February 23, 2015

An Open Letter to Members of Parliament on Bill C-51

Dear Members of Parliament,

Please accept this collective, open letter as an expression of the signatories' deep concern that Bill C-51 (which the government is calling the *Anti-terrorism Act, 2015*) is a dangerous piece of legislation in terms of its potential impacts on the rule of law, on constitutionally and internationally protected rights, and on the health of Canada's democracy.

Beyond that, we note with concern that knowledgeable analysts have made cogent arguments not only that Bill C-51 may turn out to be ineffective in countering terrorism by virtue of what is omitted from the bill, but also that Bill C-51 could actually be counter-productive in that it could easily get in the way of effective policing, intelligence-gathering and prosecutorial activity. In this respect, we wish it to be clear that we are neither "extremists" (as the Prime Minister has recently labelled the Official Opposition for its resistance to Bill C-51) nor dismissive of the real threats to Canadians' security that government and Parliament have a duty to protect. Rather, we believe that terrorism must be countered in ways that are fully consistent with core values (that include liberty, non-discrimination, and the rule of law), that are evidence-based, and that are likely to be effective.

The scope and implications of Bill C-51 are so extensive that it cannot be, and is not, the purpose of this letter to itemize every problem with the bill. Rather, the discussion below is an effort to reflect a basic consensus over some (and only some) of the leading concerns, all the while noting that any given signatory's degree of concern may vary item by item. Also, the absence of a given matter from this letter is not meant to suggest it is not also a concern.

We are grateful for the service to informed public debate and public education provided, since Bill C-51 was tabled, by two highly respected law professors – Craig Forcese of the University of Ottawa and Kent Roach of the University of Toronto – who, combined, have great expertise in national security law at the intersection of constitutional law, criminal law, international law and other sub-disciplines. What follows – and we limit ourselves to five points – owes much to the background papers they have penned, as well as to insights from editorials in the media and speeches in the House of Commons.

Accordingly, we urge all MPs to vote against Bill C-51 for the following reasons:

1. Bill C-51 enacts a new security-intelligence information-sharing statute of vast scope with no enhanced protections for privacy and from abuse. The law defines "activities that undermine the security of Canada" in such an exceptionally broad way that "terrorism" is simply one example of nine examples, and only "lawful advocacy, protest, dissent and artistic expression" is excluded. Apart from all the civil-disobedience activities and illegal protests or strikes that will be covered (e.g. in relation to "interference with critical infrastructure"), this deep and broad intrusion into privacy is made worse by the fact there are no corresponding oversight or review mechanisms adequate to this expansion of the state's new levels of information awareness. Concerns have already been expressed by the Privacy Commissioner, an Officer of Parliament, who has insufficient powers and resources to even begin to

oversee, let alone correct abuses within, this expanded information-sharing system. And there is virtually nothing in the bill that recognizes any lessons learned from what can happen when information-sharing ends up in the wrong hands, as when the RCMP supplied poor information to US authorities that in turn led to the rendition of Maher Arar to Syria and his subsequent torture based on that – and further – information coming from Canada.

2. Bill C-51 enacts a new "terrorism" offence that makes it criminal to advocate or encourage "terrorism offences in general" where one does this being reckless as to whether the communication "may" contribute to someone else deciding to commit another terrorism offence. It is overbroad, unnecessary in view of current criminal law, and potentially counter-productive. Keep in mind how numerous and broad are the existing terrorism offences in the Criminal Code, some of which go beyond what the ordinary citizen imagines when they think of terrorism and all of which already include the general criminal-law prohibitions on counselling, aiding and abetting, conspiring, and so on: advocacy or encouragement of any of these "in general" could attract prosecution under the new C-51 offence. Note as well that gestures and physical symbols appear to be caught, and not just verbal or written exhortations. In media commentary and reports, there have been many examples of what could be caught, including in some contexts advocacy of armed revolution and rebellion in other countries (e.g. if C-51 had been the law when thousands of Canadians advocated support for Nelson Mandela's African National Congress in its efforts to overthrow apartheid by force of arms, when that was still part of the ANC's strategy). So, the chill for freedom of speech is real. In addition, in a context in which direct incitement to terrorist acts (versus of "terrorism offences in general") is already a crime in Canada, this vague and sweeping extension of the criminal law seems unjustified in terms of necessity – and indeed, the Prime Minister during Question Period has been unable or unwilling to give examples of what conduct he would want to see criminalized now that is not already prohibited by the Criminal Code. But, perhaps most worrying is how counter-productive this new crime could be. De-radicalization outreach programs could be negatively affected. Much anti-radicalization work depends on frank engagement of authorities like the RCMP, alongside communities and parents, with youth who hold extreme views, including some views that, if expressed (including in private), would contravene this new prohibition. Such outreach may require "extreme dialogue" in order to work through the misconceptions, anger, hatred and other emotions that lead to radicalization. If C-51 is enacted, these efforts could find themselves stymied as local communities and parents receive advice that, if youth participating in these efforts say what they think, they could be charged with a crime. As a result, the RCMP may cease to be invited in at all, or, if they are, engagement will be fettered by restraint that defeats the underlying methods of the programme. And the counter-productive impact could go further. The Prime Minister himself confirmed he would want the new law used against young people sitting in front of computers in their family basements, youth who can express extreme views on social-media platforms. Why is criminalization counter-productive here? As a National Post editorial pointed out, the result of Bill C-51 could easily be that one of the best sources of intelligence for possible future threats – public social-media platforms – could dry up; that is, extreme views will go silent because of fears of being charged. This undercuts the usefulness of these platforms for monitoring and intelligence that lead to knowing not only who warrants further investigative attention but also whether early intervention in the form of de-radicalization outreach efforts are called for.

3. Bill C-51 would allow CSIS to move from its central current function – information-gathering and associated surveillance with respect to a broad area of "national security" matters – to being a totally different kind of agency that now may actively intervene to disrupt activities by a potentially infinite range of unspecified measures, as long as a given measure falls shy of causing bodily harm, infringements on sexual integrity or obstructions of justice. CSIS agents can do this activity both inside and outside Canada, and they can call on any entity or person to assist them. There are a number of reasons to be apprehensive about this change of role. One only has to recall that the CSIS Act defines "threats to the security of Canada" so broadly that CSIS already considers various environmental and Aboriginal movements to be subject to their scrutiny; that is to say, this new disruption power goes well beyond anything that has any connection at all to "terrorism" precisely because CSIS' mandate in the CSIS Act goes far beyond a concern only with terrorism. However, those general concerns expressed, we will now limit ourselves to the following serious problem: how Bill C-51 seems to display a complete misunderstanding of the role of judges in our legal system and constitutional order. Under C-51, judges may now be asked to give warrants to allow for disruption measures that contravene Canadian law or the Charter, a role that goes well beyond the current contexts in which judges now give warrants (e.g. surveillance warrants and search and seizure warrants) where a judge's role is to ensure that these investigative measures are "reasonable" so as not to infringe section 8 of the Canadian Charter of Rights. What C-51 now does is turn judges into agents of the executive branch (here, CSIS) to pre-authorize violations of Canadian law and, even, to pre-authorize infringements of almost any Charter right as long as C-51 limits – bodily harm, sexual integrity and obstruction of justice – are respected. This completely subverts the normal role of judges, which is to assess whether measures prescribed by law or taken in accordance with discretion granted by statute infringed rights -- and, if they did, whether the Charter has been violated because the infringement cannot be justified under the Charter's section 1 limitation clause. Now, a judge can be asked (indeed, required) to say yes in advance to measures that could range from wiping a target's computer clear of all information to fabricating materials (or playing agent-provocateur roles) that discredit a target in ways that cause others no longer to trust him, her or it: and these examples are possibly at the mild end of what CSIS may well judge as useful "disruption" measures to employ. It is also crucial to note that CSIS is authorized to engage in any measures it chooses if it, CSIS, judges that the measure would not be "contrary" to any Canadian law or would not "contravene" the Charter. Thus, it is CSIS that judges whether to even go to a judge. There is reason to be worried about how unregulated (even by courts) this new CSIS disruption power would be, given the evidence that CSIS has in the past hidden information from its review body, SIRC, and given that a civil-servant whistleblower has revealed that, in a parallel context, Ministers of Justice in the Harper government have directed Department of Justice lawyers to conclude that the Minister can certify under the Department of Justice Act that a law is in compliance with the Charter if there is a mere 5% chance a court would uphold the law if it was challenged in court. Finally, it is crucial to add that these warrant proceedings will take place in secret, with only the government side represented, and no prospect of appeal. Warrants will not be disclosed to the target and, unlike police investigations, CSIS activities do not culminate in court proceedings where state conduct is then reviewed.

4. We now draw attention to effectiveness by noting a key omission from C-51. As the Official Opposition noted in its "reasoned amendment" when it moved that C-51 not be given Second Reading, Bill C-51 does not include "the type of concrete, effective measures that have been proven to work, such as working with communities on measures to counter radicalization of youth – may even undermine outreach." This speaks for itself, and we will not elaborate beyond saying that, within a common commitment to countering terrorism, effective measures of the sort referenced in the reasoned amendment not only are necessary but also must be vigorously pursued and well-funded. The government made no parallel announcements alongside Bill C-51 that would suggest that these sort of measures are anywhere near the priority they need to be.

5. Finally, the defects noted in points 1, 2 and 3 (information-sharing, criminalizing expression, and disruption) are magnified by the overarching lack of anything approaching adequate oversight and review functions, at the same time as existing accountability mechanisms have been weakened and in some cases eliminated in recent years. Quite simply, Bill C-51 continues the government's resolute refusal to respond to 10 years of calls for adequate and integrated review of intelligence and related security-state activities, which was first (and perhaps best) articulated by Justice O'Connor in a dedicated volume in his report on what had happened to Maher Arar. Only last week, former prime ministers and premiers wrote an open letter saying that a bill like C-51 cannot be enacted absent the kind of accountability processes and mechanisms that will catch and hopefully prevent abuses of the wide new powers CSIS and a large number of partner agencies will now have (note that CSIS can enlist other agencies and any person in its disruption activities and the information-sharing law concerns over a dozen other government agencies besides CSIS). Even if one judged all the new CSIS powers in C-51 to be justified, they must not be enacted without proper accountability. Here, we must note that the government's record has gone in the opposite direction from enhanced accountability. Taking CSIS alone, the present government weakened CSIS' accountability by getting rid of an oversight actor, the Inspector General, whose job was to keep the Minister of Public Security on top of CSIS activity in real time. It transferred this function to CSIS' review body, the Security Intelligence Review Committee (SIRC), which does not have anything close to the personnel or resources to carry this function out – given it does not have sufficient staff and resources to carry out its existing mandate to ensure CSIS acts within the law. Beyond staff, we note that SIRC is a body that has for some time not been at a full complement of members, even as the government continues to make no apology for having once appointed as SIRC's Chair someone with no qualifications (and it turns out, no character) to be on SIRC let alone to be its chair (Arthur Porter). And, as revealed in a recent CBC investigation, the government has simply not been straight with Canadians when it constantly says SIRC is a robust and well-resourced body: its budget is a mere $3 million, which has flat-lined since 2005 when the budget was $2.9 million, even as its staff has been cut from 20 in 2005 to 17 now. Without an integrated security-intelligence review mechanism, which should also include some form of Parliamentary oversight and/or review, and with especially SIRC (with jurisdiction only over CSIS) not a fully effective body, we are of the view that no MP should in good conscience be voting for Bill C-51.

Above, we have limited ourselves to five central concerns, but it is important to reiterate that some or all of the signatories have serious concerns about a good number of other aspects of C-51 – and/or about detailed aspects of some of the concerns that were generally expressed in the above five points.

The following are some (but only some) of those concerns, in point form. They are included by way of saying that signatories believe these all need to be looked at closely and rigorously during House of Commons committee study of C-51, now that it has passed Second Reading:

- C-51 radically lowers the threshold for preventive detention and imposition of recognizance with conditions on individuals. Only three years ago, Parliament enacted a law saying this detention/conditions regime can operate if there is a reasonable basis for believing a person "will" commit a terrorist offence. Now, that threshold has been lowered to "may." There has been a failure of the government to explain why exactly the existing power has not been adequate. In light of the huge potential for abuse of such a low threshold, including through wide-scale use (recalling the mass arrests at the time of the War Measures Act in Quebec), Canadians and parliamentarians need to know why extraordinary new powers are needed, especially when the current ones were enacted in the context of ongoing threats by al-Qaeda to carry out attacks in Canada that seem no less serious than the ones currently being threatened by entities like ISIS and al-Shabab.

- C-51 expands the no-fly list regime. It seems to have simply replicated the US no-fly list rules, the operation of which has been widely criticized in terms of its breadth and impacts on innocent people. Is this the right regime for Canada?

- C-51's new disruption warrants now allows CSIS to impinge on the RCMP's law enforcement role, bringing back turf wars that were eliminated when intelligence and law enforcement were separated in the wake of the RCMP's abusive disruption activities of the late 1960s and early 1970s. But, even more important than turf wars is the potential for CSIS behaviour in the form of disruptive measures to undermine both the investigation and the prosecution of criminal cases by interfering with evidentiary trail, contaminating evidence, and so on.

- C-51, in tandem with C-44, permits CSIS to engage not just in surveillance and information-gathering abroad, but also in disruption. There are many questions about how this will work. The danger of lawlessness seems to be significantly greater for CSIS activities abroad, in that CSIS only needs to seek approval for disruption under C-51 where Canadian, not foreign, law could be breached or where the Charter could be contravened (with Canadian law on the application of the Charter outside Canada being quite unclear at the moment). And there is no duty for CSIS to coordinate with or seek approval from the Department of Foreign Affairs, such that the chances of interference with the conduct of Canada's foreign affairs cannot be discounted. Nor can we ignore the likely tendency for disruption measures abroad to be more threatening to individuals' rights than in Canada: for example, Parliament needs to know whether CSIS agents abroad can engage in detention and rendition to agencies of other countries under the new C-51 regime.

We end by observing that this letter is dated February 23, 2015, which is also the day when the government has chosen to cut off Second Reading debate on Bill C-51 after having allocated a mere three days (in reality, only portions of each of those days) to debate. In light of the sweeping scope and great importance of this bill, we believe that circumventing the ability of MPs to dissect the bill, and

their responsibility to convey their concerns to Canadians at large before a Second Reading vote, is a troubling undermining of our Parliamentary democracy's capacity to hold majority governments accountable. It is sadly ironic that democratic debate is being curtailed on a bill that vastly expands the scope of covert state activity when that activity will be subject to poor or even non-existent democratic oversight or review.

In conclusion, we urge all Parliamentarians to ensure that C-51 not be enacted in anything resembling its present form.

Yours sincerely,

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