

**BC CIVIL LIBERTIES ASSOCIATION SUBMISSION
TO THE STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL
SECURITY**

Bill C-51, Anti-Terrorism Act, 2015

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Introduction

Good morning. It is a privilege to appear before the Committee again. On behalf of the British Columbia Civil Liberties Association, thank you for your invitation to speak today. The BCCLA is a non-profit, non-partisan organization based in Vancouver, British Columbia. For over 50 years, the mandate of the BCCLA has been to promote, defend, sustain and extend civil liberties and human rights in Canada.

We have submitted for the Committee's consideration a written brief setting out our chief concerns with Bill C-51, and hope that as the Committee examines this Bill, it will consider not only whether its provisions are constitutionally compliant, but whether they are also efficacious and just.

We raise six chief concerns in our brief – given our limited time here, I can only canvass them in my opening remarks, but I hope the Committee will refer to our written submissions, which set out our views in a more thorough manner.

First, it is our submission that the *Security of Canada Information Sharing Act* is fundamentally flawed and should not be enacted. It endorses a radical conception of “security” unprecedented in Canadian law, and an unbounded scope of what it means to “undermine” Canadian security. Based on these expansive concepts, the *Act* authorizes warrantless information sharing across government and dissemination outside of government. As the Privacy Commissioner has pointed out in his submissions to this Committee, such widespread and relatively unfettered access to personal information poses serious dangers to individual privacy. We and others have also suggested that such massive data collection and information sharing may not necessarily benefit security, either. Moreover, the *Act* deepens an already serious deficit in national security accountability.

Professors Kent Roach and Craig Forcese have extensively detailed the legal problems with this proposed Act, so we will not repeat them here. Paul Champ, who is appearing on behalf of the International Civil Liberties Monitoring Group today, will discuss in greater detail the human rights concerns raised by the *Information Sharing Act*. We share the ICLMG's concerns. We add only the following observation: to those who might say that this proposed Act poses little threat to freedom of expression and dissent, recent examples show that government already takes a very wide view as to what constitutes a threat to Canada's security; we need only to look at CSIS and RCMP monitoring of non-violent protests undertaken by First Nations and environmental groups.

Second, it is our submission that the *Secure Air Travel Act* should be rejected. As a threshold matter, we question the efficacy of no-fly schemes in general. Travelers on such lists are deemed too dangerous to fly, yet too harmless to arrest. It is our view that if law enforcement officials have enough information to determine that an individual poses a threat to aviation safety, or that they are planning to board a plane in order to commit a terrorism offence, they are also likely to have enough information to lay charges or seek a recognizance order with conditions. If it is indeed necessary to impose a travel ban, then the criminal law is already well-equipped to allow the government to seek a court order to that effect.

But even if no-fly schemes *do* improve aviation security, the system proposed here suffers from serious procedural deficiencies. The proposed Act creates a system where travelers have no concrete way of knowing whether they are on the no-fly list, where the reasons for listings are largely kept secret, and where the judicial process for reviewing delisting applications can be held in secret. This is a dangerous lack of due process.

And while travelers can't access information relating their own listing, the proposed Act does allow the government to share its no-fly list with other countries, with no statutory limitations on how that information can be used by the foreign state. Canada's experience with mistakenly labeling individuals as security threats and providing that information to foreign governments should counsel against such carte-blanche approaches to foreign information-sharing.

Third, we oppose the creation of an advocating or promoting terrorism offence in the *Criminal Code*. We see no security interest in further criminalizing expression beyond what is already proscribed by law. The *Criminal Code* already makes it

illegal to counsel anyone to commit a terrorism offence. Considering that “terrorism offences” include acts that fall well short of violence – such as preparing to commit terrorist acts or supporting terrorist activity – this already captures a broad range of terrorism-related expression. Similarly, the participating, facilitating, instructing and harbouring provisions contemplate recruitment and instruction to commit terrorist acts as criminal offences. In *Khawaja*, the Supreme Court of Canada considered the constitutionality of the definition of “terrorist activity” in the *Criminal Code*, and allowed it to include “threats of violence”.

This new offence, then, would criminalize expression far removed from acts of terror or violence. It would make criminals of individuals whose sentiments may never even leave the confines of their own living room, so long as their listener is someone who might commit a terrorism offence. The new offence contains no requirement that the speaker actually intends a terrorism offence to be committed. It contains no requirement that the listener commit a terrorism offence, either.

Endorsing acts of terror may be upsetting to some, and repulsive to many. But freedom of expression is what creates a democratic society, in which we can debate the merits of ideas – even those that as individuals we might find deeply offensive. A democracy is based on the premise that individual citizens have the capacity to govern themselves, to understand and evaluate different perspectives with which they are confronted, to deliberate their merits, and to ultimately decide which viewpoints to adopt, and which to discard. Accordingly, we urge this Committee to reject the creation of this new offence.

Fourth, we submit that this Committee should reject the proposed “preventative detention” amendments. Bill C-51 expands a troubling regime of preventative detention by lowering already low thresholds for detaining individuals on mere suspicion of dangerousness. When this Committee debated the reintroduction of the preventative detention provisions currently in the *Criminal Code*, we expressed serious concerns about the necessity for such sweeping arrest and detention powers. While we continue to believe that it is preferable to charge terrorism suspects under the criminal law so that they are afforded appropriate due process protections, the fact remains that the government already has extraordinary powers at its disposal. Further expansion of this regime is simply unwarranted. The question this Committee and all Canadians should be asking is not what additional powers should be granted to government to protect public safety, but how well existing powers are being used and whether the existing criminal law is being properly enforced.

Fifth, we believe that the proposed amendments to the *CSIS Act* are unwise and unnecessary, and should be rejected. By giving CSIS the power to engage in “threat disruption”, Bill C-51 blurs the line between spying and policing carefully drawn following the McDonald Commission. This “threat reduction” power is a policing power. It is a policing power made extraordinarily broad by virtue of the expansive definition of “threats to the security of Canada” contained in s. 2 of the *CSIS Act* – a definition that was constructed to set out the mandate of an agency responsible for collecting and evaluating information, not a policing authority. It is a policing power made dangerous given the secrecy that accompanies national security activities – rights violations may be more difficult to detect, and once detected, more difficult to remedy. And it is a power that seems wholly unnecessary – government has provided little evidence for why this expanded power should be granted to CSIS or why CSIS should have any policing powers at all.

We are deeply troubled by the proposed CSIS warrant powers in this Bill, and the proposition that Canada’s courts should be tasked with authorizing measures that violate constitutional rights. As many others have observed, this profoundly misconstrues the role of the court in our constitutional system. And to ask the court to authorize violations of fundamental rights – such as those protected by the *Charter* – is simply offensive to the rule of law. Over the past decade, we have seen the effects of an approach to national security that at best, privileges bare legality, and at worst, descends into illegality. The consequences for the rule of law and human rights have been profound. Meanwhile, it remains an open question whether the “gloves off” approach to national security has made Canada or any of our allies any safer.

Finally, Bill C-51 ignores the Supreme Court of Canada’s teachings that the government cannot rely on secret evidence in security certificate proceedings without providing some way for the named person to know the case to be met, and a procedure by which the evidence could be tested. **The proposed amendments to IRPA which would limit the scope of materials produced to special advocates should be rejected.** It is difficult to conceive what sort of information is being exempted by these provisions – by definition, the information is neither relevant to the government’s case against the named person, nor is it information to be considered by the judge in determining whether the certificate is reasonable. It begs the question of why this information is being placed before the judge at all, and leads us to conclude that this class of information may be so problematic that rather than being exempted from disclosure, it *must* be made available to special

advocates to review and potentially challenge.

Conclusion

It is difficult to comment on national security powers without also discussing the need for real accountability and review, but I am out of time. So I will just end by saying this: We cannot afford to enact this Bill, because we cannot afford to further expand the reach and scope of our national security activities without taking steps to ameliorate what is now a staggering accountability deficit.

Thank you again for this opportunity, and I look forward to your questions.