

Proposed Amendments to Bill C-51 that Satisfy Stated Government Security Objectives and are Designed to Minimize Negative “Second Order” Consequences, Reflect Learning from Commissions of Inquiry and Honour Constitutional Expectations

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Please note that we not cover Bill C-51’s amendments to the Immigration and Refugee Protection Act, which we believe also require modification. On this issue, we defer to the submissions being prepared by the Special Advocates, who we hope will be invited before committee to present their views.

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<p>CSIS Act “measures” in Part 4 of Bill C-51.</p> <p>CSIS will be expressly authorized to “take measures, within or outside Canada, to reduce” very broadly defined “threats to the security of Canada”. Where authorized by Federal Court warrant, these “measures” may “contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms” or may be “contrary to other Canadian law”.</p>	<p>See Backgrounder #2:</p> <ul style="list-style-type: none"> • Serious departure from CSIS’s traditional role as an intelligence service, creating operational concerns relating to possible conflict and disruption of RCMP police investigations, second-order impacts for subsequent criminal trials, resource implications for CSIS in terms of building new institutional skills, etc. • Ties new “measures” powers to CSIS’s entire “threats to the security of Canada” mandate, a broad concept that contains some concepts thoroughly critiqued by SIRC in 1989, even as applied to mere intelligence gathering • In the result, measures can 	<ul style="list-style-type: none"> • Reconsider the need for CSIS to engage in “measures”, unless clearly persuaded that the RCMP is incapable of performing the necessary security functions and the RCMP and CSIS have concrete plans on how to avoid conflicting operations that may, ultimately, impair the ability to secure criminal convictions. • Especially reconsider whether CSIS needs to engage in measures violating Canadian law. • In the alternative: <ul style="list-style-type: none"> ○ At the very least, amend proposed s.12.1(3) to remove any reference to the Charter being contravened by a measure, thereby rejecting any interpretation of the amendments that suggests CSIS could violate constitutional obligations – an interpretation that would necessarily provoke an avertable constitutional challenge. The revised provision would read: (3) “The Service shall not take 	<p>Being prepared and to be added in final</p>

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	<p>reach reasonably mainstream conduct, especially given the breadth of s.2(b) of “threats to the security of Canada” and also given that the exception under s.2 of the CSIS Act is limited to “lawful” protests and advocacy. Unlawful protests could be include wildcat strikes or protests done without proper permits.</p> <ul style="list-style-type: none"> • Outer limit of the measures tied only to obligation not to inflict bodily harm, obstruct justice or violate sexual integrity – government examples of where measures would be used much less than extreme than these acts, so we are left wondering at such a permissive outer limit, accommodating much potentially controversial CSIS behaviour • This limit appears to be a “cut and paste” from RCMP powers in s.25.1 of the Criminal Code, but 	<p>measures to reduce a threat to the security of Canada if these measures will be contrary to Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1, and will not contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms.”</p> <ul style="list-style-type: none"> ○ Recraft the outer limits of illegal conduct so to include, in addition to bars on bodily harm, obstruction of justice and violation of sexual integrity, these additional prohibitions: <ul style="list-style-type: none"> ▪ loss of or serious damage to property; and ▪ detention of a person ○ Recraft s.12.2(2) to specify “In subsection (i), ‘bodily harm’ has the same meaning as in section 2 of the Criminal Code and for greater certainty includes torture within the meaning of s.269.1 of the Criminal Code or cruel, inhuman or degrading treatment or punishment within the meaning of the UN Convention Against Torture. ○ Limit the new CSIS measures to counter-terror operations under s.2(c) of the CSIS Act. Alternatively, amend s.2(b) of the 	

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	<p>without many of that section’s safeguards.</p> <ul style="list-style-type: none"> • The only clear trigger for the Federal Court warrant are “measures” that “will “contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms” or may be “contrary to other Canadian law” • The trigger will rarely apply in international operations, since Canadian law and the Charter rarely extend outside Canada, and therefore will rarely be contravened. • The concept of a court authorizing a Charter breach is alien to our legal tradition and the role of courts, is not analogous to what happens with search warrants and it not consistent with the conventional way in which s.1 of the Charter operates. • The warrant proceeding is secret, and conducted without “devil’s advocate” 	<p>CSIS Act to follow the 1989 recommendations of SIRC’s 1988-1989 assessment¹ of the CSIS Act, at p.56-57. This would at least limit the prospect that CSIS activities might reach many non-violent democratic protest movements.</p> <ul style="list-style-type: none"> ○ Incorporate the statutory special advocate provisions from the Immigration Refugee Protection Act into the warrant proceedings and expressly provide these special advocates with standing to appeal warrant decisions. ○ Follow Criminal Code s.25.1 (for the police) and require a <i>public</i> report with data on the use of CSIS measures each year and general information on the nature of the CSIS’s illegal (but judicially exonerated) conduct ○ Follow Criminal Code s.25.1 (for the police) and require that a person affected by CSIS’s illegal (but judicially exonerated) conduct must be notified of the conduct within one year, subject to reasonable exceptions analogous to those enumerated in s.25.1 of the Criminal Code. 	

¹ http://www.sirc-csars.gc.ca/pdfs/ar_1988-1989-eng.pdf

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	<p>representation balancing the government position.</p> <ul style="list-style-type: none"> ▪ There is no disclosure requirement, unlike with police warrants under Part VI or police powers under s.25.1 of the Criminal Code. CSIS warrants are rarely disclosed as part of subsequent court proceedings. In the result, the whole process risks developing a highly secretive jurisprudence on when a state agency may violate the law and Charter. • Because of the present weakness of the SIRC review system, a substantial amount of CSIS conduct will go unreviewed by an independent body, a grave concern with a covert agency that will be empowered to do things to people just short of inflicting bodily harm, obstructing justice or violating sexual integrity 		
<p>“Advocates and promotes terrorism</p>	<p>See Backgrounder #1:</p> <ul style="list-style-type: none"> • Overbroad offence could 	<ul style="list-style-type: none"> • Reject proposed offence. The government’s rationale for offence not convincing given 	

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<p>offences in general” (proposed s.83.221 of the Criminal Code, found in Part 3 of Bill C-51)</p>	<p>violate and chill free expression.</p> <ul style="list-style-type: none"> No defence for legitimate expression analogous to those found, e.g., in the Criminal Code hate speech provisions. Breadth of reference to “terrorism offences in general” is potentially vast, and at the very least uncertain. Fault requirements of “knowledge” and “recklessness” less than much more reasonable “willful” concept in the hate crimes context 	<p>breadth of existing offences and possible chilling effect of proposed offence on speech and counter-radicalization outreach</p> <p>In the alternative:</p> <ul style="list-style-type: none"> Incorporate defences found in s.319(3) (on hate crimes) Expressly incorporate defence in s.83.01(1.1) to protect expression of political and religious thought Raise fault requirement from “knowing” to “willfully” advocate, “for the purpose of inciting” not “recklessness” that terrorism offences will be committed as result of communication Replace “terrorism offence in general” with “terrorist activity” as defined in s.83.01 of the Criminal Code. The resulting offence would read: <p>(1) Every person who, by communicating statements, willfully advocates or promotes the commission of a terrorist activity for the purpose of inciting an act or omission that would be a terrorism offence—other than an offence under this section—is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.</p>	
<p>Deletion of “Hate Propaganda” from the Internet authorization in s.83.222 (in Part 3 of</p>	<p>See Backgrounder #4:</p> <ul style="list-style-type: none"> Overbroad definition of “terrorist propaganda” that includes material that 	<ul style="list-style-type: none"> Unless the new speech offence is amended as above, amend definition of “terrorist propaganda” to remove reference to written and visual material that “advocates or 	

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Bill C-51)	<p>“advocates or promotes terrorism offences in general”</p> <ul style="list-style-type: none"> • Possibility of “informal” enforcement through police requests made to internet service providers that short-circuits court order deletion process • Adversarial court deletion and appeal process is appropriate, but the adversarial nature of the process could be undermined if posters of material are unwilling to appear in court because of fear of being charged under “advocacy or promotion offence” • Enforcement of terrorist propaganda provisions by CBSA officials under consequential amendment to Customs Tariff potentially problematic, and non transparent, especially in the absence of any viable review mechanism. 	<p>promotes the commission of terrorism offences in general” so that terrorist propaganda is limited to such material that “counsels” or “instructs” a terrorist activity. This would limit the provision to speech that effectively is already criminal.</p> <ul style="list-style-type: none"> • Expressly incorporate special advocate system into the judicial deletion system, restoring an element of the adversarial system where a judicial deletion order is sought and there is no party opposing it. • Reject provision for enforcement by customs officials without judicial authorization, or some sort of robust administrative review and appeal process. 	
New Security of Canada Information	<p>See backgrounder #3</p> <ul style="list-style-type: none"> • Radically overbroad 	<ul style="list-style-type: none"> • Replace overbroad definition of “activities that undermine the security of Canada” 	

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<p>Sharing Act (Part I of Bill C-51)</p>	<p>definition of security interests for information sharing about any “activity that undermines the security of Canada”</p> <ul style="list-style-type: none"> • Under-inclusive exemption of only “lawful advocacy, protest, dissent and artistic expression” • Lack of adequate self-initiated review of information sharing by independent body, especially given the Privacy Commissioner’s own 2014 concerns about review in the national security area • Confusing mixture in s.5 of existing law authority of institutions that receive information and references to “activities that undermine the security of Canada, including in respect of their detection, identification, analysis, prevention, investigation or disruption” • Authorization in s.6 of subsequent disclosure “to any person, for any purpose” so long as is “in accordance with law” 	<p>with the more limited and established definition of “threats to the security of Canada” from s.2 of the CSIS Act. Although not eliminating the danger of information sharing about illegal protesters, this would avoid the radical expansion of security interests to include potential sovereignist, environmental, Aboriginal and diaspora groups who engage in any illegality including illegal strikes, graffiti and breach of municipal by laws</p> <ul style="list-style-type: none"> • Amend s.5 to make crystal clear that institutions can only receive information that is <i>relevant</i> to their existing mandates and legal authorities and that agencies put in place protocols for ensuring the reliability of shared information, as per the Arar Commission recommendations. • Delete s.6 that authorizes subsequent disclosure “to any person, for any purpose” • Match information sharing powers with amendments that give independent review body(s) review over all of the government of Canada’s information sharing activities under the new Act. Especially, insure that this body has the power to compel deletion of unreliable information from all the agencies to which it has been distributed. • Delete the requirement in s.2 that advocacy and protest” must be “lawful” to be protected and mirror the exemption in s.83.01(b)(ii) (E) of the Criminal Code for “advocacy, protest, dissent, or stoppage of 	

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	<ul style="list-style-type: none"> • Incorporation and expansion of possibly infinite number of laws, including the Privacy Act, that authorize the disclosure of information for a broad range of purposes • At same time, not mandatory information sharing requirements between CSIS and the RCMP, as recommended by the Air India inquiry. 	<p>work that is not intended to result in the conduct or harm referred to in any of clauses A to C.” (ie essentially that is not intended to endanger life, health or safety)</p> <ul style="list-style-type: none"> • Implement Recommendation 10 of the Air India inquiry² to establish legislated rules in the CSIS Act requiring CSIS to “report information that may be used in an investigation or prosecution of an offence either to the relevant policing or prosecutorial authorities or to the National Security Advisor.” 	
<p>New Secure Air Travel Act (Part II of Bill C-51)</p>	<p>1) Section 8(i) allows potential permanent removal of air travel on a “reasonable grounds to suspect” basis usually reserved for temporary investigative measures</p> <p>2) Section 12 contemplates that the no fly list will be disclosed to any “foreign state” in accordance with an agreement between that state and the Minister of Public Safety. One issue in the Arar case was the use of intelligence based watch</p>	<ul style="list-style-type: none"> ▪ The words “reasonable grounds to suspect” in s.8(i) should be changed to “reasonable grounds to believe” ▪ The words “for transportation purposes” could be added after the words “disclosure of information” to make clear the limited and legitimate purposes of sharing of no fly lists ▪ Copies of the “written arrangements” in s.12 should be shared with an independent review agency. The involvement of the Minister of Transport and CBSA in the administration of this act is sensible, but should be matched up adequate whole of government review. 	

² http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/air_india/2010-07-23/www.majorcomm.ca/en/reports/finalreport/volume1/vol1-chapt7.pdf

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	<p>lists for other other purposes. In recognition of this danger, s.12 should ensure that Canada’s no fly list is only exchanged for transportation safety purposes.</p> <p>3) The requirement for written arrangements is a good safeguard but information sharing agreements should, in principle as under the CSIS Act, be subject to review by an independent body, such as the “Super SIRC” discussed in backgrounder #5</p> <p>4) The “appeal” provisions in this act are in reality limited judicial review by a Federal Court judge of the reasonableness of the inclusion of a person on a no- fly list that authorize the government to use secret evidence not disclosed to the excluded person or subject to any adversarial challenge. The standard for secrecy in s.16(6) is the similar one of injury to national security or danger to any person without allowing the judge to balance the</p>	<ul style="list-style-type: none"> ▪ Section 16(6) (f) should be amended to allow security cleared special advocates or amicus to see any evidence that is used by the judge in determining whether the listing is reasonable but that is not disclosed to the affected person. At present, this section contemplates that the judge could base his or her decision on secret evidence even if no summary of that evidence has been disclosed to the affected person. Special advocates should also be able to play in appeals contemplated under s.17 of the Act. 	

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	<p>competing interests in disclosure and non-disclosure. Section 16(6) (e) again similarly to security certificate proceedings allows the judge to consider material that would not be admissible under the rules of evidence. There is no provision for adversarial challenge by a security cleared special advocate. The result is that the serious consequence of denial of air travel can be denied to a person without what the Supreme Court has stated in the security certificate context are best practices for procedures that rely on secret evidence not disclosed to the affected person.³</p>		
<p>“Preventive Detention”</p>	<ul style="list-style-type: none"> ▪ Whatever the case for more relaxed standards for 	<ul style="list-style-type: none"> ▪ At the very least, s. 83.3(4), allowing detention in exigent circumstances without 	

³ Charkaoui v. Canada [2007] 1 S.C.R. 350. We would expect that the reference in s.16(6) (c) to the requirement that the judge provide the affected person “with a summary of information and other evidence that enables them to be informed of the Minister’s case” will likely be interpreted in light of the minimal disclosure requirement outlined in Harkat v. Canada 2014 SCC 37. This is an important safeguard, but not one that obviates the need for a special advocate to provide adversarial challenge to the secret evidence.

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<p>Recognizances (s.83.3 of the Criminal Code, amended by Part 3 of Bill C-51)</p>	<p>preventive detention of greater duration, there is an urgent need to regulate the nature of that detention.</p> <ul style="list-style-type: none"> ▪ The present wording of section 83.3 allows preventive detention in less than serious instances — the provision is tied to the concept of “terrorist activity” in the <i>Criminal Code</i>. That concept includes acts of violence but also certain inchoate offences such as “conspiracy, attempt or threat to commit any such act, or being an accessory after the fact or counselling in relation to any such act.” These inchoate offences may be far removed from actual acts of violence. ▪ Preventive detentions should not amount to a form of investigative detention, allowing protracted interrogation of subjects. Such an approach could also do an end-run around the restrictions 	<p>judicial warrant, should specifically provide that it applies only where the peace officer suspects on reasonable grounds that the detention of the person in custody is likely to prevent a terrorist activity that involves a <i>serious and imminent threat to life, health, public safety or property</i>.</p> <ul style="list-style-type: none"> ▪ The bill should specify that the questioning of a person subjected to preventive detention in s.83.3 should be conducted only pursuant to conditions imposed by the judge authorizing the detention, and consistent with the requirement that the detainee be treated humanely and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment as that term is understood in the UN Convention on Torture. ▪ Special limiting provisions should be included for questioning persons under 18 years of age ▪ An alternative approach would be to prohibit questioning, as under Australian preventive detention orders (Aus. Criminal Code s.105) or regulating question as is done with respect ASIO questioning warrants under the ASIO Act in Australia. 	

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<p>Lack of Review of the Implementation of Legislation</p>	<p>imposed by Parliament and the courts on investigative hearings.</p> <ul style="list-style-type: none"> ▪ Bill C-51 provides for major changes in Canada’s security architecture, but unlike other bills of similar magnitude (the CSIS Act of 1984 and the Anti-Terrorism Act, 2001) it provides for no mandatory 3 or 5 year review of its operation and perhaps unintended consequences. ▪ Such reviews also provide a mean for Parliamentary committee to review he operation of national security activities and inserting a review mechanism in Bill C-51 would provide a means to ensure more robust Parliamentary review. 	<ul style="list-style-type: none"> ▪ Bill C-51 should be subject to a three year review by a Parliamentary committee with a requirement that the committee start the review no later than 2.5 years after the enactment of Bill C-51 and conclude it no later 3.5 years after its enactment. ▪ The committee that conducts a three year review should be a committee of parliamentarians that as established by legislation will have access to secret information including the classified versions of any relevant reports prepared by existing or new review bodies. ▪ The topics that the committee should consider in the review would include 1) the operation and effects of the <i>Security of Canada Information Sharing Act</i> 2) the operation and effects of the <i>Safe Air Travel Act</i> 3) operation and the effects of the new offence of advocating and promoting terrorism offences in general and related provisions for the deletion of terrorist propaganda including in relation to countering violent extremism measures 4) the effects of CSIS’s new powers in Bill C-44 and C-51 and the new CSIS human source privilege on C-44 on other national security actors including the police and Departments of Foreign Affairs and Department of National Defence 5) the 	

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		<p>operation and effects of changes to preventive detentions and recognizances (“peace bonds”) 6) the adequacy of oversight of these powers within government and 7) the adequacy of independent review of these powers by external review bodies.</p>	
Lack of Sunsets	<ul style="list-style-type: none"> ▪ Although Bill C-51 is proposed as a response to the rise of specific and relatively new security threats related to foreign terrorist fighters, it is introduced as permanent legislation that is not subject to a sunset. Not only may the threat environment change, but the bill may have unintended consequences including with respect to the way that government deals with this novel threat. 	<ul style="list-style-type: none"> ▪ All of Bill C-51 should be subject to a 4 year sunset and would be debated in a manner informed by the proposed 3 year review. 	
Lack of Enhanced Review	<ul style="list-style-type: none"> ▪ Although Bill C-51 will dramatically increase information sharing within government and expand the powers of CSIS and the police, it does not provide any enhanced 	<ul style="list-style-type: none"> ▪ We believe that the jurisdiction of SIRC should be amended to give it an “all of government” remit, and eliminate its stovepiping. This should allow it to “follow the trail” through all of government (a present limitation) and reach, among other things, information sharing under the new 	

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	<p>review. As we have repeatedly said, we believe that to proceed with this bill in its present form with only the current system of review, at current resource levels, would be irresponsible.</p> <ul style="list-style-type: none"> ▪ The only review specific provision in Bill C-51 tasks an already over-taxed body, SIRC, to review an “aspect” of the new CSIS “measures”. ▪ The <i>Security of Canada Information Sharing Act</i> has extremely broad definitions of security and problematic provisions will unclear mixtures of existing statutory mandates and references to preventing and disrupting “activities that undermine the security of Canada”. It also begs questions about the adequacy of existing legal provisions that will in part govern the disclosure of 	<p>information sharing Act. Adequate resources must accompany such an expansion of SIRC. There may be a case for a staged expansion of SIRC’s jurisdiction but given the focus on foreign investigations, expansion to include Foreign Affairs, Department of National Defence and Canadian Border Services Agency, and CSE should be a priority. The model is an Australian-like Inspector General of Security and Intelligence that encompasses and expands the range of the existing review bodies, rather than the splintered and underinclusive Canadian approach.</p> <ul style="list-style-type: none"> ▪ We appreciate that in the context of bill C-51 and given the constraints on the standing committee, it is unlikely that this necessary reform will be implemented. Therefore, in the alternative, the Arar commission recommendation 11⁴ should be honoured and “statutory gateways” should be created that would enable SIRC, the CSE Commissioner, the RCMP Civilian Review and Complaints Body (and, given the information sharing Act) the Privacy Commissioner to share secret information and conduct joint investigations into security matters. For language that does much of this for CSIS, CSE and the RCMP, please see Annex I in backgrounder #5. 	

⁴ http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/EnglishReportDec122006.pdf

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	<p>information under the new Act.</p>	<p>Again, though, these changes <u>must</u> be accompanied by better resourcing of the review bodies, and particularly SIRC given CSIS's new powers.</p> <ul style="list-style-type: none"> ▪ Although such amendments would shore up Canada's fragmented review structure, we stress that they are a second best to the creation of a "super SIRC" with government wide jurisdiction to review national security matters. Statutory gateways by themselves will not respond to gaps in agencies that are reviewed or problems of duplicative review. For instance, CBSA would still not be amenable to independent review, something that is urgently required. 	