly concerned that, even where an individual faces a prosecution, the hearing into whether a human source benefits from the privilege could be held in the absence of the accused and their counsel. This violates basic principles of fairness and the open courts principle.

### **E) Oversight and Accountability**

CCLA's primary concern with Bill C-44 is what it leaves out. In particular, despite evidence-based and well-reasoned recommendations made by multiple commissions of inquiry into matters of national security, the oversight and review mechanisms for CSIS and other intelligence agencies remain seriously lacking. CCLA does not accept that the Security Intelligence Review Committee (SIRC) is an adequate oversight body in light of CSIS's expanding powers and frequent collaboration with other agencies. An integrated national security oversight body has been recommended and is required in order to ensure that Canadians are not forced to trade away their basic rights and freedoms in the name of national security. Canada's security depends in part on protecting the rights and freedoms enshrined in our Constitution and codified in international human rights law. Moreover, greater parliamentary oversight of our national security agencies will address a large democratic gap in our current structures. CCLA urges the Committee to include a meaningful, integrated oversight mechanism into Bill C-44, in line with the recommendations made by Justice O'Connor in the Arar Commission of Inquiry.

### **F) Conclusion**

As set out above, CCLA has serious concerns about Bill C-44 and its implications for the rights of Canadians. The case for expanding CSIS's powers has not been made and the changes proposed in the Bill risk undermining hard-won rights protections. Finally, the Bill does not include the creation of a meaningful oversight mechanism which is long overdue.

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<sup>2</sup> 2014 SCC 37.