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Primer on

Providing Input to the Standing Committee on Public Safety and National Security

and your Member of Parliament

Regarding National Security in General and *BILL C-51,*

An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts

(Anti-Terror Act, 2015)

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ABOUT KSM LAW

KSM Law is a full-service firm located in Toronto. Its lawyers have appeared at all court levels in Canada, have appeared as experts in various areas of the law, and have been invited as human rights observers by international organizations.

KSM Law has a strong interest and track record in protecting and advancing human rights and civil liberties. KSM Law strives to accomplish this by engaging in significant community outreach efforts, media involvement, and public advocacy. The lawyers at KSM Law have been in the forefront in advocating on these issues. KSM lawyers, Faisal Kutty, Naseer (Irfan) Syed, Akbar Mohammed and Mohamed El Rashidy, have acted on behalf of individuals and institutions who have been subjected to anti-terrorism investigations, and have spoken and written extensively on these topics. The lawyers at KSM Law have also played a significant role in educating the public about their rights, responsibilities and their role in upholding our democratic ideals. In the context of Bill C51, KSM lawyers were instrumental in organizing and delivering more than three dozen seminars across the country in 2015.

Here are some highlights from KSM Law experience and contributions in the context of national security:

1) Organized and chaired the first National Security Town Hall meeting with the Muslim community post 9/11 in Toronto with community leaders, imams, concerned Canadians and officials from the Royal Canadian Mounted Police (RCMP), Canadian Security Intelligence Service (CSIS), Canada Border Services Agency (CBSA), Canadian Security Establishment (CSE), Integrated National Security Enforcement Team (INSET) and numerous other national security agencies.

2) Have conducted dozens of seminars and workshops on national security and rights.

3) Our lawyers have acted as general counsel for civil and human rights groups, including the Canadian Muslim Civil Liberties Association (CMCLA) and the Canadian-Council on American Islamic Relations (CAIR-CAN), presently known as the National Council of Canadian Muslims (NCCM).

4) Our lawyers have acted as counsel or advised many of the largest mainstream Muslim/Arab organizations including the Islamic Society of North America (ISNA), the Islamic Circle of North America (ICNA), the Muslim Association of Canada (MAC), the Canadian Islamic Congress (CIC) and the Canadian Arab Federation (CAF) from time to time.

5) Our lawyers have assisted as counsel on behalf of CAIR-CAN and/or the CMCLA in the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar; the Immigration and Refugee Protection Act security certificate cases heard in June 2006 in the Supreme Court of Canada, namely Hassan Almrei v. Minister of Citizenship & Immigration, et al., Adil Charkaoui v. Minister of Citizenship and Immigration, et al., and Mohamed Harkat v. Minister of Citizenship and Immigration, et al.; the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182; and the Internal Inquiry into the Actions of Canadian Officials in Relations to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, all of which are National Security related cases.

6) Our lawyers have also represented individuals and organizations during voluntary interviews with CSIS. Much of this representation is done on a pro bono basis because in most cases these individuals do not have access to any form of financial assistance and would have no access to justice in the form of information about their legal/constitutional rights and/or right to representation.

7) We have long supported the government's right and indeed responsibility to protect Canadians from threats of terrorism or other dangers, both external and internal. We also believe that, as Canadians, we all have a duty to cooperate in keeping Canada safe. To this end, on July 21, 2005, our lawyers were instrumental in organizing an unprecedented statement by 120 leading Canadian imams (religious leaders), spanning the broad spectrum of Islamic views, to denounce terrorism and to discourage extremism in the Canadian Muslim community. The statement read in part: “Anyone who claims to be a Muslim and participates in any way in the taking of innocent life is betraying the very spirit and letter of Islam.”

EXECUTIVE SUMMARY

Bill C-51 represents a drastic expansion of national security agencies' powers without sufficient oversight or safeguards in place. There is no evidence that demonstrates Bill C-51's provisions are necessary or effective in achieving its alleged goal of enhanced national security. Despite findings by the courts and other review bodies of prior shortcomings and abuses by Canadian officials in national security, Bill C-51 is drafted in a manner that flagrantly disregards such criticism and recommendations. Our key concern with Bill C-51 is that the increased powers it allows are not proportional to its needs, nor are they accompanied by effective oversight mechanisms to ensure accountability. Moreover, we are also deeply disturbed by the fact that national security powers, practices and policies disproportionately have on the Muslim and Arab communities in Canada.

The specific concerns can be summarized as follows:

1. Absence of Accountability, Oversight and Review in the context of national security in general and Bill C-51.

2. Exponential increase of mass information collection and sharing with internal government agencies as well as foreign entities, threatening privacy but also the safety of Canadians travelling abroad. Absent significant amendments, the Security of Canada Information Sharing Act should be repealed.

3. Impairing mobility rights without due process: The Secure Air Travel Act codifies parts of Canada's existing Passenger Protect Program (PPP) used to deny air travel to individuals. The Act does not contain adequate substantive or procedural protections for listed individuals and does not provide any effective redress system or sufficient transparency or accountability mechanisms, and places Canadians at serious risk of abuse by foreign entities as well. Absent significant reforms, this Act should be repealed.

4. Radical expansion of CSIS powers and disregard for the Charter of Rights and Freedoms. The amendments to the Canadian Security Intelligence Service Act grants powers that would be exercised covertly and without meaningful oversight or review. The amendments also undermine the rule of law and the role of our judiciary by authorizing our courts to issue warrants in violation of the Canadian Charter of Rights and Freedoms. Provisions that empower CSIS to act without regard to international law or foreign domestic law is extraordinary, and completely disregards Canada's binding international legal obligations, and sets a dangerous precedent for other countries.

5. Undue expansion of criminal offences and criminal law powers. The amendments to the Criminal Code are drastic and unnecessary. The new offence of promoting or advocating terror is overly broad and has a chilling effect on dissent. This offence is unnecessary in light of the already wide range of criminal terrorism offences. Moreover, the lower thresholds for preventive arrest, detention and recognizances with conditions – already

exceptional broad powers – are now amplified and undermine due process rights and the rule of law. Vagueness and overly broad provisions will make our society LESS SAFE not more secure.

6. Reversal of important constitutional protections pursuant to section 7 of the Charter. Amendments to the security certificate regime under the Immigration and Refugee Protection Act has reversed important constitutional protections that have been crafted in response to judicial findings that section 7 – liberty rights and the principles of fundamental justice – be upheld.

7. Our government's shameful "complicity" in torture must cease immediately.

8. Access to Justice issues. Thousands of Canadian Muslims and Arabs have had to submit themselves to "voluntary" interviews with CSIS. The number and frequency will undoubtedly increase in the wake of Bill C-51.

This primer on issues raised by our existing national security framework (with a particular focus on Bill C-51) focuses on the above noted eight main areas of concern. These have profound effect on all Canadian citizens and residents, but have a disproportionate impact on religious and ethnic minorities, especially Canadian Muslims and Arabs.

WHAT YOU CAN DO

The deadline is December 15, 2016. DO NOT DELAY.

You can do the following:

1) **Participate in the online component where you can detail your concerns to the government in writing.**
2) **Participate in the in-person consultations (this may be too late, but you can contact your MP).**
3) **Write to your Member of Parliament.**
4) **Donate, join and volunteer with organizations at the forefront (Please see list at the end of this document).**

Specific Concerns:

1. Absence of accountability, oversight and review in the context of national security in general and Bill C-51.

Most criticisms of Bill C-51 have focused on the concerns and issues with the content of the legislation. There is no question that it is fundamentally flawed, but there has not been as much focus on what is left out of the legislation. The seismic changes to Canada's national security system enacted by the Bill contains no commensurate increase in accountability mechanisms. This problem is exacerbated because Canada's existing national security framework as a whole is seriously deficient in meaningful or effective accountability. The need for greater accountability in this area has been recognized by federal Commissions of Inquiry (O'Connor, Iacobucci, and Major Commissions), two of which made considered and detailed recommendations based on extensive study, research, and expert consultation.

Accountability not only prevents human rights abuses but it can be a prerequisite for efficacious security. The failure to include meaningful oversight and review reforms in this Bill can imperil Canada's security in the long run. While the *Security of Canada Information Sharing Act* envisions widespread information sharing among many government departments which is a valid counterterror strategy, indispensable safeguards are missing.

The existing review of national security functions is done in a way that allows only for a narrow focus on a single department at a time. With respect to CSIS, the Security Intelligence Review Committee which reviews CSIS activity has repeatedly raised concerns regarding its constraints in adequately exercising its mandate. The dangers of constrained review are amplified by Bill C-51's proposed expansions of CSIS powers in Canada and abroad. The Commissioner of Communications Security Establishment Canada (CSEC) has remarked upon the difficulties inherent in reviewing CSEC's functions given its inability to engage in review of other institutions with which CSEC regularly collaborates. This collaboration is likely to increase in light of the changes introduced by Bill C-51.

The Edward Snowden revelations have further underscored the unimagined scope and scale of national security surveillance that demands oversight and review. There are numerous federal departments and agencies in Canada with national security responsibilities, and also federal, provincial and municipal police forces with such responsibilities. The plethora of powers and actors that forms Canada's national security landscape --- powers that are significantly enhanced by Bill C-51 – urgently demand commensurate accountability mechanisms. Bill C-51 acutely fails to deliver any appropriate accountability mechanisms.

2. Violations of privacy and information sharing without adequate safeguards pursuant to *The Security of Canada Information Sharing Act*

The Act authorizes significant information sharing between government institutions and foreign entities about "activities that undermine the security of Canada." The Act's definition of "activity that undermines the security of Canada" is very vague and open ended. It allows

almost any information about an individual given to a particular government department to be shared with other departments without consent or even a rational basis or connection which the government should have to justify. Even more troubling, the information gathered by the government may also be shared with other governments or foreign institutions without the individual's consent or knowledge. The broad nature of the definition could result in non-violent dissent being viewed as undermining national security and the Act could capture many peaceful individuals and organizations in its ambit.

The secretive nature of the information-sharing provisions has significant privacy implications with respect to an individual's personal information. There are no internal or external safeguards to ensure either the reliability or the relevance of the information being shared, which could result devastating consequences for the individual if the information is improperly used, such as being viewed as a terrorist or being placed on the No-Fly List.

Furthermore, the Act provides governments with broad discretion on when and how information will be shared and immunizes negligent or reckless behavior on its part from litigation. This leaves affected individuals without recourse for the harm they may face. The Arar Commission has made several recommendations regarding information sharing, but Bill C-51 has failed to take them into consideration. This is a significant oversight if the Bill is hoping to protect Canadian Muslims, such as Maher Arar, against further injustice from the government. The Act is in dire need of clarification and precise definitions of key terms, in addition to implementing effective oversight mechanisms and information sharing controls, to avoid the negative consequences that will inevitably result.

3. Inclusion on No-Fly List pursuant to the *The Secure Air Travel Act* without due process or meaningful appeal mechanism

The Act contains a very low threshold for an individual to be placed on the No-Fly List, and makes it next to impossible to be able to get one's name off the list. The Minister of public safety only needs reasonable suspicion that a person poses a threat to transportation security or air travel. Placing an individual on this list is a severe restraint on liberty. It is also illegal for anyone to disclose that someone is on the list, which makes it very difficult for affected individuals to determine why they were denied boarding or scrutinized when travelling. Being added to the No-Fly list imposes significant hardships of individuals including restrictions on mobility rights, interference with livelihoods and even physical harm at the hands of foreign entities. The latter results from the fact that there are no safeguards to address how domestic or foreign entities use this information.

The fact that more than fifty Canadian children are ensnared in the list speaks volumes about its accuracy and efficacy as a security tool.

Although there is an appeal mechanism, the individual placed on the No-Fly list must demonstrate that the Minister acted unreasonably, which is a very high standard that requires significant deference to the Minister and will be difficult to meet in most cases. The secretive

procedure, in fact, violates the *Charter* since it is based on the rules from the old IRPA security certificate regime. It allows the Minister to ask the court to hold part of the hearing in secret and the judge then has the ability to make a decision based on this information, which will be unknown to the individuals placed on the No-Fly list, their lawyers, and the public. In 2007, The Supreme Court of Canada had found this procedure was unconstitutional under section 7 of the *Charter*.

4. Radical expansion of CSIS powers and disregard for the *Charter of Rights and Freedoms*

Bill C-51 significantly alters the nature of CSIS from an intelligence-gathering agency to one that is actively engaged in countering national security threats, thereby giving CSIS new police-like powers. The Act now allows CSIS to take measures inside or outside of Canada to reduce threats to national security. These measures can be allowed even if they violate *Charter* rights if a Federal Court warrant is granted. The language of the warrant authorization in sections 12.1(2) and 21.1 are overly broad and lists very few acts that would be prohibited, such as causing death or bodily harm, or violating an individual's sexual integrity. The fact that the provision would justify the court in authorizing measures that would violate an individual's constitutionally protected rights is highly disconcerting and drastically misconstrues the role of the courts in Canada's justice system. The provisions are also plagued with uncertainty in how CSIS would interpret these authorizations to breach *Charter* rights and Canadian law. In addition, the warrant proceedings are held in secret, where only the government is present and represented, which grants minimal, if any, defences to affected individuals. The procedure is akin to the Foreign Intelligence Surveillance Act Court (FISA Court) in the United States which as highlighted by the Edward Snowden incident essentially served as a rubber stamp agency for government violations.

These provisions raise serious concerns about the potential for CSIS agents to abuse their powers and may in fact make terrorism prosecutions extremely difficult. Again, there are no oversight or review mechanisms to support these new powers, nor has the government provided a satisfactory explanation for these radical changes. Considering the fact that Canadian Muslims and Arabs have already been subjected to increased and intensified scrutiny for national security since 9/11, these broad and expansive powers have significant potential to disproportionately target these communities and infringe their constitutionally protected rights.

5. *Criminal Code* Amendments

Bill C-51 made some significant amendments to the *Criminal Code.* Much of the language of the amendments create uncertainty, vagueness, and is overly broad. Consequently, the amendments are questionable from a constitutional perspective and appear to have little, if any, impact on public safety.

a) Advocating or Promoting Commission of Terrorism Offences

This offence is overbroad considering the range of innocent speech it has the potential to capture – many of which section 2(b) of the *Charter* was designed to protect. The provision would apply to all statements, including private statements, emails, and text messages. It is much broader than other existing terrorism offences in the *Criminal Code* since this new offence does not require an actual terrorist purpose. Rather, it is meant to cover speech that promotes and advocates "terrorism in general," which is a very vague term plagued with uncertainty.

This amendment enables CSIS to justify increased surveillance of private conversations under the guise of investigating this offence. This provision will chill free speech, which would be inconsistent with our Charter rights and it could negatively affect security and public safety by driving relevant speech offline or underground. It also has the potential to censor and target members of religious communities, such as Muslims. The offence will certainly curb otherwise legitimate speech relating to politics and religion and cause people to fear expressing unpopular or critical views on controversial topics.

b) "Terrorist Propaganda"

The term "terrorist propaganda" has been added to a customs tariff in Bill C-51, which would allow customs officials to seize such material at the border. Cases in the past, such as *Little Sisters Book and Art Emporium v. Canada*, have demonstrated such authority is susceptible to abuse, since there is no mechanism for independent review. Customs officials would have the power to determine what material should be seized as terrorist propaganda without any guidance on how to assess the materials. Although we agree there is a benefit to the deletion orders for terrorist propaganda, the provision is too broad since it encompasses a wide range of material that Parliament likely didn't intent to capture. Furthermore, it lacks any requirement for mental fault, contains no requirement that the material have a terrorist purpose, and does not include any reasonable defences or exceptions. This offence also has the potential to censor religious groups, especially Muslims, since there will undoubtedly arise issues surrounding books or other religious materials permitted to enter the country.

c) Preventative Arrest and Detention

The *Criminal Code* already contains provisions regarding preventative arrest and detention. The Bill C-51 amendment lowers the threshold for preventative arrest and detention, consequently creating the risk that innocent people would be targeted based on mere suspicion. The provision creates a significant reduction in the standard for arrest and detention due to its wording. Law enforcement would be able to arrest and detain somebody if they suspect a terrorist act "*may* be carried out," instead of the previous standard of "*will* be carried out." Thus, law enforcement can arrest or detain someone as long as they believe it would likely prevent a terrorist activity that *may* occur. In some situations, these powers can even be exercised without a warrant. Bill C-51 has the effect of reducing the threshold required, extends the permissible

period of detention, and omits a sunset clause. Such high levels of discretion with inadequate protections can result in increased profiling and discrimination against ethnic and religious groups.

6. *Immigration and Refugee Protection Act* (IRPA)

Bill C-51's amendments to Division 9 of the Immigration and Refugees Protection Act are contrary to the *Charter* and the Supreme Court of Canada's 2007 decision regarding the use of secret evidence in immigration and refugee proceedings. The SCC held that such a procedure would be unconstitutional under section 7 of the *Charter* and that the government cannot rely on secret evidence in such proceedings without providing a procedure by which the evidence can be tested. The provisions would effectively limit the scope of materials provided to special advocates (appointed to assist the individual who is the subject of the IRPA proceeding) by allowing the government to decide which information is relevant and what should be disclosed them. The provisions should be rejected considering the fact that the procedure is inherently unfair and has already been deemed unconstitutional by the Supreme Court.

7. Our shameful "complicity" in torture

Another national security practice that violates the *Charter* and has left a black mark on Canada is our government's "complicity" in torture and other rights violations. This was also called out in a stinging report earlier this year by the United Nations Committee Against Torture.

The government did own up to Maher Arar in 2007 after a Commission of Inquiry. Sadly, despite calling for this while in opposition, the Liberal government now refuse to apologize and compensate Abdullah AlMalki, Ahmad Abou El-Maati, and Muayyad Nureddin for suffering the same fate. Disturbingly, Ottawa is also not prepared to rescind a directive allowing our agencies to use information obtained through torture.

Other Canadians (Dr. Mahboob Khawaja and Kassim Mohamed) have come forward publicly with allegations of our complicity in their detentions (and even torture) in Egypt, Saudi Arabia and Pakistan. Numerous others fear coming forward.

As noted by prominent national security lawyer Barbara Jackman, Canada has effectively but quietly adopted an indirect form of rendition — getting foreign governments with questionable human rights records to do the "dirty work."

This must end immediately.

8. Access to Justice and Legal Aid Funding

Since the tragic events of 9/11, hundreds if not thousands of Canadians (mostly Muslims and Arabs) have been compelled to participate in "voluntary" meetings with Canadian

intelligence agents which in many instances are far from voluntary because of the veiled threats, intimidation and coercion used in too many instances. In fact, lawyers at KSM Law alone have assisted hundreds of individuals and organizations during their interviews. Most of these interviews are nothing more than chat sessions, sometimes they are fishing expeditions and yet other times they devolve into interrogations. Much of this representation is done on a *pro bono* or reduced fee basis because in most cases these individuals do not have access to any form of financial assistance and would have no access to justice in the form of information about their legal/constitutional rights and/or representation. The consequences in many instances – livelihood issues, travel restrictions and even physical safety – are too dire for people to be essentially compelled to meet without any access to legal aid or advice. Many of these people are ensnared in our national security web merely through guilt by association and the inevitable false positives. Too many innocents are compelled to clear their name and participate in interviews without legal counsel with serious implications on their immigration and citizenship status, livelihoods, fundamental freedoms and even physical safety (especially when the information gathered from these meetings are made available to foreign sources).

Ottawa must release the number of national security "visits," those questioned overseas at our behest, those caught up on other lists, their nature and the groups targeted, if not publicly then to the new parliamentary oversight committee envisaged by Bill C-22 (which has issues of its own).

Legal aid must also be made available to these people caught up in the national security web.

CONCLUSION

Our primary concerns with Bill C-51 are its overly broad and vague provisions that contain minimal, if any, independent oversight and review mechanisms. Bill C-51 fails to consider the impact the proposed amendments would have on chilling free speech, its potential for abuse, infringement of *Charter* rights, and the adverse effects it could have on religious and ethnic minorities in Canada.

Since 9/11, Canadian Muslims have been subjected to increased suspicion and prejudicial treatment, due to stereotyping and discrimination. Additionally, considering the vast media attention on groups such as ISIS and the political discord in Muslim countries, it is highly likely that the result of Bill C-51 would be to disproportionately impact Canadian Muslims. National security is not furthered or enhanced when certain vulnerable groups are made to feel less secure and have no avenues for redress. Many, if not all, of the provisions would likely result in a heightened risk of prejudice, profiling, and discrimination of Muslims. The Arar Commissions and Air India Commission recommendations that address the deficiencies in national security regimes have failed to be considered or implemented in Bill C-51.

Although the government may assume granting increased powers and discretion to law enforcement agencies would benefit national security, it needs to realize the problem cannot be tackled and resolved merely through creating laws that would contravene the *Charter* and create more potential for abuse than perceived benefits. The provisions need to contain adequate

mechanisms for review and redress for affected individuals, in addition to limiting the potential for abuse of the powers it grants to law enforcement agencies. They need to be drafted clearly and concisely to avoid uncertainty in terms of how the provisions should be applied. The provisions should be consistent with the *Charter* and acknowledge the impact such changes may have on all members of Canadian society.

Given that the foregoing pose a formidable challenge, the best case scenario is for the changes introduced by Bill C-51 to be scrapped and the government then explore more comprehensive ways on how to better balance liberty and equality with security.

ADDITIONAL RESOURCES:

1) Antiterror.ca, a comprehensive resource website created by Anushka Nagji, a front line legal advocate, and Alnoor Gova, a scholar researching the nexus of hate crimes, Islamophobia and national security laws.
2) Resource page for the Canadian Civil Liberties Association.
3) Resource page for the Canadian Journalists for Free Expression.
4) British Columbia Civil Liberties Association National Security Consultation Series.
5) International Civil Liberties Monitoring Group comments on consultation; and
6) National Council of Canadian Muslims resource page.

The government also released two supporting documents for the consultation:

7) A national security 'green paper' which establishes the framework for the consultation. (Download 1.7mb)

8) A background document which details specific scenarios and precedents for the use of the legislation. (Download 1.5mb)

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