INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP

SUBMISSIONS TO THE STANDING COMMITTEE

ON PUBLIC SAFETY AND NATIONAL SECURITY

SPEAKING NOTES – March 12, 2015 (Paul Champ)

Mr Chair, Mr Clerk and honourable Committee members, thank you for the privilege of this invitation and the opportunity to speak to you today.

I appear on behalf of the International Civil Liberties Monitoring Group, a pan-Canadian coalition of NGOs, faith groups and trade unions. The ICLMG was formed in 2002 to address threats to civil liberties posed by anti-terrorism legislation and it has participated in the O'Connor and Iacobucci inquiries, several court cases, and numerous Committee hearings. Personally, I am a lawyer and have been associated with the ICLMG for nearly 8 years in my work on behalf of individuals who have been victims of the excesses in the national security field. In that regard, I have represented Canadians on no-fly lists, individuals harassed by CSIS agents at their home and work, and a Canadian citizen who was detained and tortured by Sudanese secret intelligence with the complicity of CSIS. I also represent individuals who have been victims of negligent information sharing. Last week I settled the case of Benamar Benatta, an Algerian refugee and engineer who was wrongfully imprisoned for five years in the US due to erroneous information sharing by Canadian officials.

This is an enormously significant piece of legislation. A historic piece of legislation. It has a laudable and important objective – enhancing the security of Canadians. But make no mistake - it also rolls back the civil liberties of Canadians in unprecedented ways. Does it get the balance right? Our fundamental concern is that I have not heard the arguments, or seen the evidence, demonstrating that these provisions are necessary and proportionate.

Security of Canada Information Sharing Act

RCMP and CSIS have long had the power to access personal information from other government departments for investigational purposes, where proper legal grounds can be demonstrated. The truly novel features of the *SOCISA* are two-fold.

- First, it creates a new expanded definition for "security of Canada" that is much broader than current definition in s. 2 of the CSIS Act, which is incorporated by reference in many other statutes which incorporate it. The CSIS Act definition limits "security of Canada" to espionage, serious acts of violence for political purpose, and attempts to overthrow government by violent means. On its face, the definition in SOCISA captures a range of activities that are not terrorism-related, or even criminal for that matter. Indeed, "terrorism" is only one of nine enumerated activities that are said to "undermine the security of Canada". There are legitimate concerns[1] that those who engage in protests, demonstrations, strikes or civil disobedience could run afoul of *SOCISA* because their activities could be construed as "interference" with "the economic or financial stability of Canada", or "unduly influencing" government by "unlawful means", which is broader than violent or criminal activity. It is worrisome that there has been no rationale offered for this expanded definition. The Minister and others have said its not meant to capture these kinds of activities. If not, then simply amend it and rely on the well-established and accepted definition in the CSIS Act.

[1] These concerns are reinforced by public comments by Cabinet ministers describing environmentalists in Canada as "radicals" ("Radicals working against the oil sands, Ottawa says", CBC News online, January 9, 2012) and the RCMP labelling aboriginal and environmental groups as "extremists" ("Anti-petroleum movement a growing security threat to Canada, RCMP say", Globe and Mail, February 17, 2015).

- The second novel feature is that it tasks all listed government departments, including those with no statutory role or experience in law enforcement or security intelligence, with a mandate to detect, prevent, investigate or disrupt "activities that undermine the security of Canada".[2] The Bill effectively turns all government employees in the listed departments into spies, and facilitates the creation of secret files on individual Canadians simply because some unknown official finds their behaviour, lifestyle, opinions or associations to be suspicious or unusual.

- The harms and risks presented by this Act are both **general and specific**. It clearly infringes the right to privacy, which is defined as the right to control information about one's private life.[3] The right to privacy protects the sphere of autonomy and freedom that every person requires to develop a sense of self and individuality, build intimacy and close relationships, and foster the social and political associations that are essential to a vibrant and robust society. Knowledge that one's actions may be recorded and collated in a secret government dossier not only impinges on personal dignity, it can create a chilling effect that may deter, discourage or inhibit exploring new or unpopular or controversial ideas or associations.

- There are also very specific dangers associated with information sharing that can have devastating consequences for individuals. It can lead to damaged reputations, loss of employment, being barred from flying or crossing the border, and worse. As two public inquires found, in the wake of 911 fears, four Canadians were detained and subjected to torture due in part to erroneous or improper information sharing by Canada with foreign countries. As mentioned, I settled a case with the federal government on behalf of an Algerian refugee and engineer, Benamar Benatta, who was wrongfully imprisoned in the US and

[2] *Security of Canada Information Sharing Act,* Preamble and section 5(1)
[3] *Jones v. Tsige*, 2012 ONCA 32 at para 61; *R. v. Duarte,* [1990] 1 SCR 30 at para. 25

abused as a 911 suspect because of negligent information sharing by Canadian officials.

- One could conclude that the government appears to have not learned the lessons of the Arar debacle, were it not for the inclusion of s. 9 in the new Act. That provision protects the government from future civil liability for information sharing, which would likely prevent Maher Arar from suing if he were to experience the same terrible ordeal today.

Secure Air Travel Act

- Canada adopted the Passenger Protect Program ("PPP") in 2007. It was estimated at that time that over 2,000 Canadians were on the "Specified Persons" list. For reasons that are unclear, the government has refused to share the number of Canadians on the list ever since. That should be a key question for all of you.

- In June 2007, all the privacy commissioners in Canada issued a resolution calling for a moratorium on PPP as it was so opaque. In December 2008, previous Privacy Commissioner of Canada Jennifer Stoddar reported that Transport Canada had provided "no evidence demonstrating the effectiveness of no-fly lists" despite he repeated requests for such information. Comments more valid today than ever, with a track record of 8 years of operation but still no evidence of effectiveness.

- It cannot be over-emphasized that being on a list is not simply an inconvenience. It is demeaning and humiliating and can have a real impact on individual lives in terms of damage to reputation, loss or limitation of employment, and the simple right to mobility.

- Above all, the system affords no due process and is unconstitutional. The SATA does nothing to fix the problems in the current regime. The Office of Reconsideration has found that the PPP violates section 7 of the *Canadian Charter of Rights and Freedoms* as the system does not allow due process. Transport Canada ignored that finding. The U.S. courts held in 2014 in *Latif v. Holder* that the US no fly regime violates the Fifth Amendment due process protections of the US Constitution. It does not appear that this new regime will remedy the constitutional problems.

- The new SATA has most of the same due process problems as the current Program: no advance notice of being placed on the list; no right to reasons for a decision; no right to see or contest information relied upon to justify the listing. No special advocate system. Regime is likely unconstitutional.

CSIS Act

- Confers extraordinary powers on security agency to violate the human rights of Canadians and "disrupt" their lives, **all in secret**. McDonald Commission called these sorts of measures as "dirty tricks", but this Bill goes much farther.

- Blurs the line between law enforcement and security intelligence and overrides the primary reason why CSIS was created over 30 years ago. Will create overlap, turf wars with RCMP, a major concern raised by Air India Inquiry. Could actually make us less safe.

- No real limits on powers, short of causing death, bodily harm, or violation of sexual integrity. Could include detention in secret locations like CIA "black sites", or could authorize "enhanced interrogation techniques" designed to cause psychological but not bodily harm. E.g., mock executions, threatening harm to family members, etc.

- Strict controls on the activities of security intelligence agents is essential in a democracy for two critical reasons: (1) their activities routinely intrude upon or impinge on the private lives and civil liberties of Canadians – it's inherent to the work; and (2) they carry out this sensitive work in almost complete secrecy.

- The warrant system is also deeply flawed because the hearings are held in secrecy, never become public, and completely rely on the good faith of CSIS to present all relevant information and to respect the warrant given. **But CSIS has a bad record of misleading courts and SIRC, and breaching their duty of candour and good faith** [Almrei (withholding exculpatory evidence from Court); Harkat (withholding data showing key evidence was unreliable); Mahjoub (deliberately intercepting solicitor client communications); Re X (duty of candour and withholding information from the Court); and as recently as last year SIRC found it had been "seriously misled" by CSIS)]

- Contrary to assertions by Minister Blaney, CSIS has acted illegally. Many examples of abuses [*Jabarah* (SIRC found violations of multiple Charter rights, namely sections 6 (right to stay in Canada), 7 (liberty), 9 (arbitrary detention), 10 (right to counsel), and 11(c) (right to silence)); *Abdelrazik* (Federal Court found violations of s. 6 of the Charter and complicity in arbitrary detention and torture by Sudanese intelligence); *Khadr* (Supreme Court Canada found CSIS violated section 7 *Charter* right); *Mejid* (Court finds CSIS creating atmosphere of coercion and intimidation and "acting in a manner that suggests either a complete lack of comprehension of our Charter rights or else, they demonstrate a total willingness to abrogate and violate these same principles"); and even Maher Arar (O'Connor found that CSIS believed, shortly after he disappeared, that US had rendered him to Middle Eastern countries to be tortured, yet did absolutely nothing)].

To conclude, protecting national security should include protecting our fundamental values as a free and democratic society. If we abandon our values and principles in the name of national security, the terrorists have won.