15 years of problematic national security and anti-terrorism policies and their consequences

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Introduction

The International Civil Liberties Monitoring Group (ICLMG) was created in 2002 with the specific mandate of monitoring the impact of anti-terrorism legislation and other measures on the rights and freedoms of Canadians.

Since then we have raised serious concerns over a series of so-called anti-terrorism measures that have had the cumulative effect of eroding the values of a free and democratic society in Canada, values such as liberty, the rule of law and the principles of fundamental justice.

Over the last 15 years we have appeared before parliamentary committees on many occasions and intervened at the Supreme Court to express our critical views on several issues that continue to be problematic today.

Preliminary remarks on the Green Paper

The Green Paper, both in tone and content, appears biased in favour of the challenges imposed on law enforcement and national security agencies, rather than reflecting a profound concern for democratic rights and freedoms.

The document can be read as to justify some existing measures contained in the *Anti-Terrorism Act, 2015* - including those that the government dubbed the "most problematic elements". It also provides a rationale for the introduction of new powers for collecting online information, such as the reintroduction of “legal access” legislation to obtain digital subscriber information without a warrant. However, the Supreme Court of Canada *Spencer* decision firmly states that law enforcement and intelligence agencies must get a warrant in order to obtain subscriber information even when the telecommunications companies would otherwise give them voluntarily. Furthermore, and in keeping with past attempts to introduce warrantless access to subcribers’ data, the Green Paper has failed to make the case that such indiscriminate powers are needed, and makes several claims that current access mechanisms are ‘inconsistent and slow’ whereas such claims have been repeatedly discredited in the past.

Furthermore, there is no mention in the Green Paper of Canadian Security Establishment Canada (CSEC) and mass surveillance operations with its Five Eyes partners, and this in spite of the Snowden revelations.

There is also no indication in the document that the government intends to implement the O’Connor recommendation to create a robust and independent “review and complaint” mechanism for national security operations - not a Parliamentary oversight body. If it was needed 10 years ago, it is even more urgently needed today.

Issues with Canada's National Security Framework

The *Anti-Terrorism Act, 2015*

Our critique of the *Anti-Terrorism Act, 2015* (or C-51) highlights, by itself, many issues regarding Canada's national security framework as a whole, which we will explore more in details throughout this brief. These include the erosion of the principle of fundamental justice and the rule of law, the repression of dissent, the chill on freedom of expression and academic freedom, Charter violations, and the impact on privacy rights. Here are the issues with C-51 in more details:

- C-51 substantially broadens the powers held by the Canadian Security Intelligence Service (CSIS), transforming it from an intelligence agency to an organization with very broad authority to directly disrupt activities, something CSIS was originally created to avoid. Anything goes except bodily harm, obstruction of justice, and violation of sexual integrity. Although the powers in C-51 generally require CSIS to get a warrant, the law allows judges to grant these warrants authorizing CSIS to violate fundamental rights under the Canadian Charter of Rights and Freedoms. The role of judges in Canada's system is to uphold the Constitution and ensure that any restrictions that the government places on our rights are justified and reasonable. The new warrant powers are a radical change that turn our constitutional system on its head.

- C-51 facilitates the sharing of information on all Canadians amongst up to 17 government agencies for "activities that undermine the security of Canada and other countries" which, according to the definition in the Act, includes a wide range of activities that are not remotely related to terrorism such as activities that "threaten the country's economic interests and financial stability". This could include illegal labour strikes, civil disobedience protests (such as roadblocks to a pipeline project) and even economic boycott initiatives. It also allows information sharing with foreign governments without meaningful safeguards on the use of information, or any oversight, review or accountability for mistakes, potentially leading to serious human rights abuses such as in the cases of Maher Arar, Ahmad El Maati, Abdullah Almalki, Muayyed Nureddin, and Benamar Benatta.

- C-51 creates a new crime of "promoting or advocating terrorism offences in general". Anyone promoting an act of terrorism – regardless of intent – can be sentenced for up to 5 years. What is promoting and what is terrorism is very vague. Furthermore, the list of existing terrorism offences in the Criminal Code is already extensive and includes facilitating, participating, instructing, harbouring and financing. Criminal liability for counselling a terrorist offence is also already a crime under the Code. The primary impact of this new offence will be to chill legitimate speech and send "radical" online expression – which can provide valuable leads for intelligence agencies and law enforcement – underground.

- C-51 codifies a system for establishing a Canadian no-fly list without providing a

clear mechanism for how a person on the list becomes aware of their status, and severely limits their ability to challenge the listing. The law allows for a judicial hearing that may occur outside of public view and allows for the use of secret evidence. This is a radical departure for a mature democracy. Furthermore, while it is next to impossible for a person to gain access to their own listing, C-51 allows your listing to be shared with foreign governments, with no statutory limits on how that information can be used.

- C-51 lowers the existing thresholds for preventive arrest and peace bonds and lengthens the amount of time someone can be held without being charged. Allowing individuals to be subjected to severe restrictions on their liberty without a criminal charge – much less a conviction – is already permitted under existing Criminal Code provisions. These measures are extraordinary and should be permitted only in the most exceptional cases, but the new law would substantially broaden the state's ability to control an individual's liberty without any criminal charge or conviction, and with minimal evidence of any criminal plan or intention by lowering the threshold for a preventive arrest from "will commit" a crime to "may commit" a crime.

- C-51, although it significantly increases information sharing and the powers held by CSIS, does not include any stronger oversight and review mechanisms. Although better oversight and review would not save the law, this omission is especially problematic in the light of the conclusions and recommendations of Justice Dennis O'Connor for the Commission of Inquiry into the Maher Arar case, and the criticisms of present or past CSIS watchdogs, affirming that the present review powers are insufficient and ineffective.

Despite a huge opposition of the Canadian population to the bill, it was adopted by the previous Harper government with an electoral promise to repeal it — which later became a promise to amend the "most problematic elements"[1] — by the current Trudeau government. However , as mentioned earlier, the Green Paper seems to suggest that even the most problematic elements could be preserved. We ask for the total repeal of the *Anti-Terrorism Act of 2015*. C-51 is so flawed and overbroad that it cannot be fixed. The need for any new measure or legislation to fulfill any gaps must then be clearly demonstrated by the government.

Lack and inadequacy of oversight and review mechanisms

In a democratic system based upon the rule of law and the protection of fundamental freedoms, every public institution must be answerable for its conduct particularly agencies such as CSIS, the Royal Canadian Mounted Police (RCMP), CSEC and the Canada Border Services Agency (CBSA) which have such intrusive powers that can profoundly affect the lives of individuals in Canada.

[1] https://www.liberal.ca/realchange/bill-c-51/

There is an urgent need for the establishment of a robust, integrated and independent Review and Complaint body that will have jurisdiction over all agencies and government departments involved in national security.

While the creation of a Committee of Parliamentarians on National Security to ensure the democratic oversight of national security agencies and operations is welcomed, it must be seen as a complimentary mechanism, not a substitute for an independent expert review and complaint body.

A committee of parliamentarians will focus on broad oversight of the national security regime and operations, and related policy matters. It will not have the resources or capacity to carry out after the fact thorough reviews and investigate complaints. Parliamentarians are busy with their parliamentary obligations and cannot develop the expertise nor allocate the time and energy to carry out detailed in-depth reviews and investigations.

As far back as 2006, the Arar Commission concluded that our national security review system was clearly inadequate. Only certain agencies have a review body. CBSA, for instance, has no watchdog body, and other agencies such as CSEC have very limited, weak and inadequate review.

With the new powers contained in C-51, the accountability regime has become even more obsolete. With or without C-51, it is time to completely reform and renovate Canada's oversight, review and accountability regime to meet the challenges of the contemporary world of national security activities.

National security operations are integrated and involve the participation of many law enforcement, security and intelligence agencies, as well as some 17 government departments. No existing review body has the authority to investigate these multi-agency operations, and only three agencies - CSIS, CSEC and the RCMP - have some sort of review bodies, which are today inadequate[2]. Canada is taking an "all of government" approach to security. This must be matched by an "all of government" approach to review and accountability.

What is needed is a new, integrated and single body with the mandate, resources and expertise to conduct detailed reviews and to investigate complaints over all law enforcements, intelligence agencies and government departments involved in national security. With jurisdiction to examine all national security matters within the federal government, the independent review body would be empowered to follow the trail of intelligence, information-sharing, and other national security activities throughout government without the need for complicated choreography between existing bodies, for the creation of new bodies for each and every implicated agency or for the discretionary appointment of public inquiries like the Arar, Iacobucci and Air India

[2] iclmg.ca/issues/oversight-and-review-of-national-security-agencies/

inquiries which had a whole-of-government mandate. Legislative reform would be required to create this entity.

This body with across government review powers must meet a number of democratic values in order for it to achieve legitimacy in the public's eye. First, it must be clearly independent of government and the national security agencies over which it has authority. Second, it must be an expert body that deals with national security issues on a daily basis. As well, the new body must be adequately resourced and staffed in order for it to meet the challenge of effectively reviewing our national security agencies. Third, it must be accountable to the public by making annual public reports assessing whether and how our agencies have lawfully responded to threats to the security of Canada. Finally, the new review body should complement the new committee of parliamentarians by making recommendations to the committee with respect to policy changes that would make our national security agencies operate more effectively and our review system more robust in protecting national security and the civil liberties of all people in Canada. The kind of "on the ground" experience gained by this review body will greatly assist the committee of parliamentarians in confronting the systemic issues it will face in fulfilling its important mandate.

A third component of a robust accountability model would include the important and complementary addition of an Independent National Security Legislation Monitor capable of supporting the work of the Parliament, the National Security and Intelligence Committee of Parliamentarians and the expert review body. Both the United Kingdom and Australia have bolstered national security accountability by appointing such independent monitors of national security law.

These independent monitors are non-government lawyers with a part-time, statutory mandate to issue reports on government performance under anti-terror law and who are entitled to see secret information. But even more notably, they also examine the necessity and usefulness of existing anti-terror laws and respond to requests to examine law reform in particular areas, creating a considerable volume of independent, thorough, and public expert policy analysis. Retaining a reviewer of this sort to perform a “special rapporteur” role in offering expert input would contribute subject-matter expertise to the Committee of Parliamentarians’ work, and also that of regular parliamentary committees performing more classic legislative functions. Finally, if empowered to comment on proposed law reforms, a credible, independent evaluator should be difficult to ignore, or paint in a partisan light.

Issues with Bill C-22

While ICLMG supports the creation of a committee of parliamentarians on national security, we have the following serious concerns with Bill C-22:

Under s. 8, the committee is mandated to review any national security or intelligence activity of CSIS, the RCMP or other Canadian agencies and departments. However, the

Minister can prohibit such a review if they determine that it would be injurious to national security.

Under s. 13, the committee can seek information from any Canadian agencies and departments so long as such information relates to its national security mandate. Despite the fact that the committee members will have security clearance, there are a number of categories of information to which the committee is not entitled under s. 14 such as cabinet confidences, ongoing defence intelligence activities and ongoing law enforcement investigation information, the identity of human sources and other classes of information. Moreover, the Minister may refuse to provide special operational information or information which would be injurious to national security.

Under s. 31, any decision by a Minister to prohibit the committee from reviewing certain national security operations or refusing the committee access to information the Minister views to be injurious to national security is final and cannot be reviewed by a court of law. This kind of unbridled ministerial power is very unusual in our legal system.

Furthermore, the committee reports to the Prime Minister who can return the reports to the committee to remove or censor sections that could be injurious to national security, national defence or international relations before they can be tabled to Parliament. We find this provision to be highly problematic since the committee is created to review the activities of national security agencies which are ultimately responsible to the executive and its head, the Prime Minister. There is an appearance of a conflict of interest in this legislative scheme which could be avoided if the committee was responsible to Parliament.

Finally, there is nothing in Bill C-22 which guarantees that the committee will be adequately resourced with sufficient funding and expert assistance, and again, since the committee reports to the Prime Minister, it would appear that the Privy Council Office would be responsible for appropriating funds. In short, the funding of the committee is left to the discretion of the Prime Minister.

Unregulated information-sharing

Besides the troublesome information-sharing allowed by C-51, we are also deeply concerned by the amount and lack of debate and regulation around information-sharing in the context of the North American Security perimeter and Canada-US border agreements. A huge amount of Canadians' private information, including airline passengers' information on most domestic flights, is now shared with US Homeland Security. Once in the hands of US authorities, this information can be shared among 17 US agencies and is not protected by Canadian privacy laws.

Mass surveillance

In recent years, with the Snowden revelations and the work of several journalists and newspapers, we have learned a lot about national security agencies' capabilities to

conduct mass surveillance, legally or illegally, contributing to the ongoing erosion of privacy. This knowledge is too voluminous to state in this brief but here are some highlights of the issues in Canada.

Communications Security Establishment Canada (CSEC) has allowed the NSA to create a “back door” in an encryption key used worldwide, has spied on Canadians using public WiFi networks, has captured millions of downloads daily, has engaged in mass Internet surveillance of file-sharing sites, has developed cyberwarfare tools to hack into computers and phones all over the world, and has shared information on Canadians with its foreign partners without proper measures to protect privacy. Data were later erased from the agency’s system making it difficult to find out the number of people impacted by the privacy breach.

Furthermore, the law allows CSEC to spy on Canadians by collecting “only” metadata and allows massive spying through Ministerial Authorizations, rather than warrants. CSEC does not necessarily need a court’s approval to assist CSIS in threat reduction, and, according to several CSEC Commissioners, the law regulating CSEC is ambiguous making it difficult for them to truly assess the legality of CSEC activities. Aggravating this situation, the poor record-keeping practices of CSEC has limited the Commissioner’s ability to assess the lawfulness of its activities, and it has no authority to enforce specific actions by CSEC. Finally, the CSEC Commissioner’s reports to Parliament are also censored by CSEC and then cleared by the Minister of Defence who is politically responsible for CSEC. Thus the Commissioner is shackled in their ability to respond to the new realities of expanded, more complex intelligence operations, and of higher levels of public expectations around transparency.

More recently, we have learned from a Security Intelligence Review Committee (SIRC) report of a little-known program of bulk data collection operated by the Canadian Security Intelligence Service (CSIS) for which we are deeply concerned. Firstly, SIRC does not agree with CSIS classification of some of its bulk data collection of private information as “publicly available” and “openly sourced” for which they say they do not need to meet the requirement for ‘strict necessity’. Secondly, and even more troubling, as regards the datasets that clearly fall under the requirement for ‘strict necessity’: “SIRC found no evidence to indicate that CSIS had appropriately considered the threshold as required in the *CSIS Act*.” It is simply impossible to read this as indicating anything other than contempt for the need to abide by the applicable law in this arena. This is so serious a matter that SIRC called for the immediate halt to the acquisition of bulk datasets until there is a system to confirm compliance with the law.

Finally, another mass surveillance related concern is the use by law enforcement agencies, including the RCMP, of IMSI catchers - or stingrays, which are devices that can identify any cellphones around them - as far back as 2005. Although it disturbs cellphone communications, including 911 call drops 50% of the time, the Canadian Radio-television and Telecommunications Commission (CRTC) was not aware of this practice. There needs to be more transparency and regulations around the use of IMSI catchers.

Increased secrecy

The ICLMG is deeply concerned by the increased secrecy that has crept into our legal and judicial system as a result of national security paranoia. This phenomenon is exemplified by the existence of the security certificate regime, secret trials and procedures, the use of “intelligence” - which is notoriously unreliable - rather than evidence to deport non-citizens, to list terrorist entities, to de-register charities and to place individuals on no-fly lists.

Under the previous government there were also talks of using secret intelligence rather than evidence in criminal proceedings against citizens. The fact that this was even discussed shows how secrecy is too widespread, has lowered the bar in legal proceedings, and is now corrupting our conception of and commitment to due process and the rule of law in Canada. These regimes, procedures and practices should be stopped and reversed immediately.

The ICLMG was the first Canadian organization to look into and denounce the no fly list regime. We were and remain concerned by the fact that the people putting names on the list are also tasked with reviewing that decision, that individuals are only notified that they are on the list if they try boarding a plane and are stopped, that the regime does not define a clear and efficient way of recourse for individuals on the list, that many if not most Canadian airline companies also use the American no fly list, for which recourse is even less clear or efficient, and, more recently, that children are flagged by the list and that a group has been created to deal with such problems several months ago, but not much else has been done. Canada should repeal the *Secure Air Travel Act* and keep suspected terrorists away from airplanes using the existing tools under the criminal law.

Chilling effect and criminalization of dissent

Over the last decade, CSIS and the RCMP security reports, along with government policy documents — notably on anti-terrorism strategies — have equated economic interests with Canada’s “national interests” and designated groups opposed to these interests as a threat to Canada’s national security. Groups challenging government policy, particularly surrounding the energy and extractive sectors, have been infiltrated and subject to surveillance by both CSIS and the RCMP. The recent passage of the *Anti-Terrorism Act of 2015* raises further concerns about enhanced powers for Canadian intelligence agencies, among other provisions, being used against Indigenous groups and other organizations contesting the government’s extractivist agenda.

Justice for torture survivors

In 2008, Justice Iacobucci, the head of the Commission of Inquiry into the actions of Canadian officials in the cases of Abdullah Almalki, Ahmad El-Maati and Muayyed Nureddin, cleared them of all allegations, found that erroneous information shared by Canadian officials to foreign authorities led to the rendition, or detention, and torture of

these three Canadian citizens, and thus recommended that the government apologize to and compensate them.

Although Maher Arar was cleared in a previous Commission of Inquiry, exactly like Almalki, El-Maati and Nureddin were in the Iacobucci Commission, and although Arar was subsequently apologized to and compensated, the three men are still waiting for justice. They are now suing the federal government.

More troubling is the fact that, while in the Opposition, the Liberals supported a motion that urged the government to apologize to and compensate these citizens. However, now that the Liberals are in power, they have appealed the latest court decisions into the lawsuit against the three men. We recommend that the Trudeau government settles the suit, and apologizes to and compensates Almalki, El-Maati and Nureddin. We also recommend that an appropriate redress system be put into place so that victims of future violations receive apologies, compensation and justice in a timely manner.

Rendition to torture of Afghan detainees

There is overwhelming evidence that, during Canada's military mission in Afghanistan, many of the Afghan detainees transferred – notwithstanding very clear and credible risks of torture – were indeed tortured. Canadian diplomats documented incidents where detainees were forced to stand for long periods of time with their hands raised above their heads; punched or slapped; beaten with electric cables, rubber hoses or sticks; given electric shocks; and threatened with execution or sexual assault. No one knows exactly how many detainees who were in Canadian custody were tortured, disappeared or died under Afghan custody – partly due to the lack of a rigorous monitoring regime for the conditions of detainees, and partly due to the cloud of secrecy the previous government relentlessly maintained over this matter. By exposing hundreds of Afghans to such high risks of torture, Canada failed utterly to prevent the torture of many of them, thus flouting one of the most basic legal and moral obligations: the prohibition of torture, enshrined in customary international law, international human rights treaties, international humanitarian law and Canada's own *Criminal Code*. We recommend that the government launch a Commission of Inquiry into Canada's policies and practices relating to the transfer of hundreds of detainees to Afghan authorities during Canada's military mission in that country.

Torture memos

We have denounced the "torture memos" since their introduction by the Harper government as a flagrant violation of Canada's *Charter of Rights and Freedoms* and international obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. As a reminder, these memos allow CSIS, in exceptional circumstances, to use and share information that is likely to have been derived from torture.

Although the Liberals have decried the "torture memos" while in the Opposition, and although Public Safety Minister Ralph Goodale has promised last February that he would look into them, they are still in effect. This is unacceptable.

The International Commission of Jurists (ICJ) released a report in 2009 (Assessing Damage, Urging Action), noting its serious concern that: "States have publicly claimed that they are entitled to rely on information that has been derived from the illegal practices of others; in so doing they become 'consumers' of torture and implicitly legitimize, and indeed encourage, such practices by creating a 'market' for the resultant intelligence. In the language of criminal law, States are 'aiding and abetting' serious human rights violations by others." The ICJ notes that the practice of trading in such torture-tainted information "undermines the absolute prohibition on torture which entails a continuum of obligations -- not to torture, not to acquiesce in torture, and not to validate the results of torture and other cruel, inhuman or degrading treatment." But this is exactly what the Harper torture memos continue to do under a Trudeau government that has allowed them to stand as is. The torture memos need to be removed at once.

De-radicalization

Although the government has specified in its national security consultation Green Paper that radical thought is not a crime, centering the fight to prevent terrorism onto radicalism or extremism rather than violent behaviour is a dangerous and slippery slope. The United Kingdom government has already slipped down that slope by moving from their very controversial de-radicalization program, Prevent, onto the government's recent emphasis on combating "non-violent extremism". The government defines this as "opposition to fundamental British values", including "democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs". Rizwaan Sabir, a lecturer specializing in counter-terrorism at Liverpool John Moores University, points out that "British values" have never been properly defined, and that by branding all opposition to them as extremist, the government is effectively outlawing dissent.

Radical ideas - meaning ideas outside the mainstream, that go to the roots of a problem - have been the beginning of great progress in our society, such as the abolition of slavery, the right for women to vote, and the adoption of human right instruments. With the alarming trend in governments' discourses - including our own - in relation to protesters and activists, especially students, Native peoples and environmentalists, and with the rising islamophobia in our country, we need to stay away from any language or methodology that conflates certain ideas, political leanings or religious beliefs with a propensity for violence. More and more studies come out everyday that link terrorism to anger at unjust or violent state actions, domestically or abroad, and disproves the links between religious beliefs and terrorism.

If the government is really serious about distinguishing radical thought and violence than it should drop de-radicalization and replace it with the prevention of violence in general and only look at speech that call to or plan violence against people, and of

course violent actions, including violence against women, specifically violence against Native women, which is endemic in Canada.

Islamophobia

Although the risk of terrorism has been an issue since before the September 11, 2001 attacks in the United States of America, and although a majority of law enforcement and national security agencies believe white supremacist terrorism is a bigger domestic threat than so called "Islamic" terrorism, there is today an overwhelming association between Muslims and terrorists. Because of ignorance, fear, racism, media's treatment of terrorism, and several governments and politicians' ill-advised discourses, verbal and physical attacks against Muslims, and damage and destruction of mosques have alarmingly increased in the Western world, including in Canada. The government needs to be mindful of the intolerant and even hateful messages it puts out there regarding the Muslim community, and be pro-active in combating any discrimination, hate speech and violent actions against our Canadian Muslim population.

Conclusion

In conclusion, ICLMG advocates in favour of:

- The abrogation of the *Anti-terrorist Act, 2015 (C-51);*
- The creation of a single robust and independent review and complaint body with jurisdiction over all law enforcement, security agencies and government departments involved in national security operations;
- Major amendments to Bill C-22 to empower a future committee of parliamentarians to carry out its oversight functions without ministerial veto and make it democratically accountable to Parliament;
- The repeal of the no-fly list, and the re-instatement of the principles of fundamental justice and due process in criminal trials and administrative tribunals;
- The settlement of the suit launched by torture survivors Almalki, El-Maati and Nureddin, and the implementation of an appropriate redress system for future victims of human right violations;
- The creation of a Commission of Inquiry into Canada's policies and practices relating to the transfer of detainees to Afghan authorities;
- The removal of the torture memos.

ICLMG also echoes the concerns raised by the Office of the Privacy Commissioner of Canada with regards to potential new legislation to facilitate surveillance in the digital world.

Finally, we urge the government to be transparent when it comes to the analysis of the data collected through this public consultation on national security.