

INTERNATIONAL CIVIL LIBERTIES MONITORING GROUP

SUBMISSIONS TO THE STANDING COMMITTEE

ON PUBLIC SAFETY AND NATIONAL SECURITY

RE 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

A. Overview

Bill C-51, the *Anti-Terrorism Act, 2015*, represents a massive expansion of state power without adequate oversight or safeguards, and no evidence that the new provisions are necessary or effective. Further, there is no indication that the drafters paid any heed to past abuses in the national security field, despite repeated findings by courts, commissions of inquiry, and review bodies that Canadian officials have often been responsible for serious human rights violations. The International Civil Liberties Monitoring Group (“ICLMG”) wishes to register its objection to the Bill and highlights the following concerns:

- (i) The *Security of Canada Information Sharing Act* shall give government officials across several departments and agencies the mandate to spy on Canadians and share that information with the police or the Canadian Security Intelligence Service. Further, the proposed Act would expand the definition of “security of Canada” to include acts that are nothing more than peaceful civil disobedience and demonstrations.
- (ii) The *Secure Air Travel Act* perpetuates and expands a “no-fly” regime that is likely unconstitutional and for which there is no evidence that it makes Canadians safer.

- (iii) Bill C-51 would amend the *CSIS Act* to confer extraordinary powers on Canadian security agents to violate the human rights of Canadians, all in secret. This extension of state power into private life, carried out largely in secret, is an invitation to abuse. Further, the system depends on the good faith and candour of CSIS, an agency that has a bad track record of “seriously misleading” courts and review bodies. The many cases of serious human rights violations by CSIS over the past 15 years heightens concerns that these “disruption” powers are unprecedented, dangerous, and have no place in a free and democratic society.

The ICLMG made oral submissions to the Standing Committee on March 12, 2015, and focussed on these three aspects of Bill C-51. These written submissions highlight and expands on the points made. However, the ICLMG would like to emphasize that, although it is providing detailed analysis on only these three areas, it is not implicitly expressing agreement with the other proposed amendments. In particular, the ICLMG shares the concerns raised by others with the creation of a criminal offence for advocating or promoting terrorism “in general” as well as the perpetuation of preventive arrest. Any attempts to criminalize expressive activity in a free and democratic society must always be met with extreme caution, even when the expression is unpopular, distasteful or contrary to the mainstream. Criminal offences for “general” comments can create a chilling effect on expression and association in ways that can be detrimental to democratic practice.

B. International Civil Liberties Monitoring Group

The International Civil Liberties Monitoring Group (“ICLMG”) is a pan-Canadian coalition of civil society organizations established in the aftermath of the September 11, 2001 terrorist attack in the United States. The coalition brings together over forty NGOs, unions, professional associations, faith groups, environmental organizations, human rights and civil liberties advocates, as well as groups representing immigrant

and refugee communities in Canada. Our member organizations came together in 2002 over shared concerns about the impact of new anti-terrorism measures on civil liberties, refugee protection, race relations, political dissent, democratic governance, international cooperation, humanitarian assistance and domestic and international human rights.

In furtherance of our mandate, ICLMG has testified before Commons and Senate committees on numerous occasions reviewing legislation involving national security and human rights. ICLMG has been granted intervenor status in Supreme Court of Canada cases and a peer-reviewed article by an ICLMG expert was cited extensively in *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Ont. Sup. Ct.), striking down the motive element in the *Criminal Code's* definition of terrorism, as amended by the *Anti-terrorism Act*. The ICLMG was granted standing in the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* as well as the *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmed Abou-ElMaati and Muayyed Nureddin*. ICLMG also regularly works with international partners in other countries on issues implicating civil liberties and national security at the global level. In 2004, ICLMG spearheaded the launch of an International Campaign Against Mass Surveillance, which was sponsored by Amnesty International Canada, the American Civil Liberties Union, the U.S. Center for Constitutional Rights, Statewatch Europe and Focus on the Global South (Asia). The ICLMG published a report on the Passenger Protect Program - i.e., the domestic no-fly regime - in February 2010.

C. The Security of Canada Information Sharing Act

Canadians interact and share personal information with the federal government in a wide variety of ways for a multitude of purposes. Filing taxes, applying for employment insurance or old age security, entering or exiting the country, confirming Indian Status, accessing survivor or veterans benefits - these are just a few examples where Canadians are required to share highly sensitive personal information with different government departments or agencies. But it has long been understood that

government will protect this personal information and only use it for a purpose consistent with the reason for its collection.

The *Security of Canada Information Sharing Act* (“*SOCISA*”) (Part I of Bill C-51) proposes to break that trust with Canadians as it will “encourage and facilitate” broad sharing of “disparate” pieces of personal information,¹ without proper controls and for broadly defined reasons. It also tasks all listed government departments, including those with no statutory role or experience in the areas of 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 encourages these government departments to work together to “collate” a wide range of personal information and create secret files on individual Canadians simply because some unknown official finds their behaviour, lifestyle, opinions or associations to be suspicious or unusual. For the reasons set out below, the ICLMG submits that the *SOCISA* represents an unprecedented threat to the privacy of Canadians, and creates a real risk that improperly shared personal information will have serious consequences for individual lives.

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 definition for “security of Canada” that is much broader than current statutes,³ and which appears to capture 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 “undermine the security of Canada”. There are legitimate

¹ *Security of Canada Information Sharing Act*, Preamble and section 3

² *Security of Canada Information Sharing Act*, Preamble and section 5(1)

³ 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. The definition is incorporated by direct reference into several other statutes - e.g, *Emergencies Act*, *Income Tax Act*, *Security Offences Act*, *Citizenship Act*, and *Aeronautics Act*.

concerns⁴ that those who engage in protests, demonstrations, strikes or civil disobedience could run afoul of *SOCISA* because their activities are 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. According to this definition, a protest that blocks a roadway immediately becomes a threat to the “security of Canada”.

Canada has a rich history of peaceful civil disobedience on important issues of the day, including the suffragette movement, workers’ rights, the peace movement, or gay equality. Few could dispute that these protests played an important role in the social and political development of Canadian society. Contemporary issues such as protecting the environment or Aboriginal rights give rise to similar far-reaching societal questions that deserve open and public debate fostered by demonstration and protest.

The second novel feature of *SOCISA* is the way it effectively deputizes government officials across government to assume responsibility for the “detection, identification, analysis, prevention, investigation or disruption” of any activities that “undermine the security of Canada”.⁵ It is hard to say how officials in departments like the Canada Revenue Agency (or HRSDC, or Veterans Affairs, or Aboriginal Affairs) will discharge these new statutory duties or interpret the broad definition of “security of Canada” under *SOCISA*. With little or no experience in law enforcement or security intelligence, and with no control or oversight in the Act, these officials will be left to their own devices.

⁴ 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).

⁵ *Security of Canada Information Sharing Act*, Preamble and section 5(1)

These changes represent a dramatic departure from the traditional understanding of the government's duty to safeguard Canadians' personal information and privacy and to secure it against unnecessary or improper dissemination, disclosure or misuse. It is not too much to say that *SOCISA* facilitates mass surveillance by the state in ways that are more commonly found in authoritarian countries, not democratic ones.

The harms and risks presented by *SOCISA* are both general and specific. It clearly infringes the right to privacy, which is sometimes defined as the right to control information about one's private life, including the right to decide when, how, and to what extent personal information is communicated to others.⁶ 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 controversial ideas or associations.

There are also very specific dangers associated with indiscriminate information sharing. As noted by Professors Roach and Forcese, "Improperly shared information may result in rumours and innuendo being reconceived as fact, and used to justify action, sometimes of a very troubling sort."⁷ This can lead to damaged reputations, loss of employment, being barred from flying or crossing the border, and, in some cases, wrongful imprisonment and even torture. As two public inquiries found, in the wake of 9/11 fears four Canadians were detained and subjected to torture in foreign countries due in part to erroneous or improper information sharing by Canadian officials. In that regard, it is disturbing that the *SOCISA* seems to have been drafted without regard to the ordeals of these four men. In the Arar Inquiry, Justice O'Connor went to great lengths to emphasize the dangers of information sharing, and

⁶ *Jones v. Tsige*, 2012 ONCA 32 at para 61; *R. v. Duarte*, [1990] 1 SCR 30 at para. 25

⁷ K. Roach and C. Forcese, "Bill C-51 Backgrounder #3: Sharing Information and Lost Lessons from the Arar Experience", p. 5

recommended that Canada should adopt a system that ensures information sharing decisions are strictly controlled, centralized, and governed by clear policies that screen for reliability, relevance and accuracy.⁸

One could conclude that the government appears to have not learned the lessons of the Arar tragedy, were it not for the inclusion of section 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. For those Canadians who have suffered serious consequences from erroneous or improper information sharing in the past, the provision is deeply disturbing. And for those Canadians who insisted that Canada should never again be complicit in the torture of their fellow citizens, they must question why the public paid for two expensive inquiries only to have their conclusions and recommendations utterly ignored.

D. Secure Air Travel Act and No Fly Lists Generally

In 2007, Canada decided to adopt a “no fly” regime similar in nature to that of the United States. The Passenger Protect Program is a highly secretive government initiative that was introduced to bar from flying those who present “an immediate threat to aviation security”. An Advisory Group consisting of high level officials from the RCMP, CSIS, CBSA and Transport Canada have the power to place anyone on the “Specified Persons List”. Individuals only learn of the listing when they attempt to fly, arriving at the airport - potentially with family or co-workers - only to be faced with the public humiliation of being denied boarding. Individuals on the list learn that the decision is based on a secret file to which they are denied access. Although they are given the right to appeal to an “Office of Reconsideration”, without access to the secret evidence the process is rendered fundamentally unfair. Moreover, even if the

⁸ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, (Ottawa: 2006), at p. 366

Office of Reconsideration rules in the individual's favour, the Minister of Transport can reject the decision and maintain the listing without providing any reasons.⁹

The new *Secure Air Travel Act* ("SATA", being Part II of Bill C-51) plans to expand Canada's "no fly" regime without adding any real transparency to the process or providing justification for the program generally. The ICLMG maintains that the Passenger Protect Program was deeply flawed and should be abandoned, not expanded as this legislation proposes to do. Simply put, the need or efficacy of no-fly regimes have never been demonstrated. Despite being in operation for nearly eight years, the federal government is unable to provide any evidence that that the Passenger Protection Program has increased aviation safety or security. In December 2008, the Privacy Commissioner of Canada Jennifer Stoddart reported to Parliament that Transport Canada had provided "no evidence demonstrating the effectiveness of no-fly lists" despite her repeated requests for such information.¹⁰ These comments are more valid today than ever, with five more years of Canadians being placed on secret lists but still no evidence of effectiveness.

If an individual was truly an "immediate threat to aviation" and is suspected of attempting a terrorist attack on a plane, law enforcement officials should be in a position to make an arrest or, alternatively, maintain close surveillance of such a highly dangerous individual. The Minister of Transport disclosed in 2007 that approximately 2,000 people were on the Canadian no-fly list. This high number - which is surely larger today, although the government has inexplicably refused to disclose the number of Canadians on the list since 2007 - seems unreasonable as it would suggest there are literally thousands of Canadians walking around who want to hijack planes. Given the lack of arrests or incidents in Canada over the past eight years, the large no-fly list would seem to present an unrealistic picture of the risk.

⁹ As discussed further below, that is precisely what occurred in the Al Telbani case.

¹⁰ Jennifer Stoddart, Annual Report to Parliament 2007-2008 - Report on the Privacy Act. (Ottawa: Privacy Commissioner of Canada, 2007), p.52.

The ICLMG's specific concerns with the *SATA* are:

(i) Expanded criteria for listing

In addition to those who pose a threat to transportation security, the *SATA* would add individuals for whom the Minister claims reasonable grounds to suspect that they will travel to commit a terrorist offence abroad.¹¹ There are other tools that the government may use to prevent those who may be travelling to join foreign conflicts, such as peace bond conditions or withdrawing one's passport, without expanding a regime that has serious due process problems.

(ii) Process for listing

Previously, listing decisions were based on the recommendation of the "Specified Persons List Advisory Group", which included high level officials from the RCMP, CSIS, CBSA, Transport Canada and Justice. Under the *SATA*, the Minister of Public Safety may delegate the listing power to any single official in his or her Department.¹² This removes the extra scrutiny and significance attached to the listing decision that comes with the involvement of several high level officials from different departments and agencies. The ICLMG submits that listing decisions, if necessary, should be reviewed and approved by a court. Individuals should also be given written notice the decision has been made, and not be left to learn about it from an airline agent when trying to board a plane. No rationale for keeping the listing secret until one attempts to fly has ever been provided and it only serves to maximize the humiliation and harm to dignity, not to mention the cost of losing an airplane ticket.

(iii) Appeal process

¹¹ *SATA*, subsection 8(1)

¹² *SATA*, section 7

Not only are individuals denied the right to a hearing prior to listing, the appeal process for delisting lacks the procedural due process safeguards that the constitution demands. Individuals on the list are still denied the right to see the information in their secret file, and are not allowed to cross examine witnesses who may be sources of information.¹³ Notably, Transport Canada's Office of Reconsideration concluded in 2008 that the Passenger Protect Program was plagued with serious problems and contravened section 7 of the *Canadian Charter of Rights and Freedoms* because persons on the list have no right to disclosure, to be heard or to know why they have been targeted.¹⁴ The Minister of Transport rejected those findings and the matter is now before the Courts.¹⁵ The *SATA* has not meaningfully addressed or corrected these constitutional shortcomings and now Parliament is being asked to pass a Bill with provisions that have already been found to violate the *Charter*. It is also important to point out that *SATA*'s appeal process in the Federal Court makes no provision for a special advocate, or other independent means to test the Minister's evidence. The Supreme Court of Canada struck down as unconstitutional a similar regime in the security certificate context.¹⁶

(iv) Information Sharing

The *SATA* expressly authorizes the Minister to share the list with foreign countries, but does not include any safeguards to ensure the information is relevant, accurate and reliable, or that it won't be shared with a country with

¹³ Under *SATA*, a person can make an application for delisting to the Minister, but the process is meaningless because absolutely nothing is disclosed to the individual: *SATA*, s. 15. There is a further appeal right to the Federal Court, but the hearing can be held completely in secret (s. 16(6)(a)) and the judge can base his or her decision on information that would be inadmissible in a court of law (s. 16(6)(e)) and which has been completely withheld from the individual (s. 16(6)(f)).

¹⁴ Report for the Office of Reconsideration dated October 9, 2008 (Allan Fenske and Wendy Sutton)

¹⁵ Mr Al Telbani's case continues to wind through the courts, with numerous preliminary decisions: *Al Telbani c. Canada (Procureur général)*, 2008 CF 1318; *Canada (Attorney General) v. Telbani*, 2012 FC 474; and *Canada (Attorney General) v. Telbani*, 2014 FC 1050.

¹⁶ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 SCR 350

a poor human rights record.¹⁷ This provision is particularly troubling because recent history has demonstrated how citizens who Canadian authorities have labelled as security threats to foreign countries have subsequently been detained and tortured.¹⁸

To conclude, there is no evidence that Canada's no-fly regime is effective, yet the cost is serious infringement of civil liberties. The ICLMG submits that *SATA* violates Canadians' rights to liberty and mobility under sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*. Notably, a similar "no fly" regime has been found unconstitutional by the U.S. courts as violating the right to due process.¹⁹ It is time to move away from this opaque and unaccountable "no-fly" tool, rather than normalizing it in Canada's legal system.

E. CSIS Disruption Powers

Part 4 of Bill C-51 proposes amendments to the *CSIS Act* that would expressly authorize Canada's security intelligence agency to violate the fundamental human rights of Canadians and "disrupt" their lives, all in secret.²⁰ The ICLMG submits that these extraordinary powers are unprecedented, dangerous, and have no place in a free and democratic society. The Bill also blurs the line between law enforcement and security intelligence, overriding the serious concerns that led to the creation of CSIS over 30 years ago. The proposed changes should be abandoned as an unsalvageable "constitutional mess".

¹⁷ *SATA*, s. 11

¹⁸ Maher Arar, Abdullah Almalki, Ahmed El Maati, Muuyad Nurreddin, Abousfian Abdelrazik and Benamar Benatta.

¹⁹ *Latif v. Holder*, 969 F. Supp. 2d 1293 (D. Or. 2013)

²⁰ Proposed CSIS Act, section 12.2

CSIS was created in 1984 in the wake of controversial actions and illegal “countermeasures” by the RCMP, which previously had responsibility for national security intelligence. This followed an investigation by a Royal Commission of Inquiry into activities of the RCMP that were often illegal and designed to target and “disrupt” individuals and groups who were deemed “subversive”. The McDonald Commission concluded that security intelligence was too different from law enforcement, and that the functions should be separated, with intelligence activities restricted to passive information gathering and collection. The Commission observed that this was necessary because intelligence investigations were carried out in secret with little or no opportunity for judicial examination or comment.

Unfortunately, the government has ignored the lessons from the McDonald Commission and wishes to turn back the clock and adopt a regressive approach to security intelligence that poses inherent risks to civil liberties. Strict controls on the activities of security intelligence agents are essential in a democracy for two critical reasons. First, their activities routinely intrude upon or impinge on the private lives and civil liberties of Canadians. Indeed, it’s inherent to the work. Second, intelligence agents carry out this sensitive work in almost complete secrecy. History shows that secrecy can be an invitation to abuses of power that can have tragic consequences for individual lives.

The warrant system is also deeply flawed because it completely relies on the good faith of CSIS to present all relevant information to the Court and then to respect the warrant given. But CSIS has a bad record of misleading courts and the Security Intelligence Review Committee, and breaching their duty of candour and good faith. Here are a few examples in the last five years alone:

- In its most recent annual report, the Security Intelligence Review Committee found that it had been “seriously misled” by CSIS and that CSIS agents had violated their duty of candour during ex parte proceedings.

- The Federal Court and Federal Court of Appeal both recently held that CSIS had breached its duty of good candour and good faith to the Court had obtained a warrant on the basis of evidence that was deliberately “crafted” to mislead and “keep the Court in the dark”.²¹
- In the Almrei security certificate case, the Federal Court concluded that CSIS had withheld exculpatory evidence from the Court.²²
- While the security certificate against Mohammed Harkat was ultimately upheld, the Court found that CSIS had withheld information from the Court that showed other key evidence that was presented was unreliable. The Court held that CSIS had undermined the integrity in the court’s process and “seriously damaged confidence in the current system.”²³
- The Federal Court found that CSIS was improperly intercepting solicitor client communications in the Mahjoub case.

All of these questions raise serious questions about whether CSIS can be trusted with greater secret powers when recent history suggests there is a pattern of misleading Courts and the Security Intelligence Review Committee.²⁴ It is also worth highlighting that this warrant system also depends on CSIS agents deciding on their own when a certain action may be “too close to the line” and violates the Charter. This discretion

²¹ *Re X*, 2013 FC 1275 at paras. 81, 90-92 and 117-118, 81 and 117 for quotes; and *Re X*, 2014 FCA 249 at paras. 52-53.

²² *Re Almrei*, 2009 FC 1263, paras 502-503

²³ *Harkat (Re)*, [2010] 4 FCR 149, paras 59 and 62

²⁴ In 2002, former Federal Court Justice James Hugessen presciently expressed reservations about the secrecy of the security certificate regime and the serious risks associated with relying on the candour of CSIS agents: “[P]ersons who swear affidavits for search warrants or for electronic surveillance can be reasonably sure that there is a high probability that those affidavits are going to see the light of day someday. With these national security affidavits, if they are successful in persuading the judge, they never will see the light of day and that fact that something improper has been said to the Court may never be revealed. See James K. Hugessen, “Watching the Watchers: Democratic Oversight” in D. Daubney et al, eds., *Terrorism, Law and Democracy: How is Canada Changing Following Septemebr 11?* (Montreal: Themis, 2002) 381 at 384.

is very wide and there is no oversight created in the statute at all for “measures” that CSIS deems too benign to bring to the attention of the Court.

This raises another important point. The Minister of Public Safety has not provided much detail regarding what kinds of “measures” are contemplated by the Act. There are no real limits on CSIS powers to break the law or violate human rights, short of causing death, inflicting bodily harm, obstructing or perverting the administration of justice, or violating the sexual integrity of an individual.²⁵ These are dangerously broad limits, and suggests that CSIS could carry out all manner of activities that could have seriously consequences for individuals. Keeping in mind some of CSIS’ activities over the past 15 years, as well as those of their counterparts in the U.S. Central Intelligence Agency, Bill C-51 could authorize activities such as the incommunicado and secret detention of individuals, in Canada or abroad. The CIA is notoriously known for maintaining a network of “black sites” around the world where terrorist suspects were detained indefinitely without charge. As noted by Professors Forcese and Roach, Bill C-51 does not expressly exclude detention as an unacceptable “measure”, as it does with other powers.²⁶ The Minister of Public Safety could easily add that to the Bill.

These are some of the more serious risks, but other activities that could be authorized are ones like the “dirty tricks” employed by the RCMP a generation ago. Called “countermeasures”, the McDonald Commission outlined some of these activities:²⁷

- The RCMP would exploit existing “power struggles, love affairs, fraudulent use of funds, information on drug abuse, etc., to cause dissention and splintering” among different groups.

²⁵ Proposed CSIS Act, section 12.2(1) [Bill C-51, Part 4]

²⁶ Professors Craig Forcese and Kent Roach, Bill C-51 Backgrounder #2, p. 21

²⁷ *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (1981) (“McDonald Commission” or “McDonald Inquiry”), at p. pp. 267,271, 272, 275 and 353-358

- The RCMP would induce employers to discharge “subversive” employees, or would leak information - sometimes true, sometimes false - to discredit individuals.
- The RCMP carried out “conspicuous surveillance” - i.e., follow someone around from place to place, but let them know they are being followed - to intimidate the person.
- The RCMP committed arson, burning down a barn to “disrupt” a planned meeting.
- The RCMP broke into the offices of a political party to steal membership lists and other records.
- The RCMP maintained files on several elected politicians, including members of the NDP and Liberal parties. The files included information on confidential caucus debates and factions as well as details on marital problems of at least two cabinet ministers.

The activities of CSIS in the last decade are even greater cause for concern. Minister Blaney informed this Standing Committee during his presentation that he was unaware of any examples where CSIS had broken the law. In fact, there are many occasions where the Courts or the Security Intelligence Review Committee have found that CSIS agents have violated the fundamental human rights of Canadian citizens:

- CSIS agents interrogated Omar Khadr in Guantanamo Bay, knowing that Khadr was a youth who had been denied the right to legal counsel and had been subjected to sleep deprivation to “soften him up” for questioning. The Supreme Court of Canada found that this violated Mr Khadr’s right to liberty and not to be deprived thereof except in accordance with principles of fundamental justice.²⁸

²⁸ *Canada v. Khadr*, 2010 SCC 3

- The Federal Court found in 2009 that CSIS agents were “complicit” in the detention of Canadian citizen Abousfian Abdelrazik by Sudanese intelligence officials. The Court also found that Mr Abdelrazik was tortured during his detention.²⁹
- In a less well known case, CSIS agents detained 21-year old Canadian Mohammed Jabarah in a hotel room in Toronto for four days. He was not given his right to counsel and was tricked into crossing the U.S. border to “speak” with American authorities. CSIS gave him a piece of paper indicating that he was only going over the border for a few hours day for questioning and could return that night. This was a lie. In fact, U.S. officials would not allow Jabarah to return and manipulated him into pleading to charges that sees him currently serving a life sentence in that country. SIRC reviewed the case and concluded that Jabarah was “arbitrarily detained” by CSIS in violation of Section 9 of the *Charter*. Because he was detained, his right to silence as protected by Sections 7 and 11(c) was violated, as was his right to counsel under Section 10. In addition, his right to remain in Canada as protected by Section 6 of the *Charter* (mobility rights) was breached.³⁰
- In 2010, an Ontario Superior Court of Justice severely criticized CSIS agents for coercing and intimidating an individual who would later be charged. The Court found that CSIS had flagrantly violated the individual’s human rights, stating with concern: “*The very people that are tasked by the federal government to oversee and safeguard Canada’s national security agency are themselves 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*

²⁹ *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 580, at paras. 91-92

³⁰ SIRC Annual Report 2006-2007, pp. 20-21

*violate these same principles. Neither is acceptable and I find that the Charter breach in this case was serious.”*³¹

All of these examples reflect a pattern of disrespect for human rights within CSIS that have not been properly recognized or addressed. ICLMG and its members have taken action on many of these cases and are disturbed that the federal government is choosing to expand CSIS powers with this Bill rather than review and remedy these serious violations.

Finally, it is recognized that Minister Blaney has highlighted that CSIS will be kept in check because their most serious actions will be approved by judicial warrants. To ask judges to pre-authorize constitutional violations of fundamental human rights is a radical departure in Canadian law and cannot be compared to search warrants. Moreover, the proposed warrant system is carried out completely in secret, with judgments that may never be disclosed to the public. Professors Forcese and Roach have commented that this risks creating a “secret jurisprudence” of human rights violations. The Honourable Ron Atkey, the first chair of the Security Intelligence Review Committee, expressed his concern that this undermined judicial independence and was generally “a constitutional mess”. ICLMG concurs in this assessment.

For democratic societies, it is a false dichotomy to pit national security as being opposed to civil liberties. The protection of national security in Canada must *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.

³¹ *R v. Mejid*, 2010 ONSC 5532