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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All of our backgrounders can be found posted at www.antiterrorlaw.ca . Thank you to the people who commented on our March 4 draft. We have done our best to incorporate suggestions. The opinions are our own, of course, but do make every effort to square the objectives set out in our title and reconcile comments made by both rights and security experts.

Please note that we do 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. As always, we apologize for typos and welcome comments.

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CSIS Act "measures" in Part 4 of Bill C-51. 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	There is no mention of the government's objective in the legislation itself, however the Backgrounder published by Public Safety Canada explains the following: This Bill proposes to give CSIS a new mandate to intervene in order to disrupt threats to the security of Canada. Currently, CSIS does not have a legal mandate to take action concerning threats. Instead, CSIS is limited to collecting and analyzing information and intelligence, and advising the Government of Canada. For instance, when CSIS conducts an interview as part of an investigation, the sole purpose of the interview must be to collect information, not to dissuade the subject from actions that	See Backgrounder #2: • 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	• 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 in relation to the terrorism foreign fighter offences add to the Criminal Code in 2013. There needs to be a coherent strategy for when CSIS and when the RCMP intervenes with respect to radicalized persons as well as ties to broader community based counter-violent extremism programs, • Especially reconsider whether CSIS needs to engage in measures violating Canadian law. • In the alternative, these would be PRIORITY amendments:

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"contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms" or may be "contrary to other Canadian law".	threaten the security of Canadians. With its new mandate, CSIS could take measures, at home and abroad, to disrupt threats when it had reasonable grounds to believe that there was a threat to the security of Canada.[1] On first reading, Public Safety Minister Steven Blaney explained that with its "strengthened mandate, the Canadian Security Intelligence Service could use a variety of techniques to counter threats in order to thwart plans or even alter behaviour."[2] To explain why this strengthened mandate was required and how it might be leveraged, Minister Blaney provided the following example: CSIS becomes aware of an individual in the process of becoming radicalized…Currently, CSIS can investigate, but it cannot do anything to stop the individual from travelling. The furthest CSIS can go now is to advise the RCMP that it believes the individual is about to commit an offence, and then the RCMP would launch an investigation. Therefore,	critiqued by SIRC in 1989, even as applied to mere intelligence gathering • In the result, measures can 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. • 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	○ 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 measures to reduce a threat to the security of Canada if these measures may 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." ○ 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: ▪ loss of or serious damage to property that endangers the health or safety of any

[1] Public Safety Canada, "Backgrounder:Amending the Canadian Security Intelligence Service Act to give CSIS the mandate to intervene to disrupt terror plots while they are in the planning stages", http://news.gc.ca/web/article-en.do nid=926869&_ga=1.88019739.2078202319.1410971187.

[2] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11362.

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	we are far from action. Under the anti-terrorism act, 2015, CSIS could engage a trusted friend or relative to speak with the individual to advise them against travelling for terrorist purposes. Further, CSIS could meet with the individual to advise them that it knows what he or she is planning to do and what the consequences of taking further action would be.[3] The Minister also asserted that the new legislation: contains elements that will improve and reduce the risk of radicalization, in particular by giving intelligence officers the ability to reduce the threat as soon as they are in contact with an individual who could fall prey to radicalization and also by shutting down websites that could be spreading terrorist propaganda.[4]	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 without many of that section's safeguards. • 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	person; and ▪ detention of a person[5] • Other possible SECONDARY amendments include: o Recraft s.12.2(2) to specify "In subsection (1), '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.[6] o Limit the new CSIS measures to counter-terror operations under s.2(c) of the CSIS Act or (if we must have "measures" for other sorts of security risks) limit them to s.2(a) and (c) matters Alternatively, at least amend s.2(b) of the CSIS Act to follow the 1989 recommendations

[3] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11362.

[4] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11364.

[5] We are aware of government statements that the new powers would not be used for detention. However, nothing in the bill makes detentions impossible – they would be permissible in Canada so long as authorized by judicial warrant (which would be required because detentions in Canada would violate the Charter and Canadian law). They would be, in most instances, permissible outside of Canada of foreigners even without warrant. (Canadian law and the Charter rarely reaches outside Canada and so a warrant requirement would not be "triggered".)

[6] The proposal responds to concerns that "bodily harm" may be narrowly construed, and not reach all forms of cruel and inhumane treatment. We note, however, that the later usually arises during detention. And therefore, the recommended bar on detention would mitigate the need for this amendment.

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		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" representation balancing the government position. ▪ There is no disclosure requirement, unlike with police warrants under Part VI or police powers under s.25.4 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	of SIRC's 1988-1989 assessment[7] 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. ○ 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. This extra level of scrutiny is appropriate since, by definition, at issue in these warrant is CSIS conduct in violation of the law. ○ Follow Criminal Code s.25.3 (for the police) and require a *public* 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.25.4 (for the police) and require that a person affected by CSIS's illegal (but judicially exonerated) conduct under a warrant must be notified of the conduct within one year, subject to reasonable exceptions analogous to those enumerated in s.25.4 of the

[7] http://www.sirc-csars.gc.ca/pdfs/ar_1988-1989-eng.pdf

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		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 and SIRC will have no jurisdiction to review the conduct of those who may assist in the execution of the CSIS warrant even though such assistance contemplated in 22.3 and 24.1	Criminal Code. We recognize that this disclosure requirements places the "measures" warrants on a different footing than CSIS surveillance warrants, which are not disclosed. We believe this fitting. First, the very purpose of a CSIS intelligence gathering surveillance warrant may be defeated if disclosed – that is, the target will change behaviour in a manner that makes the intelligence irrelevant. "Measures" warrants are said to be about disruption – here the justifications for permanent secrecy are less persuasive. Those concerns can be mitigated by provisos, analogous to those for police in the Criminal Code, which delay disclosure while legitimate security concerns remain acute (and such concerns should be subject to periodic review in the courts to ensure they remain persuasive). Second, even if there is a justification for secrecy, that justifications pales against the public interest in notice of CSIS conduct, that (by definition given the very existence of the warrant) has violated the law. There must be some manner in which a person subjected to this radical conduct can challenge it, since the prospects of any other form of accountability are

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			remote. See below about the very partial and imperfect review system available through SIRC. See also backgrounder #2 and #5 about the difficulties of the Federal Court in knowing what has been done under its warrants. All of this is to say, that if CSIS has de facto police powers, it needs also police-like levels of transparency. This is what the Senate Special Committee on Anti-terrorism has already proposed.[8]
"Advocates and promotes terrorism offences in general" (proposed s.83.221 of the Criminal Code, found in Part 3 of Bill C-51)	There is no mention of the government's objective in the legislation itself, however the Backgrounder published by Public Safety Canada explains the following: Under the current criminal law, it is a crime to counsel or actively encourage others to commit a specific terrorism offence. However, the current law would not necessarily apply to someone who instructs others to "carry out attacks on Canada" because no specific terrorism offence is singled out. The proposed legislation would help stop those who promote terrorism by creating a new Criminal Code offence that would criminalize the promotion of terrorism, including attacks on	See Backgrounder #1: • Overbroad offence could violate and chill free expression. • 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 the "willful" concept in the hate crimes context which	• Reject proposed offence. The government's rationale for offence not convincing given breadth of existing offences including their application to instruction, counseling and threats. We continue to view s.83.22 of the Criminal Code (instructing to carry out a terrorist activity) as reaching calls for attacks on Canada. The offence does not need the person who instructs to add precision, or even know that what they are instructing is a "terrorist activity". We have difficulty imagining a circumstance in which the attacks a person would call for are not "terrorist activity". At any rate, if these attacks did not meet the standard of "terrorist activity", the government's proposed offence is useless, since the concept of "terrorist activity" remains the anchor for most applications of the new offence, once all the

[8] See recommendation 10 of Interim Report of the Special Senate Committee on Anti-Terrorism March 2011 at http://www.parl.gc.ca/Content/SEN/Committee/403/anti/rep/rep03mar11-e.pdf

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	Canadians. The proposed offence would fill a current gap in Canadian criminal law by making it a crime for a person to knowingly promote or advocate others to carry out a terrorism offence.[9] On first reading, the Public Safety Minister stated that this additional offence will increase prevention efforts "by eliminating the sources of terrorist propaganda, or in other words, by putting an end to activity on websites that could constitute terrorist propaganda and criminalizing those who may be encouraging terrorist acts."[10] On second reading, a common example was used by Conservative MPs to justify the added Criminal Code provision: a terrorist entity puts on YouTube a terrorist propaganda video that concludes with the words "Attack Canada" on the screen, and, through investigation, an individual in Toronto has been identified as the person posting the video. There is no description of the kinds of attacks to be carried out… In this scenario,	the Supreme Court has recognized as an important protection for freedom of expression	definitions are unpacked. In the alternative, as PRIORITY amendments: • 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, and make it an actual, robust defence • Raise fault requirement from "knowing" to "willfully" advocate, "for the purpose of inciting" not "recklessness" that terrorism offences will be committed as a result of communication, thereby eliminating unnecessary debate about whether, e.g., a political party's fundraising letter containing terrorist propaganda is itself in violation of the new offence. • Replace "terrorism offence in general" with "terrorist activity" as defined in s.83.01 of the Criminal Code, thereby discarding an unprecedented, vague concept for one with a clear legislative definition. • The resulting offence would read: (1) Every person who, by communicating statements, willfully advocates or promotes the commission of a terrorist activity for the purpose of counseling or instructing an act or

[9] Public Safety Canada, Backgrounder: Criminalizing the Advocacy or Promotion of Terrorism Offences in General, http://news.gc.ca/web/article-en.do?nid=926049&_ga=1.92265369.2078202319.1410971187.

[10] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11363.

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	there is insufficient detail in the video to allow one to conclude that the person is counselling a specific terrorist offence under the Criminal Code to kill someone, as opposed to disrupting an essential service. Under the new powers in the anti- terrorism act, 2015, posting such a video with its call to carry out attacks in Canada in general, which is a form of active encouragement, would now be caught by the criminal law.[11]		omission that would be a terrorism offence— other than an offence under this section— or a terrorist activity is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.
Deletion of "Terrorist Propaganda" from the Internet authorization in s.83.222 (in Part 3 of Bill C-51)	There is no mention of the government's objective in the legislation itself, however the Backgrounder published by Public Safety Canada explains the following: In order to restrict the ability of terrorist organizations to spread terrorist propaganda in Canada for the purpose of radicalizing individuals and obtaining new recruits, the proposed legislation would create a tool in the Criminal Code to give the courts the authority to order the removal of terrorist propaganda, including from the internet.[12]	See Backgrounder #4: • Overbroad definition of "terrorist propaganda" that includes material that "advocates or promotes terrorism offences in general" (see above re our concerns about this concept) • Possibility of "informal" enforcement through police requests made to internet service providers that short-circuits court order deletion process	• Amend definition of "terrorist propaganda" to remove reference to written and visual material that "advocates or 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. • 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 the person who posted the material does not oppose it, perhaps because of concerns of being prosecuted under new advocacy and

[11] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Leung) at 11549.

[12] Public Safety Canada, Backgrounder: Seizure of Terrorist Propaganda, http://news.gc.ca/web/article-en.do?nid=926039&_ga=1.84932506.2078202319.1410971187.

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	The backgrounder further explains that "Canada's proposed legislation would be part of a global effort to hamper the ability of terrorist groups to spread their propaganda for the purpose of radicalizing vulnerable individuals."[13] On second reading, Conservative Party MP Jay Aspin, maintained that "these tools are designed to help address the radicalization of Canadian youth toward violence by assisting in the removal of terrorist propaganda material."[14]	• 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.	promotion offence. • 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 Sharing Act (Part I of Bill C-51)	The text of Bill C-51 describes this new legislation as: "An Act to encourage and facilitate information sharing between Government of Canada institutions in order to protect Canada against activities that undermine the security of Canada"[15] The preamble continues: "Whereas Parliament recognizes that	See Backgrounder #3 • Radically overbroad definition of security interests for information sharing: any "activity that undermines the security of Canada"	• Replace overbroad definition of "activities that undermine the security of Canada" 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

[13] Public Safety Canada, Backgrounder: Seizure of Terrorist Propaganda, http://news.gc.ca/web/article-en.do?nid=926039&_ga=1.84932506.2078202319.1410971187.

[14] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Aspin) at 11513.

[15] Bill C-51, Part 1, s. 2.

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	information needs to be shared — and disparate information needs to be collated — in order to enable the Government to protect Canada and its people against activities that undermine the security of Canada"[16] The Backgrounder published by Public Safety Canada further explains: > To facilitate the effective and timely access to government information for national security purposes and address legal gaps, the Government has introduced the Security of Canada Information Sharing Act as part of the Prevention of Terrorism Act. The proposed Security of Canada Information Sharing Act will create a clear authority for Government institutions to share national security-relevant information with designated Canadian Government institutions that have national security responsibilities. Information may be shared proactively or in response to a request.[17] When introducing Bill C-51 before the house, Public Safety Minister Steven Blaney explained that the intention behind the new legislation is	• 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" • Incorporation and	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. The refined definition would still, however, accommodate all the public justifications offered by the government. • As recommended by Privacy Commissioner amend s.5 to require shared information be "necessary" or "proportionate" and not simply "relevant"[22] to the receiving institution's security jurisdiction • Amend s.5 to make crystal clear that receiving recipients must operate within 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"so long as it is "in accordance with the law" • 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. As suggested by Privacy Commissioners review should be facilitated by agreements between governmental entities

[16]Bill C-51, Part 1, s 2.

[17] Public Safety Canada, Backgrounder: Security of Canada Information Sharing Act, http://news.gc.ca/web/article-en.do?nid=926879&_ga=1.53885867.2078202319.1410971187.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	to "allow us to share the federal community's latest knowledge, expertise and work and to use them in a way that will enhance Canada's security."[18] Alluding to events arising in the fall of 2014, Minister Blaney went on to state: > We want to prevent Canadians from travelling abroad to commit terrorist attacks, but we also want to make sure that if a part of the Canadian government is aware that an individual could represent a threat and if that individual is prevented from travelling, we are not generating a home grown terrorist who could carry out an attack here on our soil.[19] To justify the need for increased information sharing, Minister Blaney provided the following exampled: > A passport officer contacts an applicant's reference person as part of a routine check. Without being asked,	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, no *mandatory* information sharing requirements between CSIS and the RCMP, as recommended by the Air India inquiry.	that share information.[23] 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 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) • Implement Recommendation 10 of the Air India inquiry[24] 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."

[22] Privacy Commissioner Submission to the Standing Committee on Public Safety and National Security March 5, 2015 at https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp Recommendation 1

[18] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11361.

[19] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11362.

[23] Privacy Commissioner Submission to the Standing Committee on Public Safety and National Security March 5, 2015 at https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp Recommendation 4

[24] 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

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	the reference person expresses some concerns about the applicant's intentions abroad. The reference fears the applicant could go to Iraq to fight alongside ISIL, because he supports its goals. At this time, the passport officer can open an investigation in order to determine if the passport application should be denied for national security reasons. As we have seen, passports can be revoked or not issued for reasons of national security. However, that officer will have a hard time sharing information proactively for further investigation of that threat. This could push the individual to commit a terrorist act in Canada. Indeed, if we prevent him from travelling outside Canada, he becomes a threat here, since he did not get his passport. This increases the threat of a terrorist attack here on Canadian soil. This situation is unacceptable. That is what we are trying to correct with the first of the five measures set out in this bill, in order to improve the means we have to reduce the terrorist threat here in this country. Under the anti-terrorism act, 2015, passport officers would be able to proactively share information with a national		

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	security agency in order to combat this possible terrorist threat.[20] On second reading, Conservative Party MP Ryan Leef stated very simply "[t]he legislation effectively breaks down silos that exist between government agencies. These silos put Canadians' lives at risk."[21]		
New Secure Air Travel Act (Part II of Bill C-51)	Bill C-51 defines this new legislation as "An Act to enhance security relating to transportation and to prevent air travel for the purpose of engaging in acts of terrorism."[25] The Backgrounder published by Public Safety Canada further explains : It is essential to identify and respond effectively to individuals who may be traveling to engage in terrorism in order to enhance the security of millions of legitimate travellers. As such, the Government of Canada committed to enhancing the PPP as part of its response to the Final Report of the Air India Inquiry. These changes would enable the Government to fulfil that	1) Section 8(1) allows potential permanent removal of air travel on a "reasonable grounds to suspect" basis usually reserved for temporary investigative measures 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 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.	▪ The words "reasonable grounds to suspect" in s.8(1) 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. ▪ 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

[20] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11361.

[21] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Leef) at 11508.

[25] Bill C-51, Part 2, s 11.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	commitment and to confront the challenge of terrorist travel by air.[26] When introducing this aspect of Bill C-51, Public Safety Minister Steven Blaney addressed the increased number of people traveling overseas with the intent of carrying out terrorist activities and noted: even though they are not an immediate threat to the plane on which they are travelling, they could represent a direct threat to the country of destination or to Canadian allies abroad. Canada cannot allow people to commit terrorist acts here or abroad. That is why we must improve the program's mandate in order to include those who travel to take part in a terrorist activity.[27]	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 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 competing interests in disclosure and non-disclosure. Section 16(6) (e) again similarly to security certificate proceedings allows the judge to	summary of that evidence has been disclosed to the affected person. Special advocates should also be able to participate in appeals contemplated under s.17 of the Act.

[26] Public Safety Canada, Backgrounder: Passenger Protect Program, http://news.gc.ca/web/article-en.do?nid=926839&_ga=1.32915389.2078202319.1410971187.

[27] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (Blaney) at 11362.

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		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.[28]	
"Preventive Detention" Recognizances (s.83.3 of the Criminal Code, amended by Part 3 of Bill C-51)	The Backgrounder published by Public Safety Canada explains that this amendment "would enhance the ability of law enforcement agencies to detain suspected terrorists before they can harm Canadians."[29] On first reading, Justice Minister Peter Mackay also noted that Bill C-51 will extend the period of authorized detention "to allow the police	▪ Whatever the case for more relaxed standards for preventive detention of greater duration, there is an urgent need to regulate the nature of that detention. ▪ The present wording of section 83.3 allows preventive detention in less	▪ At the very least, s. 83.3(4), allowing detention in exigent circumstances without 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 *serious and imminent threat to life, health, public safety or substantial property damage*

[28] 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.

[29] Public Safety Canada, Backgrounder: Strengthening Prevention Powers, http://news.gc.ca/web/article-en.do?nid=926009&_ga=1.100545693.2078202319.1410971187.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	agencies to ensure that they are doing everything in their power to prevent the terrorist act from occurring on Canadian soil."[30]	than serious instances — the provision is tied to the concept of "terrorist activity" in the *Criminal Code*. 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 imposed by Parliament and the courts on investigative	*that threatens life or health.* ▪ 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. This concept borrows from analogous provisions found in Australia's laws on "investigative detention"[31] and preventive detention.[32] ▪ The consequential amendments to the Youth Criminal Justice Act should make clear that all relevant parts of the Youth Criminal Justice Act relating to the taking and admissibility of statements, custody and recognizances apply to those under 18 years of age who are subject to preventive arrest and/or recognizances. ▪ An alternative approach would be to prohibit questioning, as under Australian preventive detention orders[33] or regulating question as is

[30] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 177 (18 February, 2015) (MacKay) at 11375.

31 ASIO Act, Act No. 113 of 1979 (as amended), s.34T

32 Austalian Criminal Coe, s.105.33.

33 *Ibid*, s.105.42

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
		hearings.	done with respect ASIO questioning warrants under the ASIO Act in Australia,[34] including allow on site visits by independent reviewers.
Lack of Review of the Implementation of Legislation	In the House of Commons on February, the Opposition pressed Prime Minister Harper on the need to study Bill C-51 at length. The PM responded, "[t]he bill is now before the committee and I encourage the committee to study it as quickly as possible in order to adopt these measures to help Canadian security during the life of this Parliament."[35] On second reading, Conservative Party MP Jay Aspin attempted to explain the need to pass Bill C-51 swiftly by comparing it to legislation passed in the wake of 9/11: The member might recall that it was a Liberal government that passed the Canadian Anti- terrorism Act in response to the attacks in the United States on September 11. The expanded powers at that time were highly controversial, due to their widely perceived incompatibility with the Canadian Charter of Rights and Freedoms, in particular the act's provision allowing for secret trials, lengthy detention, and expensive security and surveillance powers. The Liberal government passed that act	▪ 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.	▪ 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 *Security of Canada Information Sharing Act* 2) the operation and effects of the *Safe Air Travel Act* 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

[34] *ASIO Act,* Division 3.

[35] Canada, Parliament, *House Debate,* 41 Parl, 2nd Sess, Vol 147, No 178 (February 24, 2015) (Harper) at 11598.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	and the sky did not fall. This legislation is needed right now, 13 years later. The sky will not fall. We need protection. We need safety and security for Canadians and we need it right now.[36] Public Safety Minister Steven Blaney, also commented on the need for urgency "we have seen again this weekend how the jihadi extremists' threat is real. That is why we need to move on and put measures in place to keep Canadians safe."[37] Additionally, Conservative Party MP David Sweet rebuffed the Opposition's calls for prolonged debate: Mr. Speaker, in his speech the member alluded to the fact there is no immediacy with this and that we should take a year to debate this kind of bill. I wonder how many incidents have to happen before a bill like this is necessary. How many threats does this country have to receive, how many incidents have to happen, how many times does it have to happen internationally before this House should be vigilant, take action, and make sure the legislative tools are in		of Foreign Affairs and Department of National Defence 5) the 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.

[36] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Aspin) at 11514 (emphasis added).

[37] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Blaney) at 11522.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	place for our security forces to ensure that the next incident is not one of catastrophic proportions? That is what this government is trying to do right now.[38]		
Lack of Sunsets	No information could be found.	▪ 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.	▪ 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	In the House of Commons, Prime Minister Harper responded to questions about the accountability of Canada's security agencies stating, "we have strong, independent oversight committees and agencies that do very good work. Now is not the time to attack our police and security agencies. Now is the time to take on the terrorists. That is what this bill does."[39]	▪ See backgrounder #5. Please note that the debate on this issue has been plagued by misunderstandings about what is at issue. "Review" and oversight are different. "Review" is auditing of	▪ 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 information sharing Act. Adequate resources

[38] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Sweet) at 11538.

[39] Canada, Parliament, House Debate, 41 Parl, 2 Sess, Vol 147, No 180 (26 February 2015) (Harper) at 11739.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	When further pressed on the issue of oversight, the Prime Minister responded "Canadians are not going to trust oversight with a party that has opposed every single piece of security and anti-terror legislation ever proposed….We have serious problems in this country. Now it is time to take on the terrorists, and that is what we are doing."[40] Justice Minister Peter McKay made similar statements regarding oversight in the House of Commons on February 20th, 2015: the reality is that there is in fact oversight. There is already oversight with SIRC. This bill is also very cognizant of the fact that judicial oversight is necessary for acting upon some of the intelligence that will be gathered by our security agencies. There is oversight with respect to the bill itself as it makes its way through the parliamentary process. There will be expert evidence heard, I am sure, at committee.[41]	past conformity with law and policy. ▪ 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 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. SIRC is underresourced, can only perform increasingly partial audits, and it is "stovepiped" (and must confine its reviews to only what CSIS does). In general, our review agencies only have jurisdiction to focus on "trees" not the "forest",	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, 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. ▪ We appreciate that in the context of bill C-51 and given the constraints on the standing committee, it is unlikely that this necessary review reform will be implemented at this stage. Therefore, in the alternative, the Arar commission recommendation 11[48] 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. Also as recommended by the Privacy

[40] Canada, Parliament, House Debate, 41 Parl, 2 Sess, Vol 147, No 180 (26 February 2015) (Harper) at 11739.

[41] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 176 (20 February, 2015) (Mackay) at 11466.

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

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	He went on to state: > Oversight with respect to judges is something that I think all members present would be quick to embrace. The fact is that these powers, extraordinary though they might be, are necessary in the current threat environment. The judicial oversight that comes at the front end of the process, as opposed to political oversight after the fact, which is what is being suggested by the members opposite, we think is preferable.[42] During question period on 19 February, 2015, Peter Van Loan explained the government's choice not to implement parliamentary oversight: > We believe that the expanded powers that are to be given should not be dealt with after the fact by politicians but should be dealt with before the fact by independent judges. We thought that was the most effective form of oversight for the expanded powers this legislation seeks to give to the Canadian Security Intelligence	even as government national security operations move towards "all of government" status. ▪ 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".	Commissioner, it should be given judicial recourse.[49] For language that does much of this for CSIS, CSE and the RCMP, please see Annex I in backgrounder #5. Again, though, these changes must be accompanied by better resourcing of the review bodies, and particularly SIRC given CSIS's new powers. ▪ 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.

[42] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 176 (20 February, 2015) (Mackay) at 11466.

[49] Privacy Commissioner Submission to the Standing Committee on Public Safety and National Security March 5, 2015 at https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp Recommendation 5.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	Service. We think that is actually more effective than simply turning to politicians after the fact to duplicate the work of SIRC, the Security Intelligence Review Committee, for after-the-fact review. It is an important role. SIRC is there to play that role, but we think that these expanded powers, because of their extraordinary nature and the circumstances we are in, also require independent oversight by judges before they are used. That is why these powers can only be exercised under warrants provided by judges.[43] When questioned again on the subject of oversight, Van Loan stated: in terms of every individual action and the actual exercise of expanded powers such as those we are giving, there is a requirement for some ability to assess whether they are truly necessary and whether the threat justifies the exercise of the powers. We believe that having judges take evidence would be the best way of providing that kind of protection of Canadians' rights while at the same time allowing the security agencies to		

[43] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 175 (19 February, 2015) (Van Loan) at 11395.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	make their best efforts to keep Canadians safe. It is the right balance and it is the best form of oversight for the kinds of powers we are talking about in this legislation.[44] On second reading, Public Safety Minister Steven Blaney echoed these comments "[w]e have third-party, non-partisan, independent, and expert oversight that is bringing continuity to the monitoring of the intelligence community."[45] The Minister then went on to say : We believe that it is much better than importing a made-in-America political intervention in the process. I would reiterate the important point that often seems to be forgotten around this place, that it is the jihadis who represent a threat, not our own police officers and those protecting us.[46] One of the most detail response to the question of oversight came from Conservative Party		

[44] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 175 (19 February, 2015) (Van Loan) at 11395.

[45] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Blaney) at 11363.

[46] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Blaney) at 11363.

Proposed Provision	Summary of government justifications for the proposed provision	Key concerns	Proposed amendments
	backbencher Ryan Leef: There are parameters clearly detailed in this legislation around what the law enforcement and security intelligence agencies have to present in a show cause. There are considerations that are deeply embedded in this legislation that tell the justices what they have to consider, including the nature, extent, and quality of the information in context to the current environmental conditions. Then they can apply that to granting of a warrant or granting of an activity for law enforcement agencies. That is something we cannot debate in the House of Commons. There are protective measures that are required because of national security, individual security, witness security. It only stands to reason that it happen in the courts, and not on the floor of the House of Commons.[47]		

[47] Canada, Parliament, *House Debate,* 41 Parl, 2 Sess, Vol 147, No 177 (23 February, 2015) (Leef) at 11510.