Feb. 9, 2024

Department of Justice Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Sent by email to: JusticeCanada-FIConsultationIE@justice.gc.ca

Re: Submission regarding the consultation on "Addressing Foreign Interference: Whether to Amend the *Security of Information Act* and Modernize certain *Criminal Code* offences, and to Introduce a review mechanism in the *Canada Evidence Act* to manage sensitive information"

To whom it may concern,

I am pleased to submit the following submission regarding the consultation on whether to amend the *Security of Information Act* and modernize certain *Criminal Code* offences, and to introduce a review mechanism in the *Canada Evidence Act* to manage sensitive information in the context of addressing foreign interference, on behalf of the International Civil Liberties Monitoring Group coalition (ICLMG).

The International Civil Liberties Monitoring Group (ICLMG) is a Canadian coalition of 45 organizations founded in 2002, following the adoption of Canada's first *Anti-terrorism Act*. Over the ensuing two decades we have worked with our members, partner organizations, impacted communities and law makers to defend civil liberties in Canada against national security over-reach and abuses in the name of countering terrorism.

While issues of counter-terrorism and countering foreign interference are distinct, there are also many similarities, particularly in the kinds of legislative changes being considered and the national security-related tools being proposed. Moreover, as we highlight in our submission, many of the proposals being brought forward would not be limited in their impact to countering foreign interference but have wide-ranging impacts across the various acts and aspects of the justice system unrelated to this particular issue.

We thank you for taking the time to consider our recommendations and feedback and look forward to discussing them more with you in the coming weeks and months.

Sincerely,

Tim McSorley
National Coordinator
International Civil Liberties Monitoring Group

Whether to Amend the Security of Information Act and Modernize certain Criminal Code offences, and to Introduce a review mechanism in the Canada Evidence Act to manage sensitive information

Issue 1: Whether to Create New Foreign Interference Offences

What do you think?

1. Should Canada have additional "foreign interference" offences to ensure that we have covered situations like those described in the scenarios? If so, which of the four new offences above do you think would be beneficial?

We support and recognize the need to ensure that democratic processes and the associated human rights and civil liberties are appropriately protected from malicious attempts to undermine them. In line with this, it is also crucial that there be broad, public efforts to study and establish the basis for these concerns, what their impacts are, and what responses would best serve to address them.

However, we are concerned about the tenor of the discussion in Canada to date, and the possibility of over-reach and over-securitization in addressing this issue. Our work on the impact of national security and anti-terrorism laws, which share similar concerns of covert activities tied

to either domestic or international entities with malicious intent, has shown the importance of clear definitions, evidence-based decision-making, and responses that are necessary and proportionate. Failing to adhere to these principles can lead to the further marginalization of a variety of organizations and communities, including those from racialized, Indigenous or immigrant populations, as well as those involved in dissent, protest and challenging the status quo. This is caused by the undermining of fundamental rights and with it democratic involvement and participation, leading often to more tension and divisions. It is also important to ensure that responses beyond policing, intelligence and criminal charges are appropriately explored.

In reading the three proposed scenarios in the consultation document, we would raise questions about the appropriateness of the first scenario. While disinformation related to false information about voting would be a clear interference in the democratic process, other issues raised in the scenario are less certain. Terms such as "disinformation campaigns" and "false narratives" are difficult to define, and we have seen already how raising political differences and espousing controversial but lawful political views are labeled as "false," "disinformation" or even as harming national interests. Should a candidate have ties to a foreign country or their positions reflect those of a foreign government, they could possibly fall under this example of "foreign interference." As a result, rules around foreign interference could actually limit the full participation of some individuals in the democratic process, as well as the full enjoyment and expression of their *Charter* rights.

Moreover, "covert" is another term used throughout the consultation document that requires further definition. If an individual simply fails to publicly disclose ties to foreign entities, we would fear they would be open to allegations of covert relationships and dealings, even if their intention was not to hide it. Even then, there may be instances, because of prejudices or other concerns, that an individual may have good reasons – including privacy – not to disclose personal information tying them to foreign organizations or individuals.

Finally, as the other two scenarios demonstrate, concerns around foreign interference are framed as going beyond electoral processes and include the full spectrum of democratic life and public discourse – protest, dissent, defence of rights, etc. While concerns around "disinformation" and relationships with foreign entities are complicated in terms of elections, these terms become even more tenuous when tied to broader political activities. For example, environmental campaigners opposed to fossil fuel extraction or organizations opposed to aspects of Canadian foreign policy who work in conjunction with international partners. It will be especially important to ensure that any legislative changes to address foreign interference are clearly defined, specific in scope, and include safeguards to protect *Charter* rights and international human rights.

That said, the other two scenarios present more clear instances of threats or harm towards individuals and their families. It would still be important to clarify how one would prove that these actions – which likely already amount to criminal acts – are linked to a foreign entity in order to include additional penalties in relation to "foreign interference," but they raise less privacy and civil liberties concerns.

As to whether any of the four changes proposed in the consultation document would be acceptable:

We would generally oppose the creation of "Foreign Interference Offence – General."

We would be concerned that covert acts for the benefit of a foreign entity that are not tied to an underlying criminal offence would be overly broad, even if it is tied to an action that could result in harm to Canadian interests. Take the example given regarding the planting of "false stories": While stories that clearly invent false facts or statements are easily identified as false, often differing political views and opinions are portrayed as false, as opposed to being a disagreement. Even what some would consider concrete facts can be interpreted differently in different contexts. Combined with the lack of clarity around what would is considered "covert," this could lead to the over-application of the law and the stifling of free speech and dissent. For example, many organizations engage with international partners, some which may receive funding from or even work with foreign entities to develop political positions, and may not be required or see the need to reveal these conversations as a matter of course. If this Canadian organization were to publish an op-ed, based on these conversations, which opposes aspects of Canadian foreign policy, or even supports the foreign policy of another government – and therefore is seen as harming Canada's interests – and are accused of publishing false or misleading information, they could be open to accusations of violating the *Security of Information Act* (*SOIA*).

In our mandate addressing concerns around national security and counter-terrorism, we would even go so far as to say that some Canadians who engage in conversations with groups accused of being a terrorist entity (which remains a disputed term), could also face accusations under this proposed definition. A concrete example would be that some parts of the Canadian government erroneously regard the Freedom and Justice Party, a recognized political party which formerly formed the government in Egypt, as being a terrorist entity. Would a Canadian who entered into conversation with the FPJ while they were in power, did not disclose these conversations, and published a disputed op-ed that runs contrary to Canada's interests, be open to accusations of violating the *SOIA* should such amendments be made? It would appear yes.

This proposal also closely reflects facilitation of terrorist activities under the *Criminal Code*. These offences remain controversial, given that they are applied whether or not an individual

knows that a terrorist activity will take place, added to the fact that facilitation is very removed from the actual offence itself.

We would also question the need for the changes under "Foreign Interference – Intimidation (Harm Specific to the Person) or Inducement" to remove the requirement that there be proof that an offence actually helped the foreign state or harmed Canada. It is essential that an offence be tied to actual harm. There exist already offences for engaging in harassment or threats. The need for a provision related to foreign interference under the *SOIA* rests on the fact that it was carried out not just for the benefit or harm, but that such benefit or harm occurred. If the benefit to a foreign state or harm to Canada did not take place, we do not see the necessity for using a provision under the *SOIA.*

We also have concerns regarding the proposals under "Foreign Interference – Democratic Process.

Creating offences to protect electoral processes beyond federal elections appears reasonable, but it would be important to again ensure these are targeted and narrow, given the risks detailed in response to Scenario 1, above. Applying this to "democratic processes" more generally runs greater risks depending on how this is defined. "Democratic processes" would appear much broader than simply electoral activities, and could encompass a multitude of ways individuals participate in public life, including advocating for policy changes, lobbying MPs, engaging in protest, producing political materials, etc. We are pleased that the proposal explicitly states that safeguards would be put in place to protect the free exchange of views, etc. However, examples of exceptions included under offences in the terrorism provisions of the Criminal Code are inadequate. For example 83.01(1.1) of the *Criminal Code* reads: "For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition terrorist activity in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph."

If, as proposed, once of the "criteria" under an amended *SOIA* is that any offence include "any covert activity in conjunction with a foreign entity," it would undermine the exception and provide insufficient protections against overly broad application or misuse of the provisions.

Moreover, despite exceptions for dissent, for example, such laws can have a demonstrable chilling effect on individuals or organizations. They may simply refrain from democratic activity or may forego important work with international partners in order to simply avoid the possibility of scrutiny or suspicion, which on their own can be highly damaging.

These concerns become clear in the scenario presented. The community organization itself is not engaged in covert activities to undermine democratic processes – in fact they are being overt

about their position, meaning it can be challenged. We would be concerned, as in our previous answers, about what qualifies as both "secret" and what qualifies as "disinformation" versus legitimate opposing views (disputes over impacts of policies, for example, versus sharing false information about voting days). It also appears from this scenario that the community organization itself is the subject of threats; we would question what provisions are in place to protect them, ensure adequate domestic funding, etc., in order that they could report this external pressure without fear of failing their community. Moreover, the use of such a scenario raises very current questions of suspicion cast upon organizations, without supporting evidence, of involvement in foreign interference because they are rooted in a particular community. This again reflects our work around systemic discrimination in counter-terrorism activities. For example, we have documented how Muslim organizations are placed under undue scrutiny and surveillance, and face greater repercussions from state agencies, because their community is believed to be at greatest "risk" of being involved in terrorist financing. This risk has not been publicly substantiated or upheld by evidence or court findings, but is rooted in systemic Islamophobia that has become entrenched over the past two decades. We would be concerned that such kinds of systemic discrimination could develop in regard to "foreign interference" and would even argue that it has begun in relation to community organizations in Chinese and Asian Canadian communities.

2. Instead of creating new offences, would it be better to give the judge the ability to increase the penalty when sentencing an individual, if the crime was committed for the benefit of a foreign entity? It may be easier for prosecutors to deal with this issue as an aggravating factor at the sentencing stage, as is done with terrorism offences. This way, if a prosecutor is unable to establish the foreign link, the underlying offence could still be proven. Or should the law do both?

The option to consider increasing the penalty if an offence is carried out for the benefit of a foreign entity could be more acceptable, but more details would be required. More specific would be if the offence that was carried out resulted in harm and was to the benefit of a foreign entity. The issue of a link to a clear harm remains crucial. To simply state that benefiting a foreign entity is an aggravating factor would remain incredibly broad. We would also require more information regarding what kind of sentencing provisions are being considered and what would need to be proven for a judge to add this as an aggravating factor at sentencing.

This also raises the overall question of whether more punitive measures should be fore fronted in efforts to protect against foreign interference. Given what we have seen in our work on counter-terrorism and national security impacts on fundamental freedoms, we would argue that too often the first response to new challenges is to create new offences, or impose harsher penalties, as opposed to exploring other, non-punitive approaches that respond to the societal roots of harms.

We would encourage the government to explore other measures before moving forward with any changes to offences or the associated penalties.

3. What kinds of activities of foreign states are unacceptable in Canada, keeping in mind that Canadian officials are involved in legitimate efforts to advance Canadian interests abroad?

We have not developed a position on this question.

4. The SOIA already defines the term "foreign entity" as five things: a foreign power; a foreign power and one or more terrorist groups; a group or association of foreign powers; a group or association of foreign powers and one or more terrorist groups; or a person acting at the direction of the first four entities. Do we need to expand what we mean by "foreign entity" in relation to these offences?

We do not believe that the definition of foreign entity should be expanded. Already, given our concerns around the overly-broad and discretionary labeling of organizations as "terrorist entities", we would be worried that the current definition could be misapplied.

5. Keeping in mind the protections that already exist in the *Canada Elections Act*, and in provincial elections legislation, what sorts of democratic processes, rights and duties warrant protection from foreign interference under the SOIA?

This is not our area of expertise, but as mentioned above, any expansion of the application of the *SOIA* to "democratic processes" writ large runs the significant risk of impeding on democratic participation and fundamental freedoms. While consideration of laws to protect the integrity of other specific aspects of the electoral process may be valuable, without knowing what is already covered by, for example, provincial and territorial election regulations, it would be impossible to state what more should be included.

Issue 3: Whether to Modernize Canada's Sabotage Offence

What do you think?

1. Should the law of sabotage be updated to ensure it covers modern forms of critical infrastructure such as water, sewage, energy, fuel, communication, and food services? Should it be updated to clarify that it covers a broader range of negative impacts on infrastructure? Or, would it be enough to rely on existing offences such as

unauthorized use of computer; mischief; use of an explosive or other lethal device against a government or public facility, public transportation or other infrastructure?

This proposal mirrors similar discussions around the expansion of what should be included in the definition of "threats to national security." As in that case, we would be concerned with, and generally opposed to, the broad expansion of what is considered critical infrastructure under sabotage rules. This is particularly because, while not included in the specific question here, examples in the consultation document include protecting "economic well-being." This on its own could be especially broad, and could include private interests that, for example, are at odds with environmental or social concerns. Paired with the list in this question, a wide range of activities could be captured. And while considerations are given to including provisions to protect dissent and protest, we would disagree – as explained earlier – that they would adequately prevent against the criminalization of dissent, or against a chill against protest and assembly.

2. Would it be beneficial to give the judge the ability to increase the penalty, when sentencing an individual, if the crime was committed for the benefit of a foreign entity?

Once again, this raises the overall question of whether more punitive measures should be fore fronted in efforts to protect against foreign interference. Given what we have seen in our work on counter-terrorism and national security impacts on fundamental freedoms, we would argue that too often the first response to new challenges is to create new offences, or impose harsher penalties as opposed to exploring other, non-punitive approaches that respond to the societal roots of harms. We would encourage the government to explore other measures before moving forward with any changes to offences or the associated penalties.

3. Are the existing exemptions from liability still appropriate? Should other exemptions be considered, like those found in the terrorism provisions of the *Criminal Code*? Should there be a requirement to get the consent of the Attorney General to proceed with the offence?

While we are skeptical that the inclusion of exemptions for free expression, assembly and other fundamental freedoms are a panacea for the impacts of broader offences and harsher penalties, we would support their inclusion in any sabotage offences. We would suggest wording that is unconditional, along the lines of: "For the purposes of this Act, advocacy, protest, dissent, academic work or artistic expression do not constitute an act of sabotage."

We would also support the need or the consent from the Attorney General to proceed with any charges.

4. Would it be appropriate to create an offence to capture possession of a device to commit sabotage? Should such an offence require intent to commit sabotage? What kinds of devices would be appropriate to include in such an offence?

We would oppose this new kind of offence. While certain devices, for example explosives, may clearly pose a risk of harm, they are most often already regulated. However, under such a rule we believe that the vast majority of devices covered would likely end up being dual or multi-use; ie, tools that in the hands of one person could be used for sabotage, but could be used by others in multiple, law abiding and innocuous ways. The *Criminal Code* already contains offences related to the intent to commit an offence; it does not appear necessary nor needed to expand this to the possession of an item with the intent to commit sabotage.

Issue 4: Whether to Create a General Secure Administrative Review Proceedings Process under the Canada Evidence Act

What do you think?

ICLMG has a longstanding position opposing the use of secret processes in administrative, immigration and criminal proceedings overall. The growing use of these secret processes is eroding, and will continue to erode, fundamental principles of fairness, as understood in Canadian democracy. Secrecy should not become a normal part of judicial processes in Canada, but, lamentably, it has continued to grow over the past decades, fueled primarily by ever-expanding national security concerns

As we have previously explained:

> The use of secret intelligence in diverse proceedings before tribunals and courts has been criticized, as Canada and other states – likely in consultation with each other – appear to be normalizing what was meant to be an exceptional procedure, expanding its use in other areas, including in criminal trials. While it is perhaps trite to reference the 'slippery slope,' there are real dangers. Canada is not at war; there is no national emergency. The normalization of secrecy as part of the decision making process, in addition to the human rights issues raised, undermines democratic principles and public confidence, not just in the government, but in the judiciary itself. Secrecy feeds the perception that the government is seeking to immunize itself from public censure for the wrongdoing of its officials and to shield from scrutiny information obtained from questionable sources. It contributes to the politicization of intelligence. Regardless of the merit of a decision that a refugee is involved in terrorism, non-disclosure of

> the underlying evidence undermines confidence in the result, and gives rise to the perception that the person has been wrongfully sanctioned – especially where the evidence could have been challenged if it had been disclosed. The end result may well be the alienation of entire communities whose cooperation is critical to the fight against terrorism."[1]

While the context of this was the challenge to security certificate regimes in the *Harkat* case, "terrorism" could easily be substituted with "foreign interference" and the arguments would remain salient.

As we also argued, there are inherent defects in these secret processes that serve to undermine the fundamental principles of justice, including:

- The difficulty of defining the amorphous and elastic concept of national security, which is nevertheless necessary in order to ensure that the grounds for non-disclosure can be limited and consistently applied;
- Constant pressure on state officials to over-claim on national security grounds as a matter of prudence or because of a perceived need to protect officials from public criticism, and on the Court or tribunal to over-redact as a matter of caution;
- The existence and development of a closed body of jurisprudence available only to the court and the Minister, but not to the special advocates or to public counsel;
- The absence of an "effective means of keeping this process under independent scrutiny and review" by "legal practitioners, the media and other civil society organisations which seek to hold executive government and its agencies accountable and answerable for their actions."[2]

While one aspect of the government proposal would be to establish consistency among existing "secure administrative review proceedings," we would be concerned that this change would also serve to further normalize secret proceedings and facilitate their integration into new legislation. Once an "acceptable" template has been established, it can be more easily tacked on and presented as uncontroversial – when such proceedings should always be viewed as controversial and exceptional.

That being said, without supporting the expansion of these secret processes, and barring the rolling back of those that exist, the creation of consistent and predictable processes that integrate the strongest possible protections would be something to consider on a case-by-case basis.

While we have been informed that this proposal would not apply to the security certificate regime under the *Immigration and Refugee Protection Act*, we would also take this opportunity to raise ongoing concern about this program, and particularly in regards to limitations, introduced with the

[1] CCR & ICLMG MEMORANDUM OF ARGUMENT, Canada (Citizenship and Immigration) v. Harkat, 2014 SCC 37, [2014] 2 S.C.R. 33. Online: https://www.scc-csc.ca/WebDocuments-DocumentsWeb/34884/FM080_Intervener_Canadian-Council-for-Refugees-etal.pdf
[2] Ibid.

Anti-Terrorism Act, 2015, to further limit the information to which special advocates have access. This further restriction on the ability for a named person to defend themselves should be addressed and such a restriction should under no circumstances be part of a new standardized process.

Issue 5: Whether to introduce reforms to how national security information is protected and used in criminal proceedings

What do you think?

1. Do you see benefits to the criminal proposals in the investigation and prosecution of foreign interference cases?

It is unclear whether the proposals above are necessary or would bring benefit to the investigation or prosecution of foreign interference cases in particular. Little information or evidence is provided to specifically explain why they would be necessary for foreign interference related criminal charges.

What is certain, though, is that such changes would have wide-spread impact on all hearings that include national security-related information that the government would argue should not be disclosed. As such, it is concerning that such proposals are being made in the context of a very specific consultation on foreign interference, and believe that it is necessary, before proceeding with any legislative amendments, to consult in a much broader fashion.

Regarding these particular provisions, we have significant concerns and reservations. As above, we are opposed to the growing use of secret proceedings that limit a defendant's full access to evidence or other information underlying the case against them. This is anathema to the fundamental principles of justice, and any changes that would help to normalize or expand these kinds of proceedings would be unacceptable. This includes concerns around the use of intelligence or other forms of information that would not normally be considered evidence, given their inherent secrecy and unreliability.

We do acknowledge, however, that the current bifurcated process leads to unnecessary delays and that decisions could possibly be better made if the trial judge was also deciding on disclosure of evidence. Caution would need to be taken around any implementation of such a system. For example, a roster of national security judges may not have the expertise to adjudicate on other matters that implicate national security evidence but that do not otherwise centre on national security concerns. Further, we have seen that agencies that investigate national security concerns tend to see more national security risks around them; we would be concerned that judges focusing exclusively on national security cases may develop the same predisposition, possibly

leading to an over-identification of national security concerns. It is essential that before moving forward, much more extensive consultation takes place.

Similar to our concerns about secure administrative proceedings, we would be concerned that the ability for judges to expressly appoint a kind of "special advocate" will serve to normalize and further entrench the use of secret proceedings and to deny disclosure to the defence. The presence of a special advocate is not a substitute for disclosure, but we worry that the normalization of this regime will lead to exactly that. Instead, justice would be better served by allowing counsel for the defence to engage in an undertaking to not disclose information, and therefore be able to fully argue on behalf of their client.[3]

The pitfalls of the special advocate system have been documented, including limits on their ability to access all information related to the proceedings, as well as to be able to communicate with the defendant (or the "named person," in the case of security certificates). To state that a new special advocate regime would be based on *IRPA* provisions, therefore, raises specific concerns. A key aspect are the changes made by the *ATA, 2015*, that have served to further limit a special advocate's access themselves to all the necessary information. These should be removed from the security certificate regime, and under no circumstances replicated in other similar systems.

Further, we would generally oppose the elimination of interlocutory appeals relating to disclosure, as proposed in the consultation document. We disagree that the rights of the accused would not be irreparably harmed by limiting appeals to after a decision is rendered. Issues of disclosure can have significant impacts on the defence's approach to their case, including whether the accused testifies. Further, not every accused will have the financial or personal resources to mount a defence after a verdict is rendered, and would more likely be better placed to appeal as during the trial itself. A guilty verdict can also taint a jury pool and/or public opinion, impacting the chances of a fair re-trial. Finally, a verdict – even if overturned on appeal or a new hearing ordered – can have long-lasting and devastating impacts on an individual's reputation and well-being, even it is eventually overturned.

Finally, regarding sealing orders, we would oppose the expansion of the grounds to grant a sealing order to include, "international relations, national defence or national security." No information has been presented to specifically justify why this would now be needed or what negative impacts have occurred until now due to it not being included. All three of these terms are very broad in scope and could seriously erode transparency and openness in the judicial system.

[3] See: Factum of the Interveners Canadian Council for Refugees, International Civil Liberties Monitoring Group, et al., 2006 in *Adil Charkaoui v. Minister of Citizenship and Immigration, et al.* [30762]. pp. 18-20. Online: https://ccrweb.ca/files/charkaoui-ccr-aclc-iclmg-narcc-factum.pdf