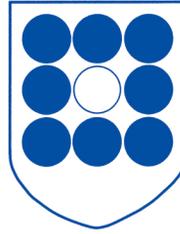


CANADIAN
CIVIL LIBERTIES
ASSOCIATION



ASSOCIATION
CANADIENNE DES
LIBERTES CIVILES

Submission to the Senate Committee on National Security and Defence regarding *Bill C-51, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts (Anti-Terror Act, 2015)*

Canadian Civil Liberties Association

April 20, 2015

Sukanya Pillay, General Counsel and Executive Director/
Cara Faith Zwibel, Fundamental Freedoms Program Director

Canadian Civil Liberties Association

215 Spadina Ave., Suite 210

Toronto, ON M5T 2C7

Phone: 416-363-0321 ext 256

www.ccla.org

Contact: media@ccla.org

TABLE OF CONTENTS

A)	Canadian Civil Liberties Association (CCLA)	2
B)	Overview of Concerns	2
C)	<i>Security of Canada Information Sharing Act</i>	4
i)	<i>Absence of meaningful accountability, review and oversight</i>	5
ii)	<i>SISA vastly expands the scope and scale of information that may be shared across government institutions, in a manner that is not restricted to constitutional principles of necessity, proportionality, or minimal impairment</i>	7
iii)	<i>SISA exacerbates existing problems in Canada’s privacy framework, and is inconsistent with transparency and accountability</i>	9
D)	<i>CSIS Act Amendments</i>	11
i)	<i>The shift in the role of CSIS</i>	11
ii)	<i>Interfering with the role of judiciary and the capacity for effective review</i>	12
iii)	<i>Undermining prosecutions</i>	13
E)	<i>Criminal Code Amendments</i>	13
i)	<i>The scope of existing terrorism offences</i>	14
ii)	<i>The potential impact of the new offence</i>	15
iii)	<i>Seizure and deletion of “terrorist propaganda”</i>	16
iv)	<i>Lowering of thresholds for preventive arrest, recognizance and peace bonds</i>	17
F)	<i>IRPA Amendments</i>	19
G)	<i>Secure Air Travel Act</i>	20
H)	Absence of Accountability, Oversight and Review Throughout Bill C-51	23

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 in 1964 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 over 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 the rule of law, we make submissions to this Committee to express our serious concerns about Bill C-51.

B) Overview of Concerns

CCLA recognizes and supports the duty of Canada to protect this country from terrorist threats and terrorist acts. CCLA recognizes that the government requires the tools to effectively respond to the evolving threat of terrorist activity. Our concern is that Bill C-51 does not provide *necessary* tools.

It is our view after careful study, that Bill C-51 expansively creates new powers, and creates new crimes in the name of anti-terror, without any commensurate increase in legal safeguards and without regard to the lessons learned in Canada's counter-terror experience since 2001. Canada already has robust and even exceptional and broad anti-terror powers in place. Bill C-51 is omnibus legislation that imperils principles of accountability critical to a liberal democracy, undermines fundamental rights and freedoms, and threatens to criminalize legitimate acts. If passed, Bill C-51 will significantly undermine Canada's constitutional and legal framework. In our view, the Bill's failings cannot be remedied through amendments. CCLA argues that this Bill should not pass.

Bill C-51 has been introduced in the name of national security to combat terrorist activities including terrorist threats, but it has not been demonstrated that more legislation creating new crimes and new powers are necessary to achieve this objective. Despite CCLA's requests and those of other actors in civil society, no clear explanations have been provided by the Government as to why these new laws are necessary. CCLA respectfully reminds the Committee that existing laws successfully thwarted the Via Rail and Toronto 18 terror plots. If existing laws were in fact deficient in preventing the tragic Parliament Hill shooting and murder of a Canadian soldier, or the Quebec murder of a Canadian soldier, then Canadians should be told clearly why those laws were deficient. Such an explanation could be provided without betraying national security secrets. The mere fact that acts of violence or terror have occurred in recent months – which acts we categorically condemn and deplore -- is not in itself a sufficient basis for claiming exceptional new laws or powers are required. No country can successfully legislate to zero risk;

however, a country that runs roughshod over constitutional protections and rule of law will be inconsistent with democracy, freedom, and security.

CCLA's specific concerns about the Bill are the following:

- **Exponential increase of mass information collection and flow, threatening privacy rights:** The proposed *Security of Canada Information Sharing Act* enables a new massive information flow regime across 17 governmental institutions and with foreign powers and actors, without adherence to legal safeguards or accountability mechanisms. These provisions give rise to serious privacy concerns, further undermining Canada's existing privacy protections in the name of an extraordinarily broad description of "activities that undermine the security of Canada". It should not be enacted.
- **Radical alteration of CSIS powers and disregard for the Charter:** The proposed amendments to the *Canadian Security Intelligence Service Act* represent a seismic shift in both CSIS's powers, and the way it may carry out its functions. Much of what CSIS does will be covert and not subject to meaningful oversight or review. The amendments also appear to give our courts a license to issue warrants in violation of the *Canadian Charter of Rights and Freedoms*, a radical proposition that is directly contrary to the rule of law and the role of the judiciary. Provisions which also seek to empower CSIS to act without regard to international law or foreign domestic law is extraordinary, completely disregards Canada's binding international legal obligations, and sets a dangerous example for foreign actors regarding Canada.
- **Undue expansion of the criminal offences and criminal law powers:** The proposed amendments to the *Criminal Code* are significant and unnecessary. The new offence of promoting or advocating terror is unnecessary in light of the already wide range of criminal terrorism offences. It is overly broad and will chill legitimate dissent. The new *Criminal Code* provisions could make terror suspects harder to detect and investigate. Further, the lower thresholds for preventive arrest, detention and recognizances with conditions – already exceptional broad powers – are now amplified and undermine due process rights and rule of law.
- **Reversing section 7 protections in the Security Certificate regime:** Amendments to the security certificate regime under the *Immigration and Refugee Protection Act* will reverse important constitutional protections that have been crafted in response to judicial findings that section 7 – in particular liberty rights and the principles of fundamental justice – be upheld. These changes will significantly prejudice Named Persons by constraining Special Advocates who themselves are security-cleared counsel, and may call the constitutional validity of the scheme into question once again.
- **Impairing mobility rights absent due process:** The proposed *Secure Air Travel Act* seeks to codify parts of Canada's existing Passenger Protect Program (PPP) which can be used to deny air travel to individuals. In 2010, CCLA called for a comprehensive legislative framework that prescribes the operations and decision-making process

implicated in the PPP, but the proposed Act does not wholly accomplish this goal. It does not contain adequate substantive or procedural protections for listed individuals, does not provide sufficient transparency or accountability mechanisms, and places Canadians at continued risk of prejudice.

CCLA reiterates our concerns over a prominent feature that cuts across all aspects of Bill C-51: the Government's failure to address outstanding concerns about the absence of meaningful oversight and review of national security agencies and activities. No less than three Federal Commissions of Inquiry have carefully and thoroughly studied the dire and tragic consequences resulting from information sharing failures. Accountability gaps and corresponding concerns continue to be the subject of considerable study, comment and debate. While there may be some disagreement about the best mechanisms for accountability, there is no debate that accountability is necessary. The Bill's failure to address accountability gaps while simultaneously expanding powers of government agencies and institutions, and law enforcement, is a fatal flaw.

Finally, there are practical concerns that some of the provisions of the Bill may actually undermine efficacious counter-terror efforts in Canada. Widening the net to potentially criminalize legitimate activities not only undermines democratic rights but also diverts precious resources away from individuals who may in fact be engaged in terrorist acts. Further, the breadth of the proposed information sharing regime risks creating large databases of irrelevant information, making it significantly harder to find those who pose a real danger. Collecting everything may mean learning nothing of value while subjecting everyone to mass surveillance. Indeed a regime that seeks to know all about all at all times will not resemble a liberal democracy. The new offence of promotion or advocacy of terrorism could also send valuable sources of intelligence underground, and hinder ongoing de-radicalization efforts in some communities. In sum, Bill C-51 may undermine the ability of law enforcement agencies to identify, target, investigate, charge and prosecute individuals who pose a genuine threat to Canada.

C) Security of Canada Information Sharing Act

Bill C-51 creates the new *Security of Canada Information Sharing Act* ("SISA"). The SISA provides for unprecedented collection and dissemination of information across State agencies, without enforceable privacy safeguards, and without limiting the collection of information to 'terrorist activities'.¹ As such, information on law-abiding, innocent Canadians can be swept up in this vast net, and shared across at least 17 national agencies and with foreign States and private actors.

CCLA recognizes that information sharing, subject to the proper safeguards, is an indispensable tool in countering terrorism. Indeed the indispensable nature of information sharing for national

¹ See s. 5(1) of Bill C-51, "relevant to the recipient institution's jurisdiction or responsibilities under an Act of

security has been recognized by three Federal Commissions of Inquiry in Canada, and by UN Security Council Resolutions post 9/11 committing to global counter-terrorism efforts.

However, CCLA reminds the Committee that effective information sharing must be anchored in a commitment to human rights: a failure to do so can result in serious errors that harm individual lives and democratic rights. It can result in the creation and use of false profiles and mistaken information, and accordingly, undermines efficient security. Information sharing failures and mistakes contributed to the torture and rights abuses of four Arab Canadian men, and of failing to prevent the Air India terrorist bombing of flight 182 which killed all 329 people aboard. The careful review, lessons and recommendations arising from three Federal Commissions of Inquiry are absent in *SISA*, which in our view exacerbates the risk of future mistakes and consequences.

CCLA will focus its serious concerns about *SISA* on the following issues:

- i) *SISA* fails to include meaningful accountability or oversight mechanisms for national security information;
- ii) *SISA* vastly expands the scope and scale of information that may be shared across government institutions, in a manner that is not restricted to constitutional principles of necessity, proportionality, or minimal impairment; and
- iii) Rather than cure the deficiencies in existing, outdated privacy legislation, *SISA* introduces a new scheme that is opaque, circular and confusing, and inconsistent with democratic principles of transparency and accountability.

These concerns are discussed briefly below.

i) Absence of meaningful accountability, review and oversight

Failures of Oversight and Review Widen the Accountability Gaps

Because of the inherent secrecy that necessarily accompanies national security information, a robust complaints and self-initiating review mechanism is necessary, as well as a robust oversight mechanism. Further, the increasingly integrated operations of national security agencies, call for integrated accountability mechanisms. The international information flow structures in which Canada is an active participant, serve to amplify these needs. CCLA has long argued for the implementation of Justice O'Connor's Arar Commission recommendations for necessary oversight and integrated review² as being indispensable to our democracy and for efficacious security.

² See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (in relation to the Factual Background) at Recommendations 6-10 broadly, regarding the need for oversight in information sharing; available online at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf at pp. 331-343, and *A New Review Mechanism for the RCMP's National Security Activities* (Policy Review), Recommendations 1-13, available

However, *SISA* delivers no appropriate accountability mechanisms, and widens the existing accountability gap. *SISA* accelerates both the integrated functions of government institutions and the information flow. *SISA* provides for unfettered information sharing broadly across government institutions unrestricted to solely national security information, thereby heightening the need for appropriate oversight and review.

Failure to properly implement written agreements or caveats

In the Arar Commission recommendations, information sharing was also required to be subject to written agreements and caveats, which CCLA recognizes as important safeguards in the collection and exchange of personal information, particularly in the national security context. The written agreements should also contain the parameters of use and destruction. CCLA is seriously concerned that there is inadequate regard in *SISA* to such safeguards. There is no requirement for written agreements.

Although *SISA* includes a set of guiding principles for information sharing, these principles are not translated into enforceable provisions in the Act. Moreover, the operational parts of the *SISA* in some cases directly contradict the principles. Significantly, one of the guiding principles is that “respect for caveats on and originator control over shared information is consistent with effective and responsible information sharing”.³ This statement is not controversial, but the provisions of the *SISA* do nothing to facilitate the use of caveats or promote the importance of originator control. Similarly the amendment to section 6 of *SISA*, (a shift from the original language permitting further disclosure and use of already shared information “to any person, for any purpose”⁴) which calls for further disclosure to be done in accordance with existing “legal requirements, restrictions, and prohibitions”, appears on its face to recognize the importance of compliance with lawful protections, scrutiny reveals that there are currently insufficient legally enforceable protections in place notwithstanding the clear recommendations of the Arar Commission report. While the possibility of civil liability might serve as a deterrent to careless or indiscriminate use of information without regard to caveats or originator control, the *SISA* also precludes civil liability for any disclosure of information, in good faith, under the Act.

Existing Mechanisms Lack Mandate and Capabilities

The Government has indicated that it considers the Privacy Commissioner, and the Auditor General to provide sufficient review of information sharing activities, but this claim is simply inaccurate. The scope and scale of information, and the agencies and institutions engaged, are beyond the mandates and resources of each entity. The Office of the Privacy Commissioner

online at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf at pp. 503-607 generally for the need for an integrated review mechanism capable of investigating and reporting on complaints and generating self-initiated review of Canada’s national security agencies.

³ Bill C-51, Part 1, *Security of Canada Information Sharing Act*, s. 4(b).

⁴ *Ibid.*, s. 6.

itself recognized its limited mandate in this regard, and has called for significant reforms to ensure adequate protections for privacy in the national security context.⁵

National Security is not a carte blanche

CCLA recognizes that the nature of national security information in specific circumstances may require secrecy --- for example, to protect foreign or domestic sources, to protect investigative strategies, to protect an ongoing investigation, to protect those suspected who have the right to be presumed innocent – but it is this very secrecy that demands appropriate accountability structures to guard against abuse and error. A clear roadmap for statutory gateways among national security review bodies to facilitate integrated review, including an Independent Complaints and National Security Review Agency for the RCMP was provided by the Arar Commission recommendations; however, the concept of integrated review and its necessity are both wholly absent in *SISA*.

SISA fails to adequately account for the existing information flows in the national security context that require commensurate oversight and accountability: Canadian agencies and government institutions share information domestically; Canada exports information to foreign states and actors and such information must be subject to strict safeguards including caveats and written agreements regarding use, dissemination and destruction parameters; Canada imports foreign intelligence and this information must also be subject to safeguards including assessing reliability, conditions of use and dissemination. *SISA* fails to incorporate the lessons of three Federal Commissions of Inquiry, while simultaneously increasing the scale and scope of information flow. In our view *SISA*'s provisions are reckless and may contribute to serious errors that are compounded in the national security context.

ii) SISA vastly expands the scope and scale of information that may be shared across government institutions, in a manner that is not restricted to constitutional principles of necessity, proportionality, or minimal impairment

SISA vastly extends the reach of information collection and dissemination by and among Canadian agencies, on a scale and a scope which is disproportionate and exceptional. Further, the scope is not limited to national security strictures, and this wide-ranging information can be collected and shared not only across 17 Canadian agencies, but also with foreign government agencies and foreign and domestic private actors. The potential for abuse and harm is significant.

⁵ Office of the Privacy Commissioner, *Checks and Controls: Reinforcing Privacy Protection and Oversight for the Canadian Intelligence Community in an Era of Cyber-Surveillance*, January 28, 2014, available online: https://www.priv.gc.ca/information/sr-rs/201314/sr_cic_e.asp. See also Statement from the Privacy Commissioner of Canada following the tabling of Bill C-51, available at: https://www.priv.gc.ca/media/nr-c/2015/s-d_150130_e.asp.

The new information sharing regime established by *SISA* allows for sharing information in relation to “activities that undermine the security of Canada”.⁶ CCLA finds the definition of such “activities” to be overbroad and concerning:

“any activity, including any of the following activities, if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada:

- (a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada;
- (b) changing or unduly influencing a government in Canada by force or unlawful means;
- (c) espionage, sabotage or covert foreign-influenced activities;
- (d) terrorism;
- (e) proliferation of nuclear, chemical, radiological or biological weapons;
- (f) interference with critical infrastructure;
- (g) interference with the global information infrastructure, as defined in section 273.61 of the National Defence Act;
- (h) an activity that causes serious harm to a person or their property because of that person’s association with Canada; and
- (i) an activity that takes place in Canada and undermines the security of another state.

For greater certainty, it does not include lawful advocacy, protest, dissent and artistic expression.”

Some of the activities listed are not clearly defined. For instance, in subsection 2(d) “terrorism” is not defined in the legislation or in any other piece of legislation (the *Criminal Code* refers to “terrorist offences” and “terrorist activity”). In other cases, the activities captured by the definition are exceptionally broad.

To allow such a dynamic, broad sharing and flow of information throughout government institutions, on the basis of “interference with critical infrastructure” or “interference with the capability of the Government of Canada in relation to intelligence,...public safety, the

⁶ Bill C-51, Part 1, *Security of Canada Information Sharing Act*, s. 2.

administration of justice,...or the economic or financial stability of Canada” is to, in effect, allow unfettered information sharing. This is arguably unprecedented in Canada, and we have outlined in the section above our serious concerns over the dearth of accountability. The scope and scale of information sharing simply widens the already existing accountability chasms, enabling operations that are inconsistent with democratic principles of transparency and accountability. Such a mass scope does not result in meaningful security benefits, but rather treats all Canadians as potential suspects rather than law abiding citizens who require protection not only from terrorist threats and acts, but also protection of their rights and liberties. To paraphrase William Binney, the NSA Whistleblower who spoke at a CCLA event publicly in September 2013, ‘if you are looking for a needle in a haystack, it does not make sense to create more hay’. In our view, the mass collection, retention, and dissemination of personal information does not make us more secure, but does undermine our democratic principles.

The definition of “activities that undermine the security of Canada” on the whole, appears to allow information sharing in relation to legitimate protest activities related to Canada’s environmental practices, municipal development activities, international trade agreements, labour disputes, Aboriginal land claims, and a variety of other areas. Ironically, “interference with intelligence activities” might be interpreted to capture encryption and other methods that individuals use to safeguard their personal information and protect their privacy. The definitional base of the legislation is sweeping in its scope and gives rise to real concerns about the protection of privacy and the level of intrusion Canadians should reasonably have to tolerate from their government.

We recognize the recent amendment removing the word “lawful” from the scope of advocacy, protest, dissent and artistic expression activities – while we welcome this amendment we are quick to point out that the amendment does not cure the host of flaws we have iterated above. To sum up, the definition contains no effective limits to the breadth of the information-sharing regime that it establishes.

Canadians have received no clear convincing explanation as to why such massive information sharing powers proposed by *SISA* – which clearly undermine constitutional rights and democratic principles -- are required. CCLA has long argued that any information collection and sharing must be targeted, and compliant with the constitutional and human rights principles of ‘necessity, proportionality, and minimal impairment’. This is not the case with *SISA*.

iii) SISA exacerbates existing problems in Canada’s privacy framework, and is inconsistent with transparency and accountability

The Canadian privacy framework has not kept pace with advancing technologies enabling non-targeted mass surveillance and collection of information on individuals; nor does the framework provide adequate safeguards against unlawful collection and use of such information. Onto this wobbly structure that fails to provide robust accountability mechanisms, *SISA* superimposes

another information-sharing regime that exacerbates existing problems and creates new problems.

The existing framework contains overlapping laws regarding information flow, with insufficient safeguards. For example, s. 19(2)(a) of the *CSIS Act* allows CSIS to disclose information where it may be used in an investigation or prosecution.⁷ Canada's *Privacy Act* also contains multiple exemptions to allow for information sharing amongst government agencies, particularly in the context of investigations or where the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure.⁸

SISA superimposes a new layer of information sharing without commensurate safeguards. First, section 5 of *SISA* authorizes disclosure between certain government institutions where such disclosure is not prohibited by law (although as discussed above, the authorization is tied to an extraordinarily broad definition of “activities that undermine the security of Canada”). *SISA* further allows Canadian government institutions to share information with “any person, for any purpose”; including foreign governments and domestic and foreign private actors. The minimal constraints that are placed on when information can be shared (“in accordance with the law”), are not clearly defined and, as a result, are hollow limitations. The potential for error and harm to law-abiding innocent Canadians is great. Although there may be serious consequences for individuals whose information is shared, the Act grants civil immunity where disclosure is made in good faith. As Kent Roach and Craig Forcese have pointed out, the breadth of the information sharing regime and the absence of meaningful review “demonstrates wilful blindness about the Arar saga.”⁹

When viewed in the context of existing privacy legislation (including the *Privacy Act*), and the protections provided by the *Canadian Charter of Rights and Freedoms* (as interpreted by our courts in cases including *Wakeling v. United States of America*¹⁰ among others), the proposed provisions lack transparency and become unintelligible.

The reality that information will often be shared without the knowledge of the subject means that harms to an individual can be perpetuated secretly. Meaningful judicial review will be rare, and a robust jurisprudence in the area will be difficult to develop. Given the civil immunity for so-called ‘good faith’ disclosures, there is an absence of meaningful legal recourse or redress in *SISA*.

⁷ In our section on amendments to the *CSIS Act*, we set out our concerns about the constraints of SIRC review.

⁸ See *Privacy Act*, R.S.C. 1985, C. P-21, s. 8(2)(e), (m)(i).

⁹ Kent Roach and Craig Forcese, Bill C-51 Backgrounder #3: Sharing Information and Lost Lessons from the Maher Arar Experience (February 16, 2015). Available at SSRN: <http://ssrn.com/abstract=2565886>, at p. 37.

¹⁰ 2014 SCC 72.

D) CSIS Act Amendments

CCLA has serious concerns about the expanded powers of CSIS, and the lack of commensurate accountability, proposed by Bill C-51. The proposed changes to the *Canadian Security Intelligence Service Act (CSIS Act)* contained in Bill C-51, in combination with those set out in Bill C-44 (introduced in October 2014), represent a significant restructuring of Canada's intelligence and security architecture. This overhaul has been undertaken without meaningful study and absent significant public or parliamentary input. The changes largely ignore recommendations made by both the Air India and Arar Commissions of Inquiry that point to the desirability of clear demarcation of mandates and powers of agencies, the need for better coordination between agencies, and the concerning accountability deficits in the national security realm. Meaningful reforms to both oversight and review mechanisms are critical and yet completely absent in this major overhaul. CCLA has raised concerns about the changes set out in Bill C-44 in an earlier brief to this Committee. Here we focus on the changes contemplated in C-51 and highlight those of most significant concern.

i) The shift in the role of CSIS

In the wake of illegal acts and wrongdoings by the RCMP, the McDonald Commission was struck. After extensive study, the McDonald Commission recommended that law enforcement and intelligence functions be separate, and CSIS was created. Bill C-51 now proposes to expand CSIS beyond a recipient and analyst of human intelligence, into an agency with powers to act in Canada and abroad, without regard to international law or foreign domestic law. This bold and radical restructuring is at odds with Arar and Air India Commissions of Inquiry which exhaustively reviewed the functions of Canada's national security agencies with consideration to the powers, mandate and actions of CSIS. While these Commissions considered the merits of distinctions between intelligence and law enforcement functions, these distinctions were not found to hamper Canada's counter-terror efficacy. CCLA argues that if there are sound reasons to so radically alter the powers and mandate of CSIS, Canadians must be informed of these reasons rather than have a radically enhanced CSIS imposed upon them. Democratic principles dictate that an explanation and opportunities for meaningful input be provided to Canadians. Such explanation can be provided in a manner that would not compromise national security, and any justified enhancement of CSIS would require commensurate enhancement of accountability mechanisms.

The changes proposed in Bill C-51 (both on their own and in combination with changes under Bill C-44) represent a fundamental shift in how CSIS will operate, stacking greater powers onto their existing intelligence-gathering functions. The new provisions of the Act would allow CSIS to take "measures" to reduce threats to the security of Canada. While this language may initially sound benign, the outer limits of these "measures" suggest that CSIS will have a very large sphere in which to operate. In particular, the sole constraints on measures that CSIS may take

relate to causing death or bodily harm, obstructing justice, or violating the sexual integrity of an individual.

As such, a reasonable interpretation of these provisions in Bill C-51 is that other violations of law are contemplated as measures open to CSIS, in Canada and abroad.

The government has failed to offer adequate explanation as to why these new “measures” are necessary in order for CSIS to be effective in countering terrorism. As discussed further below, this expansion is particularly troubling in light of deficiencies in the existing accountability regimes and given that CSIS largely operates in secret.

ii) *Interfering with the role of judiciary and the capacity for effective review*

As outlined throughout this submission, CCLA has many concerns about Bill C-51. One of the most concerning provisions of Bill C-51, is a proposed new warrant power. In the proposed amendment to s. 12.1(3) of the *CSIS Act*, the measures that CSIS may take to reduce a threat to the security of Canada may not contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or be in contravention of other Canadian law, *unless authorized by a warrant issued under proposed s. 21.1*. A reasonable interpretation of this language is that Bill C-51 permits judges to grant a warrant that authorizes breaches of the law, including the Constitution of Canada. CCLA argues that this is a shocking proposal and of serious concern to a society committed to rule of law and constitutional supremacy. Further, the new warrant power turns the role of the judiciary – sworn to uphold the law and ensure that government actors comply with the *Charter* – into a complicit actor to flout rule of law.

Some commentators have noted that this power is unlikely to be exercised by judges or, if exercised, will be undertaken with significant care. While it may be that these warrants may very rarely be authorized as CCLA finds it incompatible with legal responsibilities for a judge to issue warrants to act outside of law, wishful thinking is not a basis upon which to introduce radical and arguably unlawful measures. Further, warrant applications will be on an *ex parte* basis, and brought *in camera*, meaning there is no real check on CSIS in seeking these warrants. The judge will not have the benefit of an adversarial process and will not be in a position to test the evidentiary basis for the warrant that is sought. The Federal Court has recently raised concerns that CSIS failed to meet its duty of candour in seeking out a warrant,¹¹ thus heightening the concerns about the secret warrant process and undermining the faith of Canadians in our security services. Further, individuals who are subject to measures authorized by such warrants may never know this, and therefore will not be in a position to challenge the warrant or the reasons upon which the warrant was authorized. The potential threat of harms from secrecy in this process is exacerbated by the absence of any transparency or accountability safeguards.

Before this Committee, Public Safety Minister Blaney stated that there is “nothing new under the sky” with respect to the issuance of judicial warrants, for example in search and seizure cases. The CCLA argues that this is an inaccurate depiction of the warrant process. Warrants exist to

¹¹ *X (Re)*, 2013 FC 1275, aff’d 2014 FCA 249. Leave to appeal to the Supreme Court of Canada has been granted.

ensure compliance with legal protections, and in the case of section 8 of the Charter, to ensure that the search warrant guards against an ‘unreasonable search’; i.e. that in the circumstances the search is reasonable. The warrant scheme proposed by Bill C-51, as worded in s. 12(3) of clause 42, directs the issuance of judicial warrants to authorize CSIS to take measures to reduce a threat to Canada *even if* those “measures will contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or will be contrary to other Canadian law.” In our view, this is unacceptable and contrary to this nation’s commitment to constitutional supremacy and rule of law.

The concerns with the new warrant power extend beyond CSIS, as a judge may order “any person” to provide assistance if their assistance may reasonably be considered to be required to give effect to a warrant. This provision could lead a range of government actors (whether or not traditionally operating in the national security realm) to become involved in covert activities and also contemplates involving private individuals in carrying out such covert “measures”. Those authorized to take measures pursuant to a warrant may also take it upon themselves to request assistance from “another person”. Extending the powers to take “measures” beyond even those within CSIS is deeply concerning and operates without any meaningful checks or balances.

iii) Undermining prosecutions

The disruptive measures contemplated in Bill C-51 are constrained only by the outer limits discussed earlier. It is foreseeable that these new powers will impact CSIS’s relationship with sources and will further blur lines between intelligence and evidence. If there is confusion or significant overlap of the mandates of CSIS, the RCMP, and other national security agencies (for example CBSA), Bill C-51 may undermine criminal prosecutions for terrorist and other offences.

Bill C-51 in conjunction with Bill C-44 extends CSIS’s powers and creates an informer privilege for CSIS sources. It is important to recognize that the Air India Commission reports set out at length the distinctions between intelligence and evidence in counter-terror efforts, and after four years of study recommended against an informer privilege for CSIS sources. The Supreme Court of Canada in its recent decision in *Harkat*,¹² also did not extend informer privilege to CSIS sources.

These changes clearly merit careful consideration and robust debate, something that has not happened to-date and is not occurring in the context of review of this Bill. We reiterate our concerns that not only can serious mistakes result from unfettered information flows, but the failures to incorporate safeguards and integrated review mechanisms can also lead to missed opportunities to properly and strategically share information to prevent a terrorist act and ultimately undermine the ability to prosecute individuals for terrorist activities.

E) Criminal Code Amendments

¹² *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37.

Bill C-51 amends the *Criminal Code* to create a new offence of advocating or promoting the commission of terrorism offences in general, provides new powers to address terrorist propaganda and lowers thresholds for preventive arrest, recognizance orders, and for peace bonds. The creation of new offences and powers suggests that our existing criminal provisions are inadequate and need to be enhanced. However, this case has not been effectively made as there is no evidence that new offences or criminal law powers are necessary or that they will be effective. In some cases, the evidence indicates that the new offence may undermine safety and security by driving those who express extremist ideas in quasi-public forums further underground. This form of expression can be a valuable tool for intelligence and law enforcement agencies.

i) The scope of existing terrorism offences

The proposed new offence states:

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

This is a speech crime. It criminalizes the expression of ideas and therefore engages core constitutional protections for freedom of expression and freedom of the press. Freedom of expression is a fundamental freedom – and a bedrock right in a democracy. The creation of criminal offences directed purely at expressive activity must be subject to careful scrutiny in any democratic system that values the free exchange of ideas. Robust protection for freedom of expression does not deny that expression can be harmful, but recognizes the value in countering and denouncing such expression rather than resorting to state-sponsored censorship.

The new speech offence is both exceptionally broad and vague. The provision criminalizes advocacy or promotion of “terrorism offences in general” – a reference to a concept that is not defined in the *Criminal Code* and extends beyond the defined terms of “terrorist offence” or “terrorist activity” (both of which are already expansive).¹³ The breadth of this term stands in contrast to narrowly defined terms that lie at the heart of other expression-based offences including the willful promotion of hatred and the child pornography offences.¹⁴ It captures statements that are made privately, intruding into personal relationships in a way that is simply not justified, and may, for reasons explored further below, undermine ongoing counter-radicalization efforts. The breadth of the offence is extended even further since aiding and abetting the offence is also a basis for criminal liability. The provision requires that the accused

¹³ See *Criminal Code*, R.S.C. 1985, c. C-46 at ss. 2 and 83.01(1).

¹⁴ See e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *R. v. Sharpe*, 2001 SCC 2.

“knowingly” advocate or promote “terrorism offences in general” thus setting a lower *mens rea* standard than the more demanding “willful” language used in association with hate speech provisions. Further, the new offence contains no specific defences. It is difficult to conceive of an expression-based offence that captures more.

In CCLA’s view, the proposed offence is overbroad, vague, and cannot withstand constitutional scrutiny. Moreover, the government has not demonstrated any compelling reason why such an offence is necessary. The *Criminal Code* already contains a large number of offences that address terrorism in a variety of different forms. The existing provisions include financing offences, (83.02-83.04), and participating, facilitating, instructing and harbouring offences (ss. 83.18-83.23). In addition, the *Criminal Code* defines “terrorism offence” in part as including *any* indictable offence committed for the benefit of, at the direction of or in association with a terrorist group. It also extends to a conspiracy, attempts to commit, being an accessory after the fact, or any counselling in relation to a terrorism offence. These offences already catch a great deal of behavior that involves no violence and that may have only a very remote connection to what most Canadians would consider an act of terror.

In light of the restriction the new offence places on free expression, the government must demonstrate why it is justified. To date, the government has not done so nor offered any examples of how this new offence will assist in the fight against violent extremism, which is already well-addressed in our *Criminal Code*.

ii) The potential impact of the new offence

CCLA has a number of concerns about the impact that the new offence may have on Canadians, regardless of whether it is actually used to prosecute individuals. The mere existence of this offence “on the books” has the potential to chill or stifle freedom of expression and freedom of the press in a manner that is neither reasonable nor demonstrably justified.

Given the breadth of the terrorism offences, and the addition of the phrase “in general” in the new offence, it is not only those who advocate or promote suicide bombings or mass shootings that could be caught within the law’s ambit. Individuals speaking out about foreign wars and expressing their views about who is on the “right side” risk being caught by the law. Individuals who wish to encourage financial assistance to humanitarian organizations that have some tenuous or suspected links to listed terrorist entities (including entities that may control territory or act as the *de facto* government in a region) would also fall under the law’s large umbrella. The freedom of journalists is put at risk and academic freedom will also suffer. The chill that this law could have on expressive freedom will not be known or measurable, since those with controversial and unpopular views will simply not express themselves.

In addition to the chill that this law will cast on legitimate expression on matters of public interest, it might also hinder the ability of law enforcement and intelligence agencies to meaningfully monitor threats and investigate useful leads.

Further, counter-radicalization efforts may be undermined. Free speech can be an important tool in fighting radicalization and promoting free exchange of ideas. Intervention in the early stages of radicalization will require frank discussions about an individual's views on controversial topics. If these individuals can be charged for the simple (and private) expression of their views, the already difficult task of de-radicalization will be rendered all the more challenging.

iii) Seizure and deletion of “terrorist propaganda”

The new terrorist propaganda provisions contained in proposed ss. 83.222 and 83.223 of the *Criminal Code* create new powers to allow for the seizure or deletion of “terrorist propaganda”, defined as “any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general – other than an offence under subsection 83.221(1) – or counsel the commission of a terrorism offence.”¹⁵ These powers give rise to concerns of vagueness, overbreadth, and unjustified restrictions of free expression that are similar to those outlined above. By lumping in the advocacy or promotion of “terrorism offences in general”, this law would sweep up a wide range of material that may have little to do with genuine terrorist threats. Freedom of expression is not just significant for the speaker or author, but also for the listener or reader. Allowing for deletion of materials that may be harmless (and might even help in provoking meaningful debates and discussions on matters of public interest) affects the rights of Canadians not just to speak, but also to hear. For example, under the new provisions it is possible that Canadians would be denied the opportunity to view the recently released video of the Ottawa shooter. Similarly, academics who have recently read the recorded speech of the Ottawa shooter may be captured by these broad provisions.

The new propaganda provisions allow for the owner, author or person who posted the material to come forward and participate in the hearing on the issue of seizure or deletion. While this is an important safeguard, its utility is significantly undermined given the existence of the new promotion/advocacy offence. An individual would have good reason to be concerned about whether coming forward could expose them to criminal liability. As a result, any judicial considerations of the terrorist propaganda powers may well occur without the benefit of an adversarial hearing.

There are three further concerns with the terrorist propaganda provisions that merit attention. First, it is likely that law enforcement or intelligence services will be able to easily avoid the

¹⁵ Bill C-51, s. 16.

judicial process by simply approaching internet service providers or companies that host content and ask for voluntary removal.¹⁶ Given that, under the law's broad remit these companies could themselves be liable for hosting this content, cooperation is likely. Even if we accept that removing this content from the Internet is an appropriate and constitutionally-compliant tactic, circumventing the judicial process (and the law's requirement for the consent of the Attorney General before seeking a seizure or deletion order) creates a private censorship scheme without meaningful review. A society that takes freedom of expression seriously should reject such an approach.

Second, Roach and Forcese have pointed to the concerns about the incorporation of "terrorist propaganda" into the material that can be stopped at the border by customs officials. The breadth of material that can be caught under this is, as outlined above, troubling in any context, but particularly so when applied by border officials with minimal relevant training and with no body dedicated to review.

Finally, both the new speech offence and the terrorist propaganda provisions may negatively impact Canada's ability to engage in counter-radicalization activities. CCLA's position on freedom of expression has long been that offensive or hateful expression should be denounced and countered, not censored. While the issue of radicalization is a complex one that lies beyond the scope of our primary expertise, we are troubled that Bill C-51 takes an approach to radicalization that is narrowly focused on the criminal law and that does not address the need for educational and outreach strategies to counter radical messages that may be persuading some individuals to take violent action in or against Canada. This lopsided approach suggests that rather than seeking to balance and reconcile freedom and security, the Bill has the potential to undermine both.

iv) Lowering of thresholds for preventive arrest, recognizance and peace bonds

Another significant change proposed by Bill C-51 is to the *Criminal Code* sections that provide for preventive arrest, recognizances and peace bonds. The preventive arrest and recognizance measures were part of a package of changes made to the *Code* in the *Anti-terrorism Act*.¹⁷ The exceptional provisions were subject to a sunset clause, had not been used, but were reintroduced in 2012 despite widespread criticism and concern expressed by civil society groups. In particular, at the time that these controversial measures were re-introduced, CCLA and a number of other rights organizations issued a statement expressing our strong disagreement, stating in part:

¹⁶ See Kent Roach and Craig Forcese, Bill C-51 Backgrounder #4: The Terrorism Propaganda Provisions (February 23, 2015). Available at SSRN: <http://ssrn.com/abstract=2568611> at p. 20.

¹⁷ *Anti-terrorism Act*, S.C. 2001, c. 41

Renewing these provisions would normalize exceptional powers inconsistent with established democratic principles and threaten hard-won civil liberties. Commitment to the rule of means that counter-terrorism measures must adhere to the values embodied in the *Charter of Rights and Freedoms*, and cannot infringe on basic rights.¹⁸

These exceptional powers allowing for detention and for the imposition of conditions on individuals absent any charge have been re-enacted in the *Code* despite the fact that they were not necessary (or employed) to thwart multiple terrorist plans. Moreover, even before the terrorism provisions were introduced, the *Code* already allowed for detention of an individual where an officer has reasonable grounds to believe the individual is “about to commit an indictable offence”¹⁹. The *Code* also imposes criminal liability for a number of inchoate offences, including attempts and conspiracies. Individuals charged with these crimes can be detained without bail in appropriate circumstances, or released on conditions. In sum, the special terrorism provisions for preventive arrest, peace bonds, recognizances and detention are not necessary and were not justified when they were re-enacted. Bill C-51 now proposes lowering the evidentiary thresholds that must be met before these measures can be imposed. This demonstrates how easily exceptional measures once considered necessary for a limited purpose and period of time can become integrated into the ordinary criminal law. The absence of any sunset clauses confirms that preventive arrest is no longer considered extraordinary or unusual in our system.

In addition to the question of need, CCLA is also concerned about the efficacy and impact of the new thresholds. The standards are so loose that they would appear to allow these exceptional measures to be applied in a wide variety of cases that may not present any genuine danger or significant threat to public safety. Officers may lay an information where they believe on reasonable grounds that a terrorist activity (defined broadly) may be carried out or where they suspect on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is likely to prevent the carrying out of a terrorist activity. These standards can result in detention in custody for a period of up to seven days and the imposition of a recognizance with conditions for up to a year (or more if the judge is satisfied that the individual was previously convicted of a terrorism offence).

The Bill also creates a new peace bond provision in the *Code* allowing a person who “fears on reasonable grounds that another person may commit a terrorism offence” to lay an information with the Attorney General’s consent. Where a judge is satisfied that the informant has reasonable grounds for the fear, a recognizance of up to twelve months may be imposed (a five year period is permitted where the judge is satisfied the defendant was previously convicted of a terrorism offence). The conditions that may be imposed with the recognizance are wide-ranging

¹⁸ Statement on Reintroduction of Anti-Terrorism Provisions, November 28, 2012, available at: <http://ccla.org/wordpress/wp-content/uploads/2012/11/20121128-Statement-on-Reintroduction-of-Anti-Terrorism-Provisions.pdf>.

¹⁹ *Criminal Code*, R.S.C. 1985, c. C-46 at s. 495.

and can be intrusive and extremely restrictive, including weapons prohibitions, surrender of passport and more general restrictions on mobility. The punishment for breaching conditions has also been increased, even though the conditions may have little or no connection to the allegedly dangerous activity the individual is suspected of planning. The judge may commit the individual to prison for up to twelve months if he/she fails or refuses to enter into the peace bond.

These are exceptional incursions into liberty and are based on watered down standards that do not provide meaningful guidance to law enforcement or judges. It is well-accepted that a liberal democracy does not eliminate or significantly restrict individual liberty absent a compelling reason (and usually a criminal charge). The lowering of standards to make this part of the *Code* easier to invoke is troubling and its necessity has not been established.

F) IRPA Amendments

Bill C-51 seeks to amend parts of the *Immigration and Refugee Protection Act (IRPA)*, primarily in relation to the security certificate regime. This regime has been the subject of significant litigation and, as a result of the Supreme Court's decision in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*,²⁰ a Special Advocate system was established to provide some procedural protections to those subject to security certificates. In particular, prior to the existence of the Special Advocate system, the Supreme Court found that the procedure for judicial approval of security certificates was unconstitutional, as the rights of the named person to know the case against him/her and challenge it, were denied due to secrecy in the proceedings. In a unanimous decision, the Court found that inability to know the case against him or her violated principles of fundamental justice and "the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet."²¹ The Court further stated that the national security context cannot be used to "erode the essence"²² of the section 7 protection which is meant to provide "meaningful and substantial protection"²³ and due process.

In light of the clear interpretation of section 7 rights by the Supreme Court of Canada and its direction, Parliament enacted legislation creating the Special Advocate regime in the security certificate context. While not fully disclosing the case to named persons, Special Advocates (top security-cleared lawyers) were allowed access to the secret evidence and could test and challenge the evidence *in camera* on behalf of the named individuals.

The amendments proposed by Bill C-51 however backpedal on these important protections that are considered fundamental to the section 7 guarantee. Bill C-51 would shield some information from disclosure to the Special Advocate, even where the information is relevant to the case against the named person. In addition, the changes give the Minister virtually unfettered interim

²⁰ [2007] SCC 9.

²¹ *Ibid.*, para. 64.

²² *Ibid.*, para. 27.

²³ *Ibid.*

rights of appeal regarding orders made for disclosure of information. While the protection of information touching on national security is certainly a pressing and substantial goal, the delays in judicial determinations that will be occasioned by broad appeal rights on behalf of the Minister may be highly prejudicial to named individuals. The appeal rights are also asymmetrical, putting the named person at a further disadvantage in cases where orders for disclosure have been refused. The proposed amendments call into question the constitutional validity of the security certificate regime that has already been the subject of significant litigation. Indeed, a group of existing Special Advocates have already remarked that the newly proposed provisions of the *IRPA* will likely constrain their advocacy, and their capacity to effectively carry out its duties. Re-opening the regime for further judicial scrutiny may ultimately frustrate the underlying purpose of the scheme: the protection of Canada.

G) *Secure Air Travel Act*

Bill C-51 proposes new legislation, the *Secure Air Travel Act*, which appears to codify Canada's existing Passenger Protect Program (PPP). The program will allow the Minister of Public Safety and Emergency Preparedness to effectively create a "no-fly list." Listed individuals could be denied transportation or required to undergo special screening before entering certain areas of an airport or boarding an aircraft.

The Passenger Protect Program has been in existence since 2007, relying on provisions in the *Aeronautics Act* that do not clearly spell out the nature of the program, how it functions or the procedural protections in place for those who are listed. The new *Secure Air Travel Act* seeks to give the PPP its own legal basis and framework. In principle, this is positive and indeed CCLA has long recommended a clear legislative basis for the program. Unfortunately, the proposed Bill does not accomplish this goal.

The CCLA has identified six major deficiencies of the *Secure Air Travel Act*.

First, pursuant to the Act, the Minister may establish a list of persons who the Minister has reasonable grounds to suspect will "engage or attempt to engage in an act that would threaten transportation security" or "travel by air for the purpose of committing an act or omission that" is considered to be a terrorism offence under the *Criminal Code of Canada*. The Act gives no indication of how the Minister might form such a reasonable suspicion and the standard of reasonable suspicion is a low one given that the effect of listing could be a near-total abrogation of mobility rights guaranteed under s. 6 of the *Canadian Charter of Rights and Freedoms*.

The lack of certainty on how these listing decisions are made has been an ongoing problem in the implementation of Canada's air travel security. The Office of the Privacy Commissioner (OPC) identified this concern in its 2009 Audit Report of the Passenger Protect Program, stating that the Minister (of Transportation) was not provided with complete information when deciding to add or remove names to or from the Specified Persons List, and that this posed serious consequences

to the livelihood, reputation and ability to travel of the person named.²⁴ It appears that this concern raised by the OPC has not been addressed in the new legislation, especially in light of the Minister's new authority under s. 7 to delegate his or her power, duties and functions under the Act to *any* officer or employee, or *any* class of officers or employees, in the Department of Public Safety and Emergency Preparedness. The authority to delegate may exacerbate the problem of relying on insufficient information in order to make listing decisions. The delegation also substantially dilutes (and may even eliminate) any meaningful accountability for the listing process.

Second, a person who has been denied transportation as a result of a Ministerial direction may apply to the Minister, in writing, to have their name removed from the list. This may only be done within sixty days of being denied transportation, although provisions of the new Act do not make it clear how an individual may come to know that they have been listed, or that this will be done at the time that transportation is denied. Indeed, the Act suggests that a person who is denied transportation may not be informed of the fact that they have been placed on the list.²⁵ An appeal mechanism is futile if the supposed beneficiary may have no way of knowing there is anything to appeal.

The notification process for listed persons is currently addressed by section 7 of the *Identity Screening Regulations* (under the *Aeronautics Act*) which provides that:

If an emergency direction is made in respect of a person specified to an air carrier by the Minister under paragraph 4.81(1)(b) of the Act, the Minister shall provide the air carrier with contact information for the Department of Transport's Office of Reconsideration and the air carrier shall make that contact information available to the person.²⁶

The aforementioned regulation is still in effect, but section 20(3) of the new proposed Act prohibits air carriers from disclosing any information related to a listed person, including whether or not an individual is listed. There is a genuine conflict between the two laws and it is unclear whether or how the notification procedures have been altered. If the proposed law, and not the current regulation, is to operate as the notification mechanism, it is unclear how a person will become apprised of their status as a listed person. Providing a listed person with a way to challenge their listing is useless if the inclusion of their name on the list is not effectively and promptly communicated.

Third, the appeals mechanism afforded by s. 16 of the Act allows the judge presiding over an appeal to hear information or evidence in the absence of the public and the appellant or his/her counsel. Although section 16(6)(c) purports to offer a procedural protection for the appellant in

²⁴ Office of the Privacy Commissioner, *Audit of Passenger Protect Program, Transport Canada*, November 17, 2009, Para 84 <https://www.priv.gc.ca/information/pub/ar-vr/ar-vr_ppp_200910_e.pdf>.

²⁵ Bill C-51, Part 2 *Secure Air Travel Act*, s. 20(1).

²⁶ *Identity Screening Regulations* (SOR/2007-82), s. 7.

providing that “the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister’s case,” this protection is directly undermined by subsection 16(6)(f), which allows the judge to base a decision on the Minister’s information or evidence, even if a summary has not been provided to the appellant. The ability for a judge to both use and rely on “secret evidence” is inconsistent with an overarching principle of fundamental justice: that the listed person/appellant has the right to know the case against her or him, and has the right to fully and fairly answer that case. The Supreme Court of Canada has held in another context that

As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party’s case so that they may address evidence prejudicial to their case and bring evidence to prove their position...The exclusion of the appellant from portions of the government’s submissions is an exceptional departure from this general rule. The appellant operates in an informational deficit when trying to challenge the legitimacy of the exemptions claimed by the government.”²⁷

Despite s. 16(6)(d)’s assertion that “the judge must provide the appellant and the Minister with an opportunity to be heard,” this right will not be meaningful if the appellant is unaware of the evidence against him/her.

Fourth, in light of the potential for the use of secret evidence in these appeals, we are concerned about the absence of a special advocate, a safeguard put in place in the security certificate regime under the *Immigration and Refugee Protection Act*, where secret evidence may also be used. Without a special advocate privy to the evidence and information submitted by the Minister, the listed person is at a significant disadvantage. In these circumstances, judicial oversight is insufficient to ensure that due process rights are respected. The government is represented at all times and apprised of all of the facts and allegations, while the listed person may be denied information crucial to the case against him/her. This creates an obvious imbalance of power. No matter how fair, able, and apprised of the facts the judge may be, the imbalance threatens the fairness and efficacy of the hearing. It also requires judges to simultaneously act as advocate and neutral arbiter, eroding the separation of functions which lies at the heart of the adversarial system. In CCLA’s view, where secret evidence is used in these appeals, the appointment of a special advocate should be mandatory.

Fifth, section 16(5) of the new Act states that if the judge finds that the decision denying removal from the list is unreasonable, the judge “may order that the appellant’s name be removed from the list.” It is unclear why the wording of the provision is discretionary (may) rather than mandatory (shall). If a decision to keep an applicant’s name on the list is found to be unreasonable, the name should presumptively be removed.

²⁷ *Ruby v. Canada (Solicitor General)*, [2002] 4 SCR 3 at para. 40.

Finally, the OPC's Audit Report from 2009 highlighted a number of privacy concerns, including issues around inadequate verification of the handling and safeguarding of listing information by air carriers. This issue, among others highlighted by the OPC, do not appear to be addressed by the proposed legislation. Put simply, important lessons learned over the years in which the PPP has been in place are not reflected in the *Secure Air Travel Act*.

H) Absence of Accountability, Oversight and Review Throughout Bill C-51

This submission has focused on CCLA's concerns with respect to specific contents of Bill C-51. It is also crucial to address what is not in the Bill.

The significant overhaul to Canada's national security system envisioned by the Bill contains no commensurate increase in accountability mechanisms. This problem is exacerbated because Canada's existing national security structures in sum are seriously deficient in meaningful or effective accountability. The need for greater accountability in this area has been recognized in federal Commissions of Inquiry, two of which have made considered and detailed recommendations based on extensive study, research, and expert consultation. Accountability not only prevents human rights abuses but it can be a prerequisite for efficacious security. The recent suggestions that review mechanisms amount to "red tape" are reckless in light of the painful and detailed lessons unearthed by the study of the O'Connor, Iacobucci, and Major Commissions of Inquiry.

The failure to include meaningful oversight and review reforms in this Bill can imperil Canada's security in the long run. While the *Security of Canada Information Sharing Act* envisions widespread information sharing among many government departments which is a valid counter-terror strategy, indispensable safeguards are missing and review of national security functions is done in a way that allows only for a narrow focus on a single department. With respect to CSIS, the Security Intelligence Review Committee which reviews CSIS activity has repeatedly raised concerns regarding its constraints in adequately exercising its mandate. The dangers of constrained review are amplified by Bill C-51's proposed expansions of CSIS powers in Canada and abroad. The Commissioner of Communications Security Establishment Canada (CSEC) has remarked upon the difficulties inherent in reviewing CSEC's functions given its inability to engage in review of other institutions with which CSEC regularly collaborates. This collaboration is likely to increase in light of the changes in Bill C-51. The Edward Snowden revelations have further underscored the unimagined scope and scale of national security surveillance that demands oversight and review. There are numerous federal departments and agencies in Canada with national security responsibilities, and also federal, provincial and municipal police forces with such responsibilities. The plethora of powers and actors that forms Canada's national security landscape --- powers that are significantly enhanced by Bill C-51 --- urgently demand commensurate accountability mechanisms. Bill C-51 acutely fails to deliver any appropriate accountability mechanisms.

