BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

# SUBMISSION TO THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY

Bill C-44, An Act to amend the Canadian Security Intelligence Service Act and other Acts

November 26, 2014 | Carmen K. M. Cheung, Senior Counsel



## Introduction

The British Columbia Civil Liberties Association ("BCCLA") is one of Canada's oldest and most active civil society organizations. Our mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. We are an independent, non-partisan organization. We speak out on the principles which protect individual rights and freedoms, and have played an important and prominent role on almost every significant national security-related civil liberties issue for over 50 years.

Nowhere is the BCCLA's national presence and expertise more evident than in the roles it has played in the development of policy on national security, intelligence and anti-terrorism matters. We were participants in the McDonald Commission, which led to the creation of the Canadian Security Intelligence Service ("CSIS"). We made submissions on the Canadian Security Intelligence Service Act ("CSIS Act") when it was under consideration by Parliament in 1983, at the Act's five-year Parliamentary review, and at various other times when Parliament has considered amendments to the Act. The positions taken by the BCCLA are based on the guiding principle that in a democratic society, restrictions on basic rights and freedoms are justified only if they are ultimately necessary for the sake of protecting those very rights and freedoms.

The BCCLA's submissions on Bill C-44 focus on the following three areas:

1. The creation of a class privilege for CSIS informants;

2. The scope of CSIS's authority to investigate outside Canada; and

3. The jurisdiction of the Federal Court with respect to warrants issued pursuant to s. 21 of the CSIS Act.

## 1. The creation of a class privilege for CSIS informants

It is our submission that this Committee should reject the creation of a class privilege for CSIS informants.

Bill C-44 seeks to create a statutory class privilege over the identity of CSIS informants, similar to the absolute privilege granted to police informants at common law. A CSIS informant privilege would serve as blanket prohibition against the disclosure of either the identity of the human source or information that might lead to the identification of the human source. This prohibition would apply in virtually every circumstance where information may be compelled: the scope of "a proceeding before a court, person or body with jurisdiction to compel the production of information" can encompass everything from criminal trials and immigration hearings to Commissions of Inquiry and investigations by review bodies.



Bill C-44 contemplates only two exceptions to this prohibition. First, if the informant and the CSIS Director both consent to disclosure of identity and identity information, then the privilege can be waived. Second, the Federal Court of Canada may order an exception to the privilege where disclosure of identity and identity information is essential to establish innocence. The burden to seek such an order would rest on the individual whose innocence is at stake. The application for such an order could only be made by security-cleared counsel – a specially-appointed *amicus curiae* or a lawyer appointed to act as a special advocate in proceedings under the *Immigration and Refugee Protection Act* ("IRPA").

The role of privilege vis-à-vis CSIS informants was extensively studied by the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 ("Air India Inquiry").[1] Mr. Justice John Major canvassed a number of arguments both for and against the creation of a class privilege, including its effect on the willingness of human sources to come forward in the future and its impact on terrorism prosecutions. With all these considerations in mind, he ultimately recommended that CSIS should not be permitted to grant an informer privilege.[2] Rather, the identity and identity information of CSIS informants should be protected on a case-by-case basis under the common law

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[1] Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (2006-2010) (Chair: Mr. Justice John Major), *Air India Flight 182: A Canadian Tragedy, Volume Three: The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions* (Ottawa: Public Works and Government Services Canada, 2010).

[2] *Id.* at 337.

"Wigmore privilege" framework, which places decisions concerning human source confidentiality in the hands of a judge – an impartial and independent decision-maker capable of determining where the appropriate balance lies between confidentiality and disclosure. As he noted in the Air India Inquiry's final report:

> The identities of CSIS sources can already be protected through applications for public interest immunity and national security confidentiality under sections 37 and 38 of the *Canada Evidence Act* or through the recognition of a case-by-case privilege. CSIS dealings with its sources would fall under the first three Wigmore criteria: (1) the communications originated in a confidence that they will not be disclosed; (2) the confidentiality is essential to the maintenance of the relation between the parties; and (3) the relation is one that should be fostered. The critical question in most cases would be whether the injury to the relation by the disclosure of the communication would be greater than the benefit gained for the correct disposal of litigation.[3]



**We agree with the Air India Inquiry's recommendation and submit that a case-by-case confidentiality privilege is the preferable approach when it comes to ensuring that claims of confidentiality are properly balanced against the public interest in disclosure and an individual's interest in knowing the case to be met.**

A class privilege encourages reflexive secrecy in a national security regime that is already prone to secrecy. As Chief Justice Beverly McLachlin noted in her decision for the majority in *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, where the Supreme Court of Canada declined to create a common law class privilege for CSIS informants:

> Courts have commented on the government's tendency to exaggerate claims of national security confidentiality. As Justice O'Connor commented in his report on the Arar inquiry,
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> > Overclaiming exacerbates the transparency and procedural problems that inevitably accompany any proceeding that can not be fully open because of [national security confidentiality] concerns. It also promotes public suspicion and cynicism about legitimate claims by the Government of national

[3] *Id.* at 137.

security confidentiality.[4]

Thus, the Chief Justice emphasized the important role of the judge as "gatekeeper" against such overclaiming, and the importance of courts remaining "vigilant and skeptical" with respect to government claims of confidentiality.[5]

The case-by-case approach to privilege appropriately puts the initial decision of whether secrecy is warranted in the hands of the court, rather than with the CSIS agent tasked with handling the human source. As independent and impartial decisionmakers, judges are regularly called upon to engage in complex balancing of competing needs and interests. They are in the best position to ensure that decisions concerning whether to disclose informant identity are made with full consideration of not only state interests in confidentiality, but of the rights of the individual seeking disclosure.



Ultimately, there is little to be gained in terms of protecting national security information through the creation of a CSIS informer privilege. Indeed, sensitive information such as CSIS informer identity is already broadly protected through multiple schemes, from the *Security of Information Act* to ss. 18 and 19 of the CSIS Act to the statutory disclosure framework in Division 9 of the *Immigration and Refugee Act* to the sections of the *Canada Evidence Act* referred to by Justice Major. On the other hand, departing from the case-by-case model will have serious consequences for the rights of individuals implicated by confidential human source information. Under the case-by-case model, the burden is on the government to justify confidentiality in each individual case. Under the class privilege model, the burden is on the individual to argue for why there should be an exception to the privilege. In cases involving national security, where much of the evidence might already be secret or heavily redacted, this adds yet another level of complexity to the proceedings for individuals who might be facing serious criminal charges or threat of deportation.

Moreover, under Bill C-44, this ability to challenge the privilege is only available in cases where innocence is at stake. But the use of information from CSIS human sources is not limited to criminal prosecutions – it is commonplace in immigration proceedings (such as security certificate cases or inadmissibility proceedings) and can play a role in justifying preventative detention, subjecting an individual to investigative hearings, or even in

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[4] *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37 at para. 63 (internal citations omitted).
[5] *Id.* at paras. 63-64.

passport revocation and citizenship stripping. **If there is to be a class privilege for CSIS informants, then the legislation must be clarified to ensure that the exception to the privilege encompasses all instances where rights to life, liberty and security of the person are at stake.**

### 2. The scope of CSIS's authority to investigate outside Canada

Bill C-44 seeks to establish CSIS's authority to conduct investigations outside of Canada, potentially with the cooperation of foreign agencies. Any expansion of CSIS authority, however, must be accompanied by a corresponding expansion of independent review and oversight.



Since CSIS was first established, Canada's national security apparatus has grown in size, scale, reach and integration. The various agencies responsible for protecting Canada's national security have become more integrated in their operations, and ever more funds are devoted to national security activities. Meanwhile, review and oversight mechanisms for national security activities have failed to keep pace, and in the case of CSIS, have been actively eroded.

The McDonald Commission, which led to the creation of CSIS, made clear that review and oversight were crucial components of any security intelligence regime.[6] As a result, the CSIS Act as originally enacted contained two accountability mechanisms for CSIS. The first is the Inspector General, responsible for internal review and reporting on operational compliance directly to the Minister overseeing CSIS. The second is the Security Intelligence Review Committee ("SIRC"), responsible for external review and reporting on audits and public complaints to Parliament. In 2012, however, the office of the Inspector General was abolished, which eliminated the key internal monitor over CSIS activities. Its responsibilities were reallocated to SIRC, though SIRC itself has been faced with ongoing operational challenges these past few years, and just recently publicly questioned its ability to "operate efficiently" in light of ongoing concerns relating to appointments to the Committee.[7]

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[6] Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (1979-1981) (Chair: Mr. Justice David C. McDonald), *Freedom and Security under the Law: Second Report* (Ottawa: Supply and Services Canada, 1981) vol. 2 at 754.
[7] Ian MacLeod, "Depleted spy watchdog SIRC scrambles to keep up with CSIS" *Ottawa Citizen*, online: (2014) <http://ottawacitizen.com/news/national/depleted-spy-watchdog-sirc-scrambles-to-keep-up-with-csis>; *see also* Reg Whitaker, "CSIS Watchdog Misbehaves, Government Shrugs" *Prism Magazine*, online: (2011) <http://prism-magazine.com/2011/11/csis-watchdog-misbehaves-government-shrugs/>.

The elimination of the Inspector General has had a direct impact on the effectiveness of CSIS's operations; indeed, at least some of the issues identified by SIRC in its 2013-2014 Annual Report can be traced back to the fact that the Minister no longer has the Inspector General as his "eyes and ears" inside the agency. In one review, SIRC found that CSIS failed to report sensitive and potentially controversial activities to the Minister of Public Safety in a systematic or consistent manner.[8] SIRC only came to discover this because it happened to be studying a particularly sensitive CSIS activity. Under the oversight regime envisioned by the original CSIS Act, such accountability failures would likely have been detected earlier by the Inspector General, who was responsible for ensuring that the Minister remained appropriately informed of CSIS activities.



The way in which CSIS engages with review and oversight bodies has also created challenges for accountability. For example, SIRC reports that it encountered serious difficulties in conducting its review and that in one investigation, it had been "seriously misled" by CSIS and that CSIS had "violated its duty of candour". As noted in SIRC's most recent annual report:

> In two reviews, SIRC encountered significant delays in receiving requested documentation and had to press the Service to obtain complete and consistent answers to several questions. With effort, SIRC was eventually provided all the relevant information it required to carry out and complete its reviews, but these difficulties and delays caused the Committee concern.
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> SIRC encountered similar disclosure difficulties in the investigation of two complaints. In one investigation, SIRC found that it had been seriously misled by CSIS and that CSIS had violated its duty of candour during *ex parte* proceedings by not proactively disclosing in its evidence its rejection of the reliability of a source of information. In a second complaint report, SIRC was critical of CSIS for failing to proactively highlight a highly relevant document. SIRC reminded CSIS that its disclosure obligations went beyond producing a large quantity of documents for SIRC's review and included the duty to proactively present the most relevant pieces of evidence before any presiding Member.[9]

Last year, the Federal Court of Canada similarly held that CSIS had breached

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[8] *Id.* at 19. *See also id.* at 23 ("SIRC believes that many of the issues raised in this review go to the heart of Ministerial accountability over CSIS.").
[9] *Id.* at 3 (emphasis added).

its duty of candour when applying for a warrant to engage in foreign investigations of Canadians overseas under section 21 of the *CSIS Act*.[10] This year, the Federal Court of Appeal affirmed that ruling.[11]

CSIS simply has not been properly accountable for its existing powers. While Bill C-44 expands CSIS's authority outside of Canada, SIRC's latest report highlights serious concerns with current CSIS operations overseas.[12] This includes flaws with how CSIS confirms the value and reliability of intelligence collected overseas, as well as operational issues at the foreign stations themselves.[13] These problems can have a direct impact on how CSIS investigates Canadians at home and calls into question the effectiveness of current CSIS operations abroad.



These operational concerns all highlight the need for robust review and oversight to ensure that Canada's security agencies are working effectively and lawfully. Any further expansion of CSIS's authority must be accompanied by expanded accountability. **It is our submission that the office of the CSIS Inspector General must be restored, and that Parliament should take immediate steps to create an integrated and expanded national security accountability regime as contemplated by Justice Dennis O'Connor in his recommendations arising from the Arar Inquiry.**

### 3. The jurisdiction of the Federal Court with respect to warrants issued pursuant to s. 21 of the CSIS Act

Canadian courts should not be asked to authorize violations of foreign law.

Bill C-44 proposes to amend s. 21 of the CSIS Act to permit judges to issue warrants for CSIS to conduct investigations "[w]ithout regard to any other law, including that of any foreign state". This is simply extraordinary in what it asks of Canadian courts, and what it permits CSIS to do once such warrants are granted.

We believe that asking Canadian courts to authorize violations of foreign law simply invites reciprocal conduct by foreign courts and erodes Canada's reputation for respecting the rule of law. It is also not entirely clear what sort

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[10] *X (Re)*, 2013 FC 1275 at para. 118.
[11] *X (Re)*, 2014 FCA 249.
[12] Security Intelligence Review Committee, *Lifting the Shroud of Secrecy: Thirty Years of Intelligence Accountability, Annual Report 2013-2014* (Ottawa: Public Works and Government Services Canada, 2014) at 20-26.
[13] *Id.* at 20-23, 25-26.

of protection these warrants would provide for the CSIS agent caught breaking a foreign law while abroad. Nor is it clear whether such warrants can completely shield CSIS from accountability here in Canada if illegal actions undertaken by a foreign agency working in coordination with CSIS results in the violation of a Canadian's rights abroad – CSIS complicity in the mistreatment of Omar Khadr while he was detained at Guantanamo Bay comes to mind.[14]

**This expansion of the s. 21 warrant is both unprincipled and unwise. We urge the Committee to reject this amendment to the CSIS Act.**



## Conclusion

There is little doubt that CSIS has a crucial role in maintaining public safety and national security. Bill C-44 proposes important changes to the CSIS Act, which warrant serious consideration and meaningful public debate. We hope that these submissions will assist the Committee in its deliberations.

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[14] *See* Security Intelligence Review Committee, *CSIS's Role in the Matter of Omar Khadr* (SIRC Study 2008-05), online: (2009) <www.sirc-csars.gc.ca/opbapb/2008-05/index-eng.html> (finding that "CSIS failed to give full consideration to Khadr's possible mistreatment by US authorities before deciding to interact with them on this matter" and that "CSIS failed to take into account that while in US custody, Khadr had been denied certain basic rights which would have been afforded to him as a youth"); *see also Canada (Justice) v. Khadr*, 2008 SCC 28; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3.