INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP [ICLMG]

Submission of information by the ICLMG to the Human Rights Committee [HRC] For the examination of Canada's sixth [6th] report during July 2015

[The Ligue des droits et libertés endorses this submission – please see letter attached at the end of this document]

The ICLMG

The ICLMG is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11th, 2001 terrorist attacks in the United States of America. The coalition brings together 43 human rights and international development NGOs, unions, professional associations, faith groups, environmental and refugee organizations. Its purpose is to monitor the impact of anti-terrorism legislation on human rights standards, to advocate against abuses and violations, and in certain cases, to take up the cause of those who have become innocent victims of such abuses.

Canada's ratification and implementation

Canada ratified the ICCPR on May 19th, 1976; recognized the competence of the HRC under art. 41 on October 29th, 1979; ratified the first optional protocol on May 19th, 1976; and the second optional protocol on November 29th, 2005. The implementation of the ICCPR in Canada is carried out principally through the constitutionally entrenched Charter of Rights and Freedoms of 1982, through human rights acts and commissions at the federal and provincial levels, and through the Criminal Code and other legislative measures.

Submission summary

ICLMG has examined the list of issues published by the HRC in October 2014 in relation to Canada's sixth report, and submits that certain Canadian laws, policies, and practices, with respect to those issues, contravene several provisions of the international covenant, which contraventions are set out below. In particular we must emphasize recent Canadian Bill C-51 which has substantially extended these contraventions in a most serious way.

Canada's continuing violations of the ICCPR

A. **The Anti-terrorism Act** [C-36] adopted by the Canadian Parliament in 2001 contained provisions dealing with preventive detention, arbitrary arrest, investigative hearings, listing of alleged terrorist groups, and suspension of the right to remain silent, and the principle of innocence until proven guilty, contravening articles 9, 14, 17, and 18 of the ICCPR. While art. 4 of the ICCPR allows for derogation of these articles in times of emergency, the ICLMG argues that these measures have been in force for 14 years and go far beyond what is strictly permitted by art. 4. This law has been supplemented recently by Bill C-51 described below, which has extended the said contraventions.

B. **Canada's "no-fly list"**, introduced as "Passenger Protect" in June 2007 under an obscure provision in the Public Safety Act of 2004, allows the government to place the names of persons on a list of specified individuals prevented from boarding flights, without any judicial process and without notice to the listed person. The individual in question can apply to have her/his name removed from the list but has no access to the information forming the basis of the listing. Many listings appear to have been influenced by racial and religious profiling.

   The ICLMG argues that this "no-fly programme" contravenes the ICCPR, and in particular articles 2, 9, 12, 14, 17, 18, and 19. These contraventions go beyond what is strictly required for an emergency under art. 4. There has been a serious loss of freedom without any trial, due process, or transparency. The "no-fly list" has been amended by Bill C-51 described below with the result that the contraventions are now more serious.

C. **Security certificates** are provided for in the Canadian Immigration and Refugee Protection Act. The act allows the minister to issue such a certificate leading to the detention and deportation of a permanent resident or a foreign national deemed to be inadmissable on security or certain criminal grounds.

   The definition of "security inadmissability" is extremely broad. The certificate is subject to review by a judge to determine if it is reasonable [a very low level of proof] and the review is based on intelligence, not on evidence generally required in a trial. The judge may hear evidence in secret [which is often the case] that is not disclosed to the person concerned, and use that evidence in deciding whether the certificate is reasonable. Security certificates cannot be used against Canadian citizens.

On Feb. 3rd, 2007 the Supreme Court of Canada ruled that this non-disclosure of evidence contravened the Canadian Charter of Rights and Freedoms and that a fair hearing leading to detention must include the right to know the case put against one, and the right to answer that case [Charkaoui vs. Canada].

In Feb. 2008 the Canadian Parliament passed a law to offset the 2007 Supreme Court ruling and to resurrect the security certificate process. The key difference between the new law and the one ruled unconstitutional is the provision of special advocates to protect the interests of the persons named in the certificates. However these special advocates do not have the right to discuss the so-called evidence with the persons subject to the certificate. In these circumstances, the ICLMG argues that these certificates still contravene the ICCPR [art. 2, 9, 13, and 14] the person affected is still held in prison without a proper trial, and does not have the right to know the case against him or her.

In 2009, the courts quashed two of the security certificates, but three men are still being detained.

The security certificate regime has been amended by Bill C-51 and the contraventions of the ICCPR have become more serious.

D. **The Arar Commission**. Maher Arar is a Canadian citizen who was a victim of extraordinary rendition in 2002 when he was arrested, removed to Syria against his will, imprisoned, and tortured for nearly a year. Following his release without charge and his return to Canada in 2003, the Canadian government appointed Justice Dennis O'Connor to conduct a public inquiry respecting Mr. Arar's experience and to make recommendations for an independent review mechanism for national security activities.

Justice O'Connor carried out his inquiry from Feb. 8th, 2004, tabled his first report in September 2006, and his second on Dec. 12th, 2006. In his second report, judge O'Connor made strong recommendations to establish a comprehensive review and oversight mechanism for all security and intelligence operations in Canada.

Judge O'Connor found that there were 17 federal agencies involved in security and intelligence in Canada. Some, such as the Canadian Border Services Agency [CBSA], had absolutely no review and oversight body, and others were narrowly focused, diverse in their mandates and powers, and ineffective against joint force operations.

O'Connor's recommendations would provide greater assurance that security and intelligence activities respected the rule of law, due process, and human rights standards. To date, Canada has not implemented these recommendations.

It is acknowledged that the government established a new oversight body for the Royal Canadian Mounted Police [RCMP] through Bill C-42 in 2012, but this is for one agency only, and falls far short of the comprehensive mechanism recommended by O'Connor.

E. **Torture**. The minister of Public Safety issued directives to the RCMP and the CBSA giving them the authority to use and share information that was likely extracted through torture. The minister issued these directives in September 2011 shortly after giving similar orders to CSIS, Canada's intelligence service. These directives are still in operation. ICLMG submits that such policies are in violation of ICCPR art. 7 and CAT art. 2.2.

F. **Iacobucci Commission**. During his inquiry, judge O'Connor came across three other cases similar to that of Arar. Three Arab Canadians -- Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin -- were all arrested in Syria, detained and tortured in the same prison as Mr. Arar and were subject to the same questioning and abuse. They were finally released without charge and returned to Canada. Since judge O'Connor did not have a mandate to investigate these three cases, he recommended a new, separate inquiry to carry out this task. As a result on Dec. 11th, 2006 the government appointed former Justice Frank Iacobucci to determine whether any Canadian officials were responsible for the abuse suffered by these three men. Iacobucci found that the actions of Canadian officials were deficient and indirectly led to the detention and mistreatment of these three men. As of this date, the Canadian government has not apologized nor compensated these men despite a majority vote in the House of Commons in favor of a motion to that effect.

G. **The Communications Security Establishment** [CSE], originally created in 1946 by order-in-council, was given a new legislative mandate and powers in the Anti-terrorism Act [ATA] of 2001. It allows the minister of Defence to authorize the CSE to intercept private communications coming into and out of Canada in relation to any activity or class of activities specified in the authorization, for the very broad purpose of obtaining foreign intelligence. While the CSE used to be restricted to spying outside of Canada, the legislation now allows it to spy on domestic communications as long as it involves someone outside Canada. There is no requirement for judicial authorization. The CSE needs only to seek a discretionary authorization from the Defence

minister who is given an open-ended range of grounds in making his decision. The language of the legislation mirrors that of the National Security Agency [NSA] in the USA which has allowed spying without warrants on emails, faxes, and telephone calls. The CSE provisions in the ATA have opened the door to massive domestic and international spying on ordinary citizens. The ICLMG argues that the powers and operations of the CSE constitute a major violation of articles 2 and 17 of the ICCPR, which combined with the new provisions set out in Bill C-51 described below, result in a massive attack on human rights.

While the operations of the CSE are overseen by a commissioner to ensure that they are within the legal mandate of the agency, the annual reports of successive commissioners since 2001 have warned that they were unable to reach a conclusion because of a lack of details in the ministerial authorizations reviewed. This is another example of the need to implement the recommendations of judge O'Connor for a new oversight mechanism as set out in his second report.

Recent measures in violation of the ICCPR

A. **Bill C-51, Anti-terrorism Act 2015**, was introduced in Parliament in January 2015; was passed by the House of Commons on May 6th, 2015; and is before the Senate at the moment we submit this brief. The bill provides for a massive increase in the powers of the Canadian Security and Intelligence Service [CSIS], without providing for the necessary oversight and review mechanisms, especially those recommended by judge O'Connor in his second report. The office of the Inspector General of CSIS which played an oversight role was already eliminated in 2012. In particular the legislation increases the role of CSIS to engage in secret, judicially approved counter-terrorism actions in Canada, as well as in foreign countries. It goes so far as to allow applications to judges to approve violations of the Charter of Rights and Freedoms, which surely, in due course will be ruled unconstitutional by the courts.

It also introduces far-reaching and ambiguous changes to the Anti-terrorism Act of 2001 that potentially criminalizes now lawful activity, and creates new vaguely defined speech crimes, such as the promotion of ideas, in private or in public, related to terrorism. ICLMG argues that these provisions are contrary to articles 14, 17, 18, 19 of the ICCPR, and go beyond what is permitted under art. 4. Serious concerns have been raised about the impact of these measures on dissent in Canada, in particular dissent by indigenous and environmental activists who could be labelled as terrorists under the act.

With respect to security certificates, the bill makes a bad situation worse by providing that the minister can request the court to withhold information from the special advocates who were meant to assist the detainees in secret trials. This appears to be in complete violation of the Supreme Court decision in the Adil Charkaoui case.

Further the bill expands the list of those who may be put on the "no-fly list" in contravention of articles 9, 12, 14, and 17 of the ICCPR. C-51 codifies a system for establishing a Canadian no-fly list without providing a clear mechanism for how a person on the list becomes aware of their status, and severely limits their ability to challenge the listing. The law allows for a judicial hearing that may occur outside of public view and allows for the use of secret evidence.

It also boosts the wider sharing of intelligence information, which is contrary to recommendations in the O'Connor report, and which puts at risk, and could seriously harm many innocent individuals [art. 2, 9, 14, and 17 ICCPR].

ICLMG supports measures to combat terrorism which can be a serious attack on human rights, but such measures already exist in our criminal law. While we challenge the constitutional legality of provisions in Bill C-51, we also question their effectiveness. They will certainly open the door to the criminalization of now lawful activities and the suppression of dissent, but according to many experts they do very little to combat terrorism and protect the public.

B. **Bill C-44, the Protection of Canada from Terrorists Act**, approved by Parliament on April 23rd, 2015. This law preceded Bill C-51 and provided for greater powers and resources for CSIS, permitted it to operate internationally, and expanded its power to share information. This law should be read in conjunction with Bill C-51 which followed it and expands the role of CSIS still further.

C. **Bill C-59, the Economic Action Plan 2015 Act, No. 1** [the Budget] includes provisions, in the case of a person whose passport has been cancelled as the result of a decision of the minister, allowing the judge to hear secret evidence at the government's request in the name of "national security". The ICLMG is greatly concerned by the present trend of increasing ministerial discretionary powers to revoke passports, allow mass surveillance, and put individuals on the "no-fly list" with little recourse except for judicial reviews potentially held outside of public view and allowing the use of secret evidence.

Conclusions

In this submission, the ICLMG requests the HRC to raise the above cited issues with the Canadian government during the review of Canada's 6th report in July 2015 and to recommend changes in its laws and policies which would require Canada to conduct its anti-terrorist campaign within the framework of the ICCPR, the UN Charter, and all human rights standards.

May 6th, 2015

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Letter of support for the Submission of information by the ICLMG to the Human Rights Committee [HRC]
For the examination of Canada's sixth [6th] report

May 28, 2015

The Ligue des droits et Libertés (LDL) fully endorses the submission of information of the International Civil Liberties Monitoring Group (ICLMG).

The ICLMG submission demonstrates that Canada has cast aside its obligations regarding the ICCPR and the CAT in the name of antiterrorism and national security. Extraordinary powers are being granted to the state security apparatus with no oversight mechanism capable of mitigating the abuses which such powers inevitably entail.

Ministers can put Canadians on the no-fly list, withdraw their passports and even strip them of their citizenship and the redress mechanisms do not even meet the minimum standards of judicial fairness. Muslims have been the primary victims of these measures.

The Snowden documents have revealed how the Canadian Security Establishment is engaged in mass surveillance of Canadians and foreigners. Bill C-51 will only make matters worse. It opens the door to the use of the entire data which the Canadian government has on its population for mass surveillance and profiling. CSIS can engage in actions, even illegal, against perceived threats to national security. These threats are very broadly defined and include environmental and indigenous protest movements.

We request that the HRC recommend to Canada that measures taken in the name of national security respect the framework of the ICCPR, the UN Charter, and all human rights standards.

In a separate submission the LDL will focus on the Canada's violation of the ICCPR in the context of social protest in Quebec and Canada.

Dominique Peschard, président
Ligue des droits et libertés