Policy Phase submission
to the
Public Inquiry into Foreign Interference

by the
International Civil Liberties Monitoring Group

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Since 2021, the Canadian government has initiated multiple reviews and independent inquiries, including the Public Inquiry on Foreign Interference, to address alleged threats of foreign interference in Canada. We recognize the importance of addressing this issue, particularly in instances where governments are threatening individuals or their close ones in order to suppress their ability to exercise their fundamental rights or to engage in democratic processes.

However, we are deeply concerned by the policy approach and legislative responses that the Canadian government has adopted to date to address this issue, and the direction that it signals the government will take in the future.[1]

This includes a nearly exclusive focus on granting new powers to national security agencies and creating significant new offences that we fear will result in over-reach and over-securitization of responses to this issue. Our work on the impact of national security and anti-terrorism laws, which share similarities in terms of addressing covert activities tied to either domestic or international entities with malicious intent, has shown the necessity 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.

The most glaring example is the adoption, in haste, of Bill C-70 – *the Countering Foreign Interference Act* – in June 2024, which will have wide-ranging impacts on Canada's national security, intelligence and criminal justice systems. As such, it will also have significant impacts on the lives and fundamental rights of people in Canada.

For example, the decision to provide CSIS with new forms of warrants, granting it extra-territorial reach for foreign intelligence activities, and allowing the service to disclose information to any person or entity, in order to build "resiliency," will lead to increased surveillance, diminished privacy, and racial, religious and political profiling. Powerful new offences for actions undertaken in "association with" foreign entities, including foreign governments and state-affiliated agencies, punishable by up to life in prison, will infringe on freedom of expression and association, and raises questions of proportionality in sentencing. Likewise, vague and undefined terms raise similar worries about the *Foreign Influence Transparency and Accountability Act* (*FITAA*) and the foreign influence registry it will create. This is compounded by significant areas of *FITAA* being left to regulation as opposed to specified in the legislative text. The bill has also transformed how, in administrative

[1] See, for example: ICLMG. "Brief on Bill C-70," submitted to the Senate Standing Committee on National Security, Defence and Veterans Affairs, June 2024. Online at: https://iclmg.ca/wp-content/uploads/2024/06/C-70-BRIEF-PROPOSED-AMENDMENTS-ICLMG.pdf

proceedings, federal courts handle sensitive information that can be withheld, undermining due process in courts through the use of secret evidence.

A bill of such breadth required in-depth study. However, in the rush to address issues of foreign interference as quickly as possible, the bill passed through the entire legislative process in less than two months. This is faster than even the rushed 2001 study of the first *Anti-terrorism Act*, which studied for two months.

This astoundingly short study resulted in significant aspects of the legislation going unstudied and areas of concern going unaddressed: less time meant that experts and organizations with limited resources had to rush their analysis of the bill, and made submitting briefs and appropriate amendments nearly impossible, with many who would normally have intervened deciding not to do so for fault of resources. Even when members of parliament and senators recognized concerns, the refrain was that the bill's study was either constrained by time limits imposed in the House of Commons or by the necessity to adopt new rules before an eventual election.

Moreover, the bill was introduced just days after this Inquiry published its first interim report, and before the public tabling of reviews from both the National Security and Intelligence Review Agency and the National Security and Intelligence Committee of Parliamentarians on the same topic. The tabling of significant legislation before the public has had the ability to fully consider reports on the breadth and impact of foreign interference in Canada raises significant concerns of being able to adequately assess the necessity and proportionality of government responses, let alone whether these responses will be effective in addressing foreign interference activities.

This curtailing of debate in the name of expediency on an issue as important as protecting our democratic systems remains deeply troubling. Unfortunately, it also appears indicative of a rush to make policy decisions and take action that has permeated much of the recent debate.

> **Recommendation 1:** That the government ensure that all proposed responses to foreign interference concerns are necessary and proportionate, and based on evidence.
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> **Recommendation 2:** That policy and legislation related to foreign interference be adopted in an open and transparent manner, that prioritizes consultation and promotes democratic participation.

Below are key areas from Bill C-70 that illustrate the concerns raised above and future policy considerations that the federal government should take into account.

1. **Foreign interference being used to justify unrelated, but long sought-after, security powers**

Bill C-70 presented various changes to legislation that are only tangentially related to foreign interference concerns, and instead reflect powers that have been long sought after by either the government or by national security agencies.

This includes several of the changes made to the CSIS Act as part of Bill C-70. For example, CSIS was granted immense new powers in 2019 to collect datasets of information, under the provisions of the *National Security Act, 2017*. At the time of debate, while foreign interference concerns were already beginning to be raised in Canada, at no point was this given as a justification for the creation of the new dataset regime. In 2024, the National Security and Intelligence Review Agency released a scathing critique of CSIS' implementation of the dataset regime including that it was not operating within the legal framework.[2] The *National Security Act* included a provision requiring parliamentary review in the fourth year after coming into force, namely 2023. This review would have provided an appropriate venue to examine, in-depth, NSIRA's findings and any required changes to CSIS' dataset regime. Instead, Bill C-70 modified the dataset regime to accommodate CSIS' activities, with no substantial debate or amendments.

Similarly, Bill C-70 granted CSIS new powers to issue production orders and to create new forms of warrants to seize and search items and to conduct online intelligence gathering outside of Canada. These are powers that CSIS has sought, under other circumstances, for several years. For example, the new seizure and search powers were proposed during consultation for online harms legislation in 2021. This was a more fulsome consultation, during which the proposal raised so much alarm that it was eventually dropped from future legislation, in the form of Bill C-63, the *Online Harms Act*. However, it was revived and included in Bill C-70. In the rush to adopt the bill, and the escalating pressure to simply act, these new powers received very little scrutiny and passed without question.

> **Recommendation 3:** Concerns around foreign interference cannot be used to justify the hasty adoption of unrelated, or minimally related, legislation or policies.

2. **Information sharing/disclosure powers**

Ensuring that appropriate information is shared with the public, with institutions facing general challenges related to foreign interference, as well as those who are directly impacted by foreign interference activities has been a central policy goal from this government. We would agree that this is an important priority, given that reports have demonstrated a clear failure to

[2] National Security and Intelligence Review Agency. "NSIRA Review of CSIS Dataset Regime," 27 March 2024. Online at: https://nsira-ossnr.gc.ca/en/reviews/ongoing-and-completed-reviews/completed-reviews/nsira-review-of-csis-dataset-regime/

appropriately inform individuals and institutions of possible threats, as well as clear information about the scope and impact of foreign interference, and how best to protect against any consequences.

However, the government's approach on this issue once again raises concerns, particularly since it has concentrated the role of disseminating information via national security agencies that have a history of problematic information sharing and a lack of transparency and accountability.

Changes implemented in Bill C-70 to disclosure powers in s. 19 of the *CSIS Act* have broadened its disclosure powers in two ways:

First, it expanded the ability for CSIS, with ministerial approval, to disclose any information – including personal information – with individuals and entities. While previously restricted to government agencies, with approval CSIS will now be able to share with "any person or entity." It retains the restriction that any disclosure must be "essential in the public interest and that interest clearly outweighs any invasion of privacy that could result from the disclosure, to that person or entity," but this still provides wide latitude to begin sharing personal information with private corporations, or individuals and entities outside of Canada who are not obliged to follow Canadian privacy protection laws.

Second, it creates a new power for CSIS to disclose information "for the purpose of building resiliency against threats." Such disclosure cannot contain personal information or the names of specific private entities, but can be once again shared with any "person or entity."

In both cases, it is important to note that the disclosure rules are not limited to foreign interference threats, but any threat to the security of Canada as defined in the *CSIS Act*.

This grants CSIS a central role in deciding what information to disclose and to whom. However, journalists and NSIRA have raised serious questions about how CSIS has handled the disclosure of sensitive information in the past. This includes, for example, participating in private information sharing sessions with natural resource companies which framed Indigenous land defenders as "extremists" and prioritized economic interests over Indigenous rights, as well as Charter protected rights of free expression.[3] In another example, NSIRA found that when disclosing information under its threat reduction powers, CSIS failed to account for ways in which third parties could take actions that violate the rights of individuals.[4]

[3] Livesey, B. "Canada's spies collude with the energy sector," 18 May 2017. *National Observer.* Online: https://www.nationalobserver.com/2017/05/18/news/canadas-spies-collude-energy-sector

[4] National Security and Intelligence Review Agency. "Annual Report 2021," 2022. Online: https://nsira-ossnr.gc.ca/wp-content/uploads/AR-2021_EN.pdf

In addition to these concerns, there is also the challenge of ensuring that information shared in secret is accurate. There have been multiple instances in the past of CSIS sharing either inaccurate or unsubstantiated information, resulting in harm to individuals' rights. During the Public Inquiry into Foreign Interference, we have heard that CSIS was required at times to revisit and recall intelligence reports. While this cannot be completely avoided, it raises questions of whether intelligence shared with a broader audience that is found later to be inaccurate may have already caused irreparable harm.

Improper information sharing has also been at the heart of some of the gravest violations of human rights in the name of national security. Commissions of inquiry into the cases of Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin all demonstrated how their detention, abuse and torture in foreign prisons was facilitated by erroneous and even fabricated information sharing with foreign entities.[5] Currently, Canadian Abousfian Abdelrazik is pursuing Canada in court for damages relating to his detention and torture in Sudan at the hands of their national police, which he alleges – and documents support – was based on requests and information sharing from Canadian national security agencies.[6]

This potential for harm and the need for accountability and record-keeping around information sharing is reflected in the important rules around record-keeping, reporting and destruction of information inappropriately shared, that are contained in the *Security of Canada Information Disclosure Act.*

While we would recommend that the government revisit the changes made to s.19 of the CSIS Act, our broader recommendation to this Inquiry is that government policy should move away from centralizing information sharing with national security agencies whose focus is primarily addressing threats and not on building the resiliency of or supporting democratic processes. Instead, the government should consider creating a separate office to organize and arrange briefings with non-governmental entities to avoid a bias towards securitization and to ensure a holistic approach to protecting against interference with the exercising of fundamental rights or participating in democratic processes.

> **Recommendation 4:** That the government rescind the changes made to s. 19(2)(d) to allow the Minister to authorize disclosure to any person or entity. Alternatively, any authorized disclosure should be limited to entities or persons within Canada.
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> **Recommendation 5:** That the government revisit s. 19(2.1) of the CSIS which allows for information, excluding personal information, to be disclosed by CSIS to

[5] International Civil Liberties Monitoring Group. "Arar +10 Report," October 2015. Online at: https://iclmg.ca/wp-content/uploads/2015/10/Arar-10-EN.pdf

[6] Tunney, C. "Judge rejects Crown's attempt to have CSIS, RCMP testify behind closed doors in lawsuit," *CBC News*, 24 September 2024. Online: https://www.cbc.ca/news/politics/abdelrazik-csis-rcmp-open-trial-1.7332969

any person or entity for the purpose of building resiliency against threats to the security of Canada.

- Resiliency should be defined in the CSIS Act and any further legislation
- Add transparency and accountability requirements for information sharing activities, including:
  - Public sharing of documents and information disclosed, where possible
  - Internal documenting of what information was disclosed to whom and why
  - Reporting all instances of information disclosure to the NSIRA, similar to the existing requirement in s. 19(3) of the CSIS Act, regarding reporting of information disclosed with Ministerial authorization.

Recommendation 6: The government should consider creating a separate office, apart from CSIS, to organize and arrange briefings with non-governmental entities to avoid a bias towards securitization and to ensure a holistic approach to protecting against interference with the exercising of fundamental rights or participating in democratic processes.

3. Protecting freedom of expression, freedom of association and dissent

Human rights defenders, international development and solidarity organizations, politicians, academics, labour organizers, environmental activists and Indigenous land defenders, journalists, and many others in Canada work directly with foreign counterparts daily. Many of these colleagues may work for or represent foreign governments, foreign state-owned or affiliated businesses, organizations, academic institutions or media, or work for multilateral organizations composed of foreign states. These international partnerships are crucial, helping to bring new perspectives, make advances in research and policy, share the work of people in Canada internationally, and help build cooperation and international solidarity.

However, in its response to allegations of foreign interference, the federal government has introduced rules that will almost certainly have a negative impact on the freedom to associate with international colleagues, freedom of expression and on the ability of people in Canada to engage in protest and dissent.

For example:

- The inclusion of vague and undefined language throughout amendments to the *Security of Information Act* (now the *Foreign Interference and Security of Information*, or *FISI*),

particularly that individuals commit an offence by acting "in association with" a foreign entity.

- New offences under *FISI* that, among other things:
    - create a new indictable offense for the carrying out of *any* indictable offense - including relatively minor transgressions - if done for at the direction of, for the benefit of or in association with, of a foreign entity or a terrorist group.[7] This, along with other new or modified offenses, would be punishable by either life in prison, or consecutive sentences that could amount to life in prison, provisions that are normally reserved for the worst forms of crimes and raise concerns of proportionality in sentencing;
    - create a new offense for engaging in surreptitious or deceptive conduct with the intent to influence influencing political or governmental process at the direction of, or in association with, a foreign entity.[8] However, the broad definitions of political process, including educational governance, risks capturing legitimate political activities
- The creation of a Foreign Influence registry that will require individuals and organizations to register should they, under the direction of or in association with a foreign principal: communicate with a public office holder; communicate or disseminate information that is related to the political or governmental process; or distribute money, items of value or provide a service or use of a facility.[9]
- Changes to the sabotage provisions of the *Criminal Code* that introduces the offense of interference with the broad new category of "essential infrastructure" without adequate protection for acts of dissent, protest or civil disobedience.[10]

While some of these provisions may be necessary to fill gaps in current legislation, there are common, worrisome trends throughout that will have a serious and deleterious impact on freedom of expression, freedom of association, and the ability to participate in democratic processes, including public debate, advocating for policy changes, and acts of protest and dissent.

Most alarming is the use, throughout new foreign interference provisions, of the phrase, "in association with." Acting in association with other organizations does not on the face of it imply influence or control by a foreign entity, but rather a partnership. In such an association, it could be the Canadian partner that is in fact setting the agenda, or working collegially to develop a key set of principles. For example, environmental organizations may work internationally to develop a key set of principles for achieving climate justice goals, or business councils may work

[7] *Foreign Influence and Security of Information Act* [FISI], s. 20.2(1)
[8] FISI, s. 20.4
[9] *Foreign Influence Transparency and Accountability Act*, s. 2
[10] *Criminal Code*, s. 52.1(1)

together to develop ethical and sustainable corporate practices. Neither of these examples entail a Canadian entity working to further the interests of a foreign organization, but would likely be viewed as working "in association with." If these proposals were shared as part of a social media campaign to effect Canadian policy (at any level of government), and one of the partners in such an endeavour is a "foreign principal," the Canadian partner would be required to register their activities with the Foreign Influence registry. Failing to do so could result in substantial fines or prison,[11] and should there be suspicions that the Canadian partner purposefully did not register, they would be open to much more significant charges and penalties under *FISI*.[12]

The combination of the vague nature of "in association" with the broad definition of what constitutes a government process as well as what is considered an influence activity (i.e., sharing on social media), will mean that these laws capture a broad range of activities under the guise of "foreign influence" or "foreign interference."

The result of registering as being involved in "foreign influence" itself will be stigmatizing for Canadian organizations, regardless of how they associate with an international partner. This runs a high risk of Canadians eschewing international work out of fear of accusations of working on behalf of a foreign government. It can also lead to foreign agencies declining to work with Canadians in order to avoid being tagged themselves as being involved in foreign influence activities. For examples, we recommend consulting the International Center for Non-profit Law's recent report, "Foreign Influence Registration Laws and Civil Society: An Analysis and Responses."[13]

It is also likely that these new offences will have a chilling impact on participating in the democratic process in other ways as well. For example, an individual who works in association with foreign partners may decide not to present for office, participate in legitimate lobbying activities or vote in a leadership or nomination process for fear of accusations that they may be engaged in foreign influence activities

These fears are compounded by the significant penalties for contravening either the Foreign Influence and Transparency Act, which, if convicted on indictment, would carry the maximum penalty of $500,000 in fines, up to 5 years in prison, or both. Violations of provisions of the FISI are liable for up to life imprisonment, or, if less than life, the possibility of multiple consecutive sentences. Such severe penalties, combined with ambiguous offences, will only add to the chilling effect.

Bill C-70 expanded existing sabotage offenses under the Criminal Code to include the offense of interfering with a broad new category of "essential infrastructure," defined as:

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[11] *Foreign Influence Transparency and Accountability Act*, s. 25

[12] FISI s. 20.2

[13] Robinson, N. "Foreign Influence Registration Laws and Civil Society: An Analysis and Responses," International Center for Non-profit Law, April 2024. Online at: https://www.icnl.org/wp-content/uploads/2024.04-Foreign-Influence-Laws-and-Civil-Society-Report-vf.pdf

"a facility or system, whether public or private, completed or under construction, that provides or distributes — or is intended to provide or distribute — services that are essential to the health, safety, security or economic well-being of persons in Canada, including the following:

(a) transportation infrastructure;
(b) information and communication technology infrastructure;
(c) water and wastewater management infrastructure;
(d) energy and utilities infrastructure;
(e) health services infrastructure;
(f) food supply and food services infrastructure;
(g) government operations infrastructure;
(h) financial infrastructure; and
(i) any other infrastructure prescribed by regulations."[14]

This creates a very broad new category of establishments that are considered "essential." Any number of these may at some point be the focus of a protest, or impacted by the carrying out of a protest activity.

The following exception is included:

> For greater certainty
> (5) For greater certainty, no person commits an offence under subsection (1) if they interfere with access to an essential infrastructure or cause an essential infrastructure to be lost, inoperable, unsafe or unfit for use while participating in advocacy, protest or dissent but they do not intend to cause any of the harms referred to in paragraphs (1)(a) to (c).[15]

But this still leaves to great a space for interpretation of what the "intent" of a protest is. For example, an Indigenous land defenders have engaged in rail and highway blockades as acts of civil disobedience, with the stated goal of disrupting economic activity to pressure government officials. Knowing that the intent is to in fact cause a disruption, and that it could theoretically entail a risk to the security of Canada or the safety of the public, it would not be outlandish to imagine a future Attorney General of Canada using such a law to criminalize protests with a potential sentence of up to 10 years. This will no doubt cause people in Canada to reconsider whether to participate in acts of protest that could now be considered the much more serious crime of sabotage.

It is also certain that the vast majority of cases where this would be applied would in no way be related to foreign interference activities, despite being the state motivation for enacting these new provisions now.

[14] *Criminal Code*, s. 52.1 (2)
[15] *Criminal Code*, s. 52.1 (5)

Recommendation 7: That the government, at the earliest possible moment, engage with the public, including civil society organizations, to make further amendments to the provisions of Bill C-70, including those recommended in our brief to the Senate.[16]

Recommendation 8: That all future policies on foreign interference must appropriately take into account impacts on freedom of expression, freedom of association, and the ability to engage in protest and dissent.

4. Fairness in judicial proceedings

We have significant concerns regarding changes to the Canada Evidence Act implemented by Bill C-70. Our coalition is fundamentally opposed to expanding the use of secret evidence in Canada's courts under the guise of protecting national security, national defense and international affairs. The introduction of a standardized system for withholding information from those challenging government decisions that have significant impacts on their lives will normalize this process and is likely to facilitate the spread of the use of secret information further into our justice system.

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."[17]

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[16] ICLMG. "Brief on Bill C-70," submitted to the Senate Standing Committee on National Security, Defence and Veterans Affairs, June 2024. Online at: https://iclmg.ca/wp-content/uploads/2024/06/C-70-BRIEF-PROPOSED-AMENDMENTS-ICLMG.pdf

[17] 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

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 organizations which seek to hold executive government and its agencies accountable and answerable for their actions."[18]

We therefore oppose the creation of a standardized Secure Administrative Review Proceeding, as it would serve to further normalize secret proceedings. 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.

Instead, the government should review the areas of legislation that already allow for similar regimes to remove provisions for the non-disclosure of information to appellants and those seeking judicial review.

> **Recommendation 19:** Remove provisions for a new Secure Administrative Review Proceeding and instead review the areas of legislation that already allow for similar regimes, in order to remove provisions for the non-disclosure of information to appellants and those seeking judicial review.

Conclusion

Going forward, it is imperative that policy decisions related to foreign interference are fact-based; are demonstrated to be both necessary and proportionate; are not solely centred in national security responses; respect fundamental rights of freedom of expression and freedom of association; do not infringe fairness in judicial processes; and are adopted in open, transparent and effective public consultations and parliamentary study and debate.

[18] Ibid.

Immediate remedial action must also be taken to address the most glaring problems with the provisions of Bill C-70, as demonstrated above.

Failing to do so will only serve to undermine the stated goal not just of the government, but of all Canadian political parties, of strengthening Canada's democratic institutions and ensuring a safer, more secure country for everyone.

We thank the Public Inquiry into Foreign interference for taking the time to consider our submission.

About the International Civil Liberties Monitoring Group

The International Civil Liberties Monitoring Group (ICLMG) is a Canadian coalition of 44 civil society organizations that works to defend civil liberties and human rights in the context of national security and anti-terrorism activities.