

MEMORANDUM

TO: Professor Craig Forcese
FROM: Pinar Cil
 JD/MA (International Affairs)
SUBJECT: Review by Reformed Review Bodies – Bill C-51
DATE: March 30, 2015

This memorandum summarizes the proposed amendments in the area of “Review Bodies” in the *Anti-terrorism Act, 2015*, known as Bill C-51. First, it highlights the provisions of C-51 that concern the roles and powers of review bodies. Second, it provides a summary of notable critiques from various organizations and individuals who have testified before the House of Commons Standing Committee on Public Safety and National Security (SECU).

I. Summary of Bill C-51 (Part 4 – CSIS Powers and Review Bodies)

Part 4 of Bill C-51 amends the *Canadian Security Intelligence Service Act* (herein referred to as the *CSIS Act*) in order to permit CSIS to take measures to reduce threats to the security of Canada. With regards to review bodies, Part 4 of Bill C-51 creates new reporting requirements for CSIS and requires the Security Intelligence Review Committee (SIRC) to review the Service’s performance in taking measures to reduce threats to the security of Canada.

II. Provisions Applicable to Review Bodies

12.1: Measures to reduce threats to the security of Canada¹

(1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.

¹ Bill C-51, *Anti-terrorism Act, 2015*, 2nd Sess, 41st Parl, 2015, clause 42, proposing new s.12.1 to the *CSIS Act* [Bill C-51].

(2) The measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat warrant

(3) The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1.

Under s.12.1(1), CSIS is given an expansion of its authority when conducting operations it deems is in the interest of Canadian national security. In essence, the power is broadly defined (i.e. What are considered *reasonable* grounds? What can constitute a *threat* to security? Which *measures* may be taken?). Furthermore, it creates a lower standard for CSIS to apply such powers in practically any situation, thus yielding too much discretion to the Service.

Commensurate to s.12.2(1) of the proposed Act, a limited number of activities that are excluded from the application of these new powers, as per s.12.1(1).

12.2: Prohibited conduct²

(1) In taking measures to reduce a threat to the security of Canada, the Service shall not
(a) cause, intentionally or by criminal negligence, death or bodily harm to an individual;
(b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or
(c) violate the sexual integrity of an individual.

The limited prohibitions as set out in s. 12.2(1) enact CSIS with vague and expansive powers. Moreover, there is a stark absence of new or improved oversight and review mechanisms for agencies other than CSIS. Since 1984, CSIS has been accountable to the Security Intelligence Review Committee (SIRC). SIRC's role is to review the activities of CSIS to ensure that the extraordinary powers granted the Service are used legally and appropriately. However, throughout the years, SIRC has also been underfunded and subject to much criticism.

² Bill C-51, clause 42, proposing s.12.2 to the *CSIS Act*.

Furthermore, SIRC's reach is only as far as CSIS operations. In other words, the activities of other intelligence and security agencies, such as the Communications Security Establishment of Canada (CSEC), are outside of the jurisdiction and scrutiny of SIRC. In 2012, the Office of Inspector General was disbanded, whose previous function was to provide an annual classified report on CSIS's operational activities for the Minister of Public Safety. Bill C-51 would not create, nor reinstate, a similar position. With regards to SIRC, s.50 of C-51 would amend s.38 of the *CSIS Act* by adding the following:

Review of measures³

Section 38 of the Act [CSIS Act] is amended by adding the following after subsection (1):

(1.1) In reviewing the performance by the Service of its duties and functions the Review Committee shall, each fiscal year, review at least one aspect of the Service's performance in taking measures to reduce threats to the security of Canada.

This minor amendment is the only provision in C-51 that alludes to some form of "review." In essence, it amends the SIRC's reporting requirements by necessitating an annual review of the Canadian Security and Intelligence Service's performance in "at least one aspect." The broad language of "aspect" may yield to partial audits of CSIS's new kinetic powers.

III. Proposed Amendments and Critiques

1) The Standing Committee on Public Safety and National Security (SECU)

a) Ron Atkey – Adjunct Professor, Osgoode Hall Law School, York University

March 12, 2015

Ron Atkey, who served as the first chair of the Security Information Review Committee (SIRC), delivered his testimonial on the government's proposed anti-terror provisions during the

³ *Bill C-51*, clause 50, amending s.38 to the *CSIS Act*.

opening round of the House of Commons Standing Committee on Public Safety and National Security (SECU). According to Atkey, “It is unfair to dramatically expand CSIS's powers to conduct disruptive or international activities to fight terrorism at home and abroad *while leaving the watchdog frozen in time* [emphasis added].”⁴ In other words, while SIRC—Canada’s primary review body—manages to oversee and review CSIS activities, it remains antiquated, insufficient, and limited in scope. In particular, Atkey noted concerns regarding the extent of independent review of the Royal Canadian Mounted Police (RCMP) and CSEC as well. Moreover, he said that there remains to be a lack of independent review for other important agencies within Canada’s intelligence and security enterprise, such as the Canada Border Services Agency (CBSA); Transport Canada; the Department of Foreign Affairs, Trade, and Development (DFATD); Citizenship and Immigration Canada (CIC); and various other federal agencies and police forces involved in security intelligence work. With regards to the nature of review bodies and their differentiated roles from oversight mechanisms, Atkey stated:

Review bodies do not approve operations in advance, but they do assure accountability after the event to ensure that, hopefully, all agencies exercising security functions are effective and operate within the law and they engage the public through exhaustive annual reports tabled in Parliament, with a minimum of redactions, redactions which are necessary for protecting individuals or methods of operation.⁵

Finally, Atkey supported the idea of a parliamentary oversight committee, noting that, “Parliament is the ultimate watchdog and is directly accountable to the people.”⁶ Furthermore, Professor Atkey commended Senator Hugh Segal’s private members bill, *The Intelligence and Security Committee of Parliament Act*, known as Bill S-220.

⁴ *Standing Committee on Public Safety and National Security*, 42st Parl, 2nd Sess, No 54 (12 March 2015) at 0915 (Ron Atkey) [Atkey].

⁵ *Ibid.*

⁶ *Ibid.*

Ron Atkey: “Whether we need to adopt a federal security czar to supervise, monitor and coordinate security agencies, as is done in the U.S., or to develop a super SIRC, with expanded powers of review and accompanying budget, or to have statutory gateways to achieve accountability, as recommended by the O'Connor report in 2006, this is an issue that cannot be left aside as Parliament gallops ahead on Bill C-51.”⁷

b) Barry Cooper – Professor of Political Science, University of Calgary

March 12, 2015

Barry Cooper, a professor of Political Science at the University of Calgary, also testified before the SECU. He stated that the concerns over Bill C-51 are not so much about the lack of oversight, but rather, the lack of *review*.⁸ Simply put, the absence of review bodies akin to SIRC for other security agencies is blatant. While Cooper concedes that SIRC remains to be underfunded and understaffed, it nonetheless provides after-action audits to CSIS activities.

If there is to be a “whole-of-government” approach to security and intelligence sharing, as is contemplated by C-51, and which, as I said, is a laudable objective, then there needs to be a whole-of-government approach to reviewing what the government agencies do.⁹

According to Cooper, authorities like the CBSA, which conducts both police and intelligence work, are not subject to any review mechanism. Instead, he suggests an expansion of the SIRC model, with specialists and technical officers, as well as members from both Houses of Parliament. “This seems to work fairly well in Australia, so far as I know. Obviously the MPs, like other SIRC members, would have to be sworn to secrecy.”¹⁰ With regards to the importance of either oversight or review, Professor Cooper added:

Increasing oversight it not as important as increased after-action reviews. The reason is, one, more oversight amounts to more interference with the executive in matters where intelligence activities are often time-sensitive; and, two, after-action reports will influence

⁷ Atkey, *supra* note 4.

⁸ *Standing Committee on Public Safety and National Security*, 42st Parl, 2nd Sess, No 54 (12 March 2015) at 1005 (Barry Cooper) [*Cooper*].

⁹ *Ibid.*

¹⁰ *Ibid*

future expectations, which is a kind of internal oversight, by providing appraisals of how the various security services behave. C-51, in short, is a good first step but it can be improved.¹¹

When asked to choose between an oversight model akin to a parliamentary committee or a super-SIRC proposal that would apply to all security agencies, he opted for the latter.

If it's a choice between the two, I'd go for super SIRC and for the reason that if there's intelligence or information sharing among all these agencies, then there should be some kind of reporting after the fact.¹²

In brief, Mr. Cooper would include members of Parliament under the same circumstances as the current SIRC members operate.

2) Select Briefs Presented to the SECU

a) Amnesty International Canada

Insecurity and Human Rights: Concerns and Recommendations

As outline in Amnesty's brief on Bill C-51, one of its recommendations is to establish a robust oversight and effective review of agencies and departments engaged in national security activities. In particular, it seeks to:

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| <p>a) Develop a model of integrated, expert and independent review as proposed by Justice Dennis O'Connor in his 2006 Arar Inquiry report;</p> <p>b) Ensure that all agencies and departments engaged in national security activities are subject to review and oversight;</p> <p>c) Ensure that all review and oversight bodies and processes have sufficient powers and resources to carry out their work effectively; and</p> <p>d) As part of an overall system of review.¹³</p> |
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Amnesty International Canada

¹¹ *Cooper, supra* note 8.

¹² *Ibid* at 1040.

¹³ "Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, *The Anti-Terrorism Act*, 2015," *Amnesty International*, 9 March 2015 at 3 [*Amnesty International*].

In Amnesty International's view, the likelihood of human rights violations increases when there is a lack of oversight over the actions of police, intelligence, military, penal, or other security officials who have potential to abuse their powers.¹⁴ These risks are substantially augmented in cases where secrecy is preferred, as is often found in matters of national security. On oversight and review, Amnesty International maintains that due to the unevenness among the various departments and agencies involved in intelligence and security work, there is poor bureaucratic practice all around. In particular, the brief went on to critique other review bodies, such as the Civilian Review and Complaints Commission of the RCMP:

The oversight of at least one agency was diminished with the decision in 2010 to dismantle the position of Inspector General for CSIS. The Commission for Public Complaints against the RCMP has recently been replaced by the Civilian Review and Complaints Commission for the RCMP. This change, however, did not include any steps to ensure that the new Commission carried out national security review in an integrated manner with other review and oversight bodies.¹⁵

In *fine*, Amnesty International contends that Canada's intelligence and security enterprise is lacking in proper controls. Not only does it lack *independent review bodies* akin to Justice O'Connor's recommendations, but also *parliamentary* oversight with respect to national security. Moreover, "Canada is alone among our closest national security allies – the United States, the United Kingdom, Australia and New Zealand – in not entrusting parliamentarians with that responsibility."¹⁶

b) Canadian Bar Association

Legal Implications of Bill C-51, the *Anti-Terrorism Act*, 2015

The Canadian Bar Association (CBA) has recommended several amendments to Bill C-51. For example, while there are restrictions on CSIS's new kinetic powers, as proposed in

¹⁴ *Amnesty International, supra* note 13 at 15.

¹⁵ *Ibid* at 16.

¹⁶ *Ibid.*

s.12.2(1), the CBA believes that these prohibitions are too limited and insufficient.¹⁷ In addition, one of its twenty-three recommendations concerns the creation of an Office of the National Security Advisor, as once suggested by retired Supreme Court justice, John Major:

RECOMMENDATION #15:

The CBA recommends the creation of an Office of the National Security Advisor, to act as an expert review body with resources and a mandate to review all national security activity, and to ensure effective information sharing and cooperation between CSIS and other security agencies, including the RCMP.¹⁸

CBA

With regards to SIRC’s powers, the CBA stated that review is nonetheless limited, as SIRC does not possess the resources or capabilities to effectively review CSIS action. “This problem will be compounded if CSIS is given the proposed kinetic powers. SIRC’s review of CSIS activities has always been partial – it does not and cannot review every activity but rather a sampling of such activities.”¹⁹

Finally, the CBA noted proposed section 22.3, which allows other persons to assist CSIS-authorized operations. According to this provision, a judge may order that the assistance is confidential, which makes it unclear whether SIRC would be able to examine and review the actions of those who assist CSIS. In other words, if SIRC review is confined to CSIS itself, some conduct authorized under the new assistance orders may be unreviewable.²⁰ “Like the Arar Commission and others, the CBA agrees that an expert review body must be created with resources and a mandate to review all national security activity.”²¹

¹⁷ “Bill C-51, *The Anti-Terrorism Act*, 2015,” *The Canadian Bar Association*, March 2015 at 30 [CBA].

¹⁸ *CBA*, *supra* note 17 at 32.

¹⁹ *Ibid* at 35.

²⁰ *Ibid*.

²¹ *Ibid* at 36.

RECOMMENDATION #18:

In addition to the creation of an Office of the National Security Advisor, above, the CBA also recommends the creation of a Parliamentary review committee with access to secret information.

CBA

On reporting and review of new kinetic powers:

Bill C-51 proposes adding section 6(5) to the CSIS Act, which would require that reports on kinetic operations and the nature of the operations be made only to the Minister and SIRC. Confidence in our intelligence services and to a robust democracy requires informed public debate on the nature and scope of kinetic operations by Canada's security services. This is particularly true if courts are asked to authorize Charter violations under section 21.1. Although the Bill proposes an annual SIRC report on the number of warrants issued and denied under section 21.1, the reports would not require any information about the nature of the activities authorized. More disturbingly, the Bill does not require reporting of CSIS activities under section 12.1, if they do not breach Charter rights or otherwise require a warrant.²²

RECOMMENDATION #19:

The CBA recommends that if CSIS mandate is expanded to engage in kinetic operations, the agency be subject to regular reporting requirements as to the nature and number of those operations, perhaps to the expert review body recommended above, whether pursuant to section 12.1 or to warrants under section 21.

CBA

c) The International Civil Liberties Monitoring Group (ICLMG)

Submission by Paul Champ

In his presentation to the SECU committee, lawyer Paul Champ voiced concerns over the bill's new warrant measures:

The warrant system is also deeply flawed because it completely relies on the good faith of CSIS to present all relevant information to the Court and then to respect the warrant given. But CSIS has a bad record of misleading courts and the Security Intelligence Review Committee, and breaching their duty of candour and good faith.²³

²² *CBA, supra* note 17 at 36.

²³ "International Civil Liberties Monitoring Group Submissions to the Standing Committee on Public Safety and National Security," International Civil Liberties Monitoring Group, March 2015 at 12 [*ICLMG*].

Finally, Champ noted the serious shortcomings of CSIS in the last five years. He later signaled the dangers of having a warrant system too dependent on the discretion of CSIS agents when deciding whether an action is “too close to the line” or “violates the Charter.”²⁴

d) Ken Rubin

As a civil advocate, Ken Rubin submitted the following four amendments to Bill C-51²⁵:

1. That greater and new oversight provisions for monitoring security intelligence law enforcement and government agencies should be provided. But that this also include specific added binding order and audit powers for the Information and Privacy Commissioners to ensure there is a duty to document actions and a mandate added to assess and report on the privacy and access implications of such information sharing and security intelligence agencies' activities. And that the Auditor General be given new reinforced powers to investigate and report on the costs and value of such activities as proposed under bill C 51.
2. That sunset provisions be introduced as in earlier anti-terrorist legislation but with the twist that the sunset reviews parliament does, every three years, include an ability to drop certain provisions as well as a legal review mandate to investigate less invasive measures. This means examining better information sharing practices and restrictions, greater public transparency and privacy protection, and more international rules on information sharing.
3. That amendments include giving Canadians more pro-active disclosures on matters like security and intelligence and law enforcement agency costs, environmental, health and infrastructure safety, and on all information sharing agreements and arrangements.
4. That Canadians be given the right in most cases to be notified when their personal information is being accessed and shared by government or by the private sector.

e) Office of the Privacy Commissioner of Canada

While Daniel Therrien, the Privacy Commissioner of Canada, was not invited to testify before the SECU on Bill C-51, he nonetheless provided a brief before the Parliamentary

²⁴ *ICLMG*, *supra* note 23 at 13.

²⁵ Rubin, Kevin. “Submissions to the Standing Committee on Public Safety and National Security,” 16 March 2015, at 2.

committee. According to Therrien, “Bill C-51 exacerbates serious gaps in existing oversight and review mechanisms, and does not facilitate sharing between review bodies.”²⁶

RECOMMENDATION #3:

Bill C-51 should be amended to include as a statutory requirement that personal information that does not meet the recipient institution's legal collection standards should be discarded without delay. SCISA should also require that information, once collected, is retained only as long as necessary. Reviews should be held at regular intervals, prescribed by regulations, to ensure that this principle is respected and that the retention of information is justified. Finally, SCISA should require that proper documentation of all collection and retention decisions be maintained.

Office of the Privacy Commissioner

Furthermore, Therrien noted some gaps in the review structure of Canada’s security agencies:

14 of the 17 agencies listed in Schedule 3 that will receive information for national security purposes are not subject to dedicated independent review or oversight. To fill that gap, the jurisdiction of one or more of the existing review bodies should be extended to include the 14, or a new expert review body with horizontal jurisdiction should be created to review the lawfulness and reasonableness of national security activities.²⁷

He also signaled inadequacies with regards to judicial recourse and remedies available for aggrieved individuals. Moreover, “The Privacy Act currently provides no judicial recourse for complainants or indeed my Office in cases involving improper collection, use, disclosure or retention of personal information.”²⁸ Complainants only have the right to a report of non-binding recommendations by the Office of the Privacy Commissioner with no possibility for remedy.²⁹

Another obstacle to effective review is that existing review bodies are currently unable to share information amongst themselves.

In fact, the confidentiality provisions in the Privacy Act explicitly prevent my Office from sharing information with other review bodies, such as the Security Intelligence Review Committee, the Office of the Communications Security Establishment

²⁶ Therrien, Daniel. “Bill C-51, the *Anti-Terrorism Act*, 2015: Submissions to the Standing Committee on Public Safety and National Security,” Office of the Privacy Commissioner, 5 March 2015 at 4 [*Privacy*].

²⁷ *Privacy*, *supra* note 26 at 5.

²⁸ *Ibid.*

²⁹ *Ibid* at 6.

Commissioner or the Civilian Review and Complaints Commission for the RCMP concerning ongoing investigations into national security practices.³⁰

Finally, Thierren suggests a hybrid model that incorporates both a Committee of Parliamentarians and review by an independent body of experts. “Such a model would offer clear advantages in terms of democratic accountability, and the mandates of the Committee of Parliamentarians and the committee of experts could be defined so as to avoid duplication.”³¹

RECOMMENDATION #5:

Bill C-51 should be amended to ensure that all 17 agencies in Schedule 3 are subject to independent and effective review, by an expert body and by Parliamentarians; to remove impediments for information exchange between existing review bodies; and to amend the Privacy Act to allow for judicial recourse in cases involving collection, use or disclosure of personal information. The Bill should also include a mandatory period of review after three years.

Office of the Privacy Commissioner

³⁰ *Privacy, supra* note 26 at 5.

³¹ *Ibid* at 6.