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L'ASSOCIATION DU  
BARREAU CANADIEN

## **Bill C-51, *Anti-terrorism Act, 2015* Executive Summary**

**CANADIAN BAR ASSOCIATION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Canadian Bar Association with contributions from the National Criminal Justice, Immigration Law, International Law, Aboriginal Law, Environmental, Energy and Resources Law, Charities and Not-for-Profit Law and Privacy and Access to Information Law Sections, and with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

# **Bill C-51, *Anti-terrorism Act*, 2015**

## **Executive Summary**

The 2001 *Anti-terrorism Act* signaled a fundamental shift in Canada's approach to combatting terrorist acts, with significant changes to Canadian law to address those threats. After more than a decade of experience since the *Anti-terrorism Act* became law, some of its provisions have proven useful, while others have not. As the CBA and many others predicted in 2001, this experience has left little doubt about the discriminatory impact of anti-terrorism laws on some populations.

The CBA acknowledges that Canadians are concerned about terrorism – at home or abroad – and supports the government's intention to reduce the risk of terrorist acts in Canada. The CBA supports measures to improve public safety that are necessary, proportionate and accompanied by adequate safeguards against abuse. The government must show Canadians that the further powers in Bill C-51 meet this standard.

The government should also be clear with Canadians about the limits of law. No law, no matter how well-crafted or comprehensive, can prevent all terrorist acts from occurring. Promising public safety as an exchange for sacrificing individual liberties and democratic safeguards is not, in our view, justifiable. Nor is it realistic. Both are essential and complementary in a free and democratic society.

The key question is, "Does the bill strike the appropriate balance between enhancing state powers to manage risk and safeguarding citizens' privacy rights and personal freedoms?"

Our comments and legal analysis are offered to assist Parliament to improve the Bill, and we would be happy to provide further assistance on any specific issue. The CBA's full submission provides a detailed analysis of all parts of the Bill. This Executive Summary focuses on three parts of the Bill, and one overarching concern:

- *CSIS Act* changes that would constrict judges to authorize *Charter* violations and unlawful acts, under the guise of providing judicial oversight
- Creating the *Security of Canada Information Sharing Act (SCISA)*, to significantly expand information sharing powers without adequate definition and clarity, and without basic concepts of privacy protection

- New criminal law powers and offences that are vague and too broad, making them vulnerable to constitutional challenge, and likely to impact legitimate political dissent
- The absence of coherent expanded national oversight to balance significant proposed new state powers.

## I. CANADIAN SECURITY INTELLIGENCE SERVICE (CSIS)

Bill C-51 would transform CSIS from an intelligence-gathering agency to an agency actively engaged in countering national security threats. It would allow CSIS to employ undefined “measures” “within or outside of Canada” to “reduce” a “threat to the security of Canada”. The threshold for using those measures would be “reasonable grounds to believe a particular activity constitutes a threat to the security of Canada”.

The powers of CSIS have always depended on how a “threat to the security of Canada” is defined, and section 2 of the *CSIS Act* already has an extremely broad definition. This has been interpreted to include environmental activists, indigenous groups, and other social or political activists. Concerns are heightened with the proposal to grant CSIS a “disruptive” kinetic role.

The limits in the Bill are not enough. The decision as to what constitutes “reasonable and proportional” will fall unilaterally to those within government and CSIS. A warrant under section 21.1 is required *only* if CSIS has “reasonable grounds” to believe that it is required, and only where the measures “will” (not “may”) contravene a *Charter* right or a Canadian law. Measures short of what CSIS determines to be a certain *Charter* violations or criminal act require no warrant.

The combination of the proposed section 12.1(3) and the warrant provisions in section 21.1 appear to provide for judicial warrants to authorize not only contraventions of the criminal law and *Charter* rights, but the violation of *any Charter* rights – making the entire *Charter* at risk. This is unprecedented.

Judicial warrants for search and seizure *prevent*, not *authorize*, *Charter* violations. A judge authorizing a search is not authorizing a breach of the *Charter*, but may authorize a search to prevent what would otherwise be a breach of section 8. Other *Charter* rights, such as the right against cruel and unusual punishment or mobility rights, are absolute, and their violation can never be “reasonable”.

**It is untenable that the infringement of *Charter* rights is open to debate, in secret proceedings where only the government is represented. Parliament should not empower CSIS or judges to disregard the constitutional foundations of our legal system.**

## **II. INFORMATION SHARING**

Bill C-51 would establish the *Security of Canada Information Sharing Act (SCISA)* creating authority for federal government institutions to share information – including personal information – about “activities that undermine the security of Canada”. Targeted activities are defined broadly, based on whether they undermine the “sovereignty, security or territorial integrity of Canada” or the “lives or the security of the people of Canada”.

What will constitute threats to the “security of Canada” includes activities that interfere with the “economic or financial stability of Canada”. Canadians have seen this language applied broadly, for example to instances of labour unrest, Aboriginal protest and environmental activism. The exception for “lawful advocacy, protest, dissent and artistic expression” is too narrow. Legitimate advocacy and protest that is both important and common in a democratic society can often be unlawful due to breach of regulatory rules or municipal bylaws.

There are insufficient checks and balances in *SCISA*, and no safeguards to ensure that shared information is reliable. Maher Arar’s experience illustrated the devastating consequences of sharing inaccurate or unreliable information. The broad scope of disclosure under sections 5 and 6 is also a concern. While *SCISA* is theoretically subordinate to the *Privacy Act*,<sup>1</sup> the latter explicitly allows disclosure as authorized by *any other Act of Parliament*,<sup>2</sup> so would in turn permit any disclosure under the proposed *SCISA* that might otherwise be prohibited.

Additional clarification of key terms and due consideration of those basic concepts is needed, along with sufficient information sharing controls and effective oversight. The CBA also recommends Parliamentary review of the act at regular intervals.

## **III. CRIMINAL CODE AMENDMENTS**

A primary principle of criminal law is that people know in advance what conduct is prohibited and what is not. Bill C-51 proposes several *Criminal Code* amendments that generally suffer

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<sup>1</sup> *SCISA*, section 5(1),

<sup>2</sup> *Privacy Act*, RSC 1985, c P-21, section 8(2)(b).

from overly broad language, uncertainty and vagueness. These weaknesses would make the proposals vulnerable to constitutional challenge and have little, if any, impact on public safety.

**Advocating or promoting terrorism (section 83.221)** would apply to all “statements”, apparently including private statements, emails and text messages. The reference to “terrorism offences *in general*” seems to indicate an intent to cast the net broadly and loosely, to include existing terrorism offences and other indictable offence committed for the benefit of, at the direction of, or in association with a terrorist group. Criminal acts can best be detected and prevented by allocating sufficient resources to law enforcement. If narrowly construed by the courts, the proposal will add nothing to existing offences such as counselling the commission of an offence, advocating genocide, or contributing to a terrorist organization. If widely construed, it will be subject to significant challenges, at great cost to taxpayers, and may include activity more political in nature than dangerous.

**“Terrorist propaganda” (section 83.222)** would authorize 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 ... or counsels the commission of a terrorism offence”. We support in principle deletion orders for “terrorist propaganda”, but this net is cast too wide. There is no requirement of mental fault and the proposal lacks public interest, education, or religious discussion defences. “Terrorist propaganda” should be confined to material that counsels the commission of a terrorist offence or that instructs the commission of a terrorist offence.

**Preventive detention** aims to avert imminent and serious terrorist threats where there is no evidence to support reasonable and probable cause for arrest and charge for a criminal offence. Bill C-51 would reduce the legal thresholds required, extend the permissible period of detention and omit a sunset clause. It would make permanent what was once justified as a temporary and exceptional legal measure, and make this extraordinary legal measure more robust, all without evidence to show that the existing law has been useful or changes are warranted.

**Peace bonds and control orders** would rely on a significantly lower standard than currently exists. A peace bond is now available if a person fears, on reasonable grounds, that another person *will* commit a terrorism offence. Under Bill C-51 the threshold would be whether someone *may* commit a terrorism offence. The CBA supports this reduced standard as an effective way to ensure the timely disruption of possible terrorist threats. The maximum duration of a peace bond would increase from two years to five years if the defendant was

previously convicted of a terrorism offence. The increase may lead the section to be susceptible to constitutional challenge and prolong and complicate criminal proceedings as courts struggle to determine if a previous conviction was for a “terrorism offence” (given vagueness of the definition of “terrorism”). Section 810.01(1) already addresses terrorism offences and could be amended to more effectively manage risks of terrorism, so the proposal for new control orders is redundant.

#### **IV. COHERENT NATIONAL OVERSIGHT**

Many Arar Commissions and Air India Commission recommendations surround shortcomings of the current oversight and review regimes. Those recommendations have yet to be implemented. **Expanding national security powers without a corresponding reinforcement and expansion of an insufficient oversight and review is a serious problem.** An expert review body must be created with resources and a mandate to review *all* national security activity. The CBA also recommends Parliamentary review by a committee with access to secret information.

#### **V. CONCLUSION**

The CBA supports government efforts to enhance the safety and security of Canadians that are necessary, proportionate and accompanied by adequate safeguards against abuse. Promising public safety as an exchange for sacrificing individual liberties and democratic safeguards is not, in our view, justifiable or realistic. Both are essential and complementary in a free and democratic society. Safety cannot be won at the expense of Canada’s constitutional rights and freedoms.

When extraordinary powers of surveillance, intelligence-gathering and sharing, preventive arrest and detention are contemplated, shown to be necessary and then implemented, equally extraordinary mechanisms of oversight and after-the-fact review must also be in place to provide the necessary balance to those initiatives.

**For Bill C-51 to be a meaningful success, Canadians must not only feel safer but must in fact be safer – and this reality must be accompanied by the well founded and secure belief that Canada remains a democracy that leads the way internationally in scrupulously protecting privacy rights and civil liberties.**

## VI. SUMMARY OF RECOMMENDATIONS

The CBA has recommended several amendments to Bill C-51, with a view to achieving an appropriate balance.

1. The CBA recommends that *SCISA* include effective mechanisms to enforce the principles outlined in section 4.
2. The CBA recommends the scope of activities subject to information sharing under *SCISA* be narrowed, and that the exemption in section 2 of *SCISA* be expanded to specifically include unlawful protests that do not represent a genuine threat to national security.
3. The CBA recommends clarifying the interaction of the *Privacy Act* and the proposed *SCISA*.
4. The CBA recommends that section 6 of *SCISA* be narrowed to not allow disclosure of information to the private sector and foreign governments.
5. The CBA recommends that *SCISA* include safeguards to ensure that any shared information is reliable.
6. The CBA recommends that *SCISA* be amended to provide effective oversight, including regular Parliamentary review of its effects and operations.
7. The CBA recommends:
  - providing an objectively discernible basis for additions to and removals from the no-fly list,
  - curtailing warrantless search powers, and
  - adding effective safeguards for those wrongly placed on the list, including a process for expeditious removal.
8. The CBA recommends that the proposed section 83.221 be deleted from Bill C-51.
9. The CBA recommends that the definition of “terrorist propaganda” be limited to material that counsels the commission of a terrorist offence or that instructs the commission of a terrorist offence.
10. The CBA recommends the proposed deletion orders for “terrorist propaganda” include a mental fault requirement, and defences to exclude legitimate public interest, education or religious discussion activities.
11. The CBA recommends allowing judges to appoint *amicus curiae* to address appeals of the proposed deletion orders.
12. The CBA recommends that the consequential amendment to the customs tariff be deleted.
13. The CBA recommends that Bill C-51 retain existing legal thresholds for preventive detention and permissible periods for detention, and include a sunset clause.



14. The CBA recommends that, instead of introducing a new regime for control orders, the current section 810.01(1) be retained, and amended if required to better address terrorism offences.
15. The CBA recommends the creation of an Office of the National Security Advisor to act as an expert review body with resources and a mandate to review *all* national security activity, and to ensure effective information sharing and cooperation between CSIS and other security agencies, including the RCMP.
16. The CBA recommends amending section 12.2 to prohibit CSIS from arbitrarily detaining an individual and to clarify that “bodily harm” includes psychological harm.
17. The CBA recommends that the judicial warrant provisions in sections 12.1(3) and 21.1 of Bill C-51 be amended to ensure that they align with the fundamental role of Canada’s judiciary in upholding the Rule of Law and Canada’s constitutional guarantees.
18. In addition to the creation of an Office of the National Security Advisor, above, the CBA also recommends the creation of a Parliamentary review committee with access to secret information.
19. The CBA recommends that if CSIS mandate is expanded to engage in kinetic operations, the agency be subject to regular reporting requirements as to the nature and number of those operations, perhaps to the expert review body recommended above, whether pursuant to section 12.1 or to warrants under section 21.1.
20. The CBA recommends that Bill C-51 be brought back to Parliament for rigorous review after three or five years.
21. The CBA recommends that the proposed *IRPA* section 83(1)(c.1) be deleted.
22. The CBA recommends deleting changes to *IRPA* section 72 from Bill C-51.
23. The CBA recommends deleting proposed amendments to *IRPA* section 74(d) and omitting proposed *IRPA* sections 79.1, 82.31 and 87.01.