Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Submission to the Standing Committee on Public Safety and National Security in respect of Bill C-44, *An Act to Amend the Canadian Security Intelligence Service Act and other Acts*

Federation of Law Societies of Canada

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I. INTRODUCTION

1. The Federation of Law Societies of Canada (the "Federation") is the national coordinating body of the 14 provincial and territorial governing bodies of the legal profession in Canada. Our member law societies are charged with the responsibility of regulating Canada's 100,000 lawyers and 4,000 Quebec notaries in the public interest. The Federation is a leading voice on a wide range of issues of national and international importance involving justice and regulatory matters critical to the protection of the public. The Federation appreciates the opportunity to contribute to Parliament's review of Bill C-44, *An Act to Amend the Canadian Security Intelligence Service Act and other Acts* ("Bill C-44" or "the Bill").

II. SUBMISSION HIGHLIGHTS

2. Bill C-44 was introduced by the Honourable Steven Blaney, Minister of Public Safety and Emergency Preparedness, in part to ensure that the identities of Canadian Security Intelligence Service ("CSIS") human sources are kept confidential, subject to certain exceptions. The Federation's submission focuses solely on these provisions.

3. The Federation recognizes the important national security initiatives undertaken by CSIS and the complementary role it plays in relation to Canadian law enforcement agencies. This important work must, however, be accomplished within the framework of values and constitutional principles on which Canadian society rests.

4. The Federation is concerned because the Bill as drafted could lead to situations in which a person who has been detained on the basis of confidential human source information may not know the basis for the detention and may be denied the right to effective counsel. The Supreme Court of Canada affirmed in its 2007 decision of *Charkaoui v. Canada*[1], and again in its 2014 decision of *Canada v. Harkat*[2] that the right to a fair process includes the right to know and meet the case. These rights are two requirements of the principle of *habeas corpus,* a principle that was first enshrined in the Magna Carta in 1215, and have remained enshrined in our common

[1] *Charkaoui v. Canada (Citizenship and Immigration),* [2007] 1 S.C.R. 350, 2007 SCC 9 (CanLII) ("*Charkaoui*").
[2] *Canada (Citizenship and Immigration) v. Harkat,* 2014 SCC 37 ("*Harkat*").

law ever since.[3] Effective counsel is necessary to protect these fundamental principles to the greatest degree possible in the circumstances.

5. A similar concern arises with respect to the Bill's provisions that would establish Court processes for considering: (i) whether a person is a confidential human source and/or information is confidential; and (ii) whether the identity of a confidential human source and/or information from which the identity of the human source could be inferred should be disclosed. As currently drafted, the Bill would require that any such Court hearings be held in private and *in the absence of the accused or detained person and that person's counsel*, unless the judge orders otherwise. These provisions would deprive the accused person or detainee of the right to effective counsel and would undermine his or her ability to test the government's case for keeping secret potentially significant evidence. The rights of the detainee or accused person cannot be properly represented in a secret proceeding in which no one is advocating for him or her. This would represent an unnecessary departure from *Charter* protected rights and procedural protections.

6. It is not appropriate to have judges play the role that our justice system ordinarily assigns to counsel. This would represent a setback for an independent judiciary. The courts must wait for cases to be brought by counsel. Moreover, because judges must be impartial, they cannot lead evidence, cross-examine or make argument. They must remain above the fray. It is therefore left to counsel to develop and present the case. The effective participation of counsel is thus essential to the rule of law and the independence of the judiciary.

7. As the Supreme Court of Canada made clear in *Harkat*, when a legislative scheme engages an individual's life, liberty and security of the person interests, procedural justice must be met through full disclosure or through alternative proceedings that "must constitute a substantial substitute to full disclosure".[4] Its decision in *Charkaoui* and Parliament's subsequent decision to create a role for special advocates under the *Immigration and Refugee Protection Act* ("*IRPA*") demonstrate that Canada can both protect sensitive information while preserving *Charter* rights and can protect the

[3] *Charkaoui* at para. 29.
[4] *Harkat* at para. 43.

proper functioning of our courts by providing for effective counsel.

8. The Federation submits that national security interests and respect for the rule of law can both be met in this Bill by (i) expanding the right to apply for a hearing as to whether a confidential source or confidential information should be disclosed in a court hearing; and by (ii) permitting either the applicant's counsel or *amicus* counsel to participate in any hearing related to disclosure of the information at issue. The introduction of such measures would reinsert the vital role played by effective counsel into the judicial processes contemplated by the Bill. While the recommended amendments would reflect imperfect substitutes for the full regular procedural protections afforded individuals in detention, they would protect national security concerns without unnecessarily compromising the individual's right to a fair hearing, the proper functioning of our courts or respect for the rule of law.

III. OVERVIEW OF KEY PROVISIONS

9. The key aspects of the Bill of concern to the Federation relate to the provisions for protecting the identity of CSIS human sources. Proposed new s.18.1(1) of the *Canadian Security Intelligence Act* ("*CSIS Act*") identifies the following rationale for keeping the identity of CSIS human sources confidential: (1) to protect the lives of CSIS human sources; and (2) to encourage others to provide information to CSIS. This is accomplished in part by prohibiting disclosure of the identity of a human source, or any information from which the identity of a human source could be inferred in proceedings before courts or other bodies with jurisdiction to compel the production of information, such as administrative tribunals.

10. The confidentiality that the Bill would accord CSIS human sources and information from which the identity of a human source could be inferred are subject to two narrow exceptions. Either may be disclosed (1) if the human source and the Director of CSIS consent to doing so (Bill C-44, section 7, proposed new *CSIS Act* s.18.1(3)), or, (2) by order of a judge (Bill C-44, section 7, proposed new *CSIS Act* s.18.1(4)).

11. The Bill limits the jurisdiction of a judge to entertain an application for disclosure of the information. Applications may be brought in any proceeding involving CSIS human sources or confidential information for an order declaring that either the individual at issue is not a human source, or that the information at issue is not that

from which the identity of a human source could be inferred (Bill C-44, section7, proposed new *CSIS Act*, s.18.1(4)(a)). Applications may also be brought in a "prosecution of an offence" for an order for the disclosure of a human source or for the disclosure of information from which a human source may be inferred on the basis that it would be "essential to establish the accused's innocence" (Bill C-44, section7, proposed new *CSIS Act* s.18.1(4)(b)). If the judge grants the application, the judge may order the amount of disclosure that the judge sees fit, and may impose conditions on how the disclosure is made (Bill C-44, section 7, proposed new *CSIS Act* s.18.1(8)).

12. Pursuant to the Bill any application brought before a judge would be heard in private, and in the absence of the applicant *and* their counsel, unless the judge orders otherwise (Bill C-44, section 7, proposed new *CSIS Act* s.18.1(7)).

IV. IMPACT ON THE RIGHT TO A FAIR JUDICIAL PROCESS AND THE ROLE OF COUNSEL

13. There are numerous instances when the state may deem it necessary to detain persons in the interest of national security. However, the Federation is concerned that the Bill's proposed framework unnecessarily limits disclosure and testing of the evidence on which such detention is based. The Bill permits applications for the disclosure of the identity of a human source or information from which a human source can be inferred only when the proceeding is a "prosecution of an offence", and the disclosure is "essential to establish the accused's innocence". The Bill thereby prohibits applications in numerous types of situations in which a person may be detained on the basis of CSIS human source information including, for example:

- When an individual is detained as a preventative measure pursuant to the *Criminal Code of Canada*;
- When a person seeks bail pending a criminal trial;
- When an individual is detained pending a deportation hearing under the *IRPA*; and
- When an individual is the subject of a deportation hearing under the *IRPA.*

14. The Supreme Court of Canada decisions in *Charkaoui* and *Harkat* make it clear that although full disclosure of information and evidence may be impossible in certain circumstances, "basic requirements of procedural justice must be met 'in an alternative fashion appropriate to the context, having regard to the government's objective and the interests of the person affected'".[5]

15. The Federation submits that when an individual's life, liberty and security interests are at stake, procedural protections must be developed to act as a reasonable substitute to full disclosure in open court when such full and open disclosure is not possible.

16. In *Charkaoui,* the Supreme Court of Canada identified a number of such mechanisms. It noted how defense counsel in the Air India trial were able to review sensitive materials on an undertaking not to disclose the materials to anyone, including their client. It also embraced the concept of special advocates, the system ultimately implemented for security certificate cases under *IRPA*.[6] These examples demonstrate that by harnessing the unique and "fundamentally important" role of legal counsel within the administration of justice,[7] courts and legislatures have fashioned means of safeguarding national security interests while providing procedural protections. Although such substitutes to full disclosure in open court may be "imperfect", as the Supreme Court notes,[8] they would be less problematic than the proposed legislative scheme, which provides no procedural mechanism to seek disclosure in certain circumstances, and undermines the right to effective counsel.

17. The Federation submits that the presence of counsel or a special counsel system could alleviate concerns with the Bill's proposed new *CSIS Act,* s.18.1(7), which, as noted above, would require that applications be held in the absence of the applicant *and* their counsel unless the judge orders otherwise. Without counsel or an *amicus* at the hearing, the applicant would be denied the right to effective counsel as no one would be representing his or her interests. The difficulties in holding judge-alone hearings with respect to confidential information were dealt with extensively by the

[5] *Harkat*, at para. 43, citing *Charkaoui* para. 63.
[6] See *Charkaoui*, at paras. 70 to 84
[7] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 187-8 per Justice McIntyre.
[8] *Harkat,* at para. 77.

Supreme Court in *Charkaoui:*

> The judge, working under the constraints imposed by the *IRPA*, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing. The judge sees only what the ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions of the named person when the hearing is reopened, the judge is prevented from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the designated judge needs to hear. If the judge cannot provide the named person with a summary of the information that is sufficient to enable the person to know the case to meet, then the judge cannot be satisfied that the information before him or her is sufficient or reliable. Despite the judge's best efforts to question the government's witnesses and scrutinize the documentary evidence, he or she is placed in the situation of asking questions and ultimately deciding the issues on the basis of incomplete and potentially unreliable information.
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> The judge is not helpless; he or she can note contradictions between documents, insist that there be at least some evidence on the critical points, and make limited inferences on the value and credibility of the information from its source. Nevertheless, the judge's activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?[9]

18. In contrast, counsel, or, when necessary due to the nature of the confidential information at issue, special advocates can ensure that the interests of a person detained will be represented.

19. As the Supreme Court noted in *Harkat,* special advocates under the *IRPA* are security-cleared, competent counsel whose presence ensures that government claims that information should not be disclosed are fully scrutinized.[10] They do not

[9] *Charkaoui,* at paras. 63-64.
[10] *Harkat,* 35, 67 and 70.

communicate confidential information to the applicant, or the applicant's counsel. Their participation, while imperfect from the perspective of the applicant, protects procedural fairness and *Charter* rights without compromising confidential information or national security.

20. The Supreme Court of Canada has made it clear that testing confidential information should not be left to a judge alone. The presence of effective counsel saves a judge from being forced to descend into the arena. The presence of effective counsel thereby maintains judicial independence and protects the rule of law.

V. RECOMMENDATION

21. In the Federation's respectful submission the Bill should be amended to expand the right to apply for release of information on the identity of a human source, or from which the identity might be inferred, to all proceedings in which such information is at issue. This would ensure that effective counsel could be present in all instances in which the Government intends to rely upon information from a confidential human source.

22. The Federation submits that the Bill should also be amended to permit the courts to determine in each case whether to permit the applicant's own counsel to fully participate in a hearing on an application for release of information related to a human source, or to appoint *amicus* or special counsel. In the Federation's view, legitimate security interests could be protected by requiring that participation by the applicant's own counsel in any closed proceedings would be subject to counsel obtaining any necessary security clearance, and undertaking not to disclose any secret evidence to his or her client. Alternatively, if the judge believes that the first option is unworkable, the individual should be permitted to choose special counsel from a roster of lawyers who have security clearances. That special counsel would be privy to all of the evidence put before the court or tribunal, would represent the individual in any closed proceedings, and would work with the individual and his or her counsel to test the Government's evidence. As in the case of participation by an applicant's own counsel, security interests could be protected by requiring special counsel to undertake not to disclose any secret evidence to the individual or his or her counsel.

23. It is respectfully submitted that these proposed amendments would meet Parliament's objective of protecting Canadian security in a manner that is consistent with the *Canadian Charter of Rights and Freedoms* and the rule of law. Ensuring that an individual knows the case he or she must meet and respecting the right to effective counsel is the bare minimum that is constitutionally required.

24. On behalf of our member law societies, the Federation therefore asks that Bill C-44 be amended as set out above.

VI. CONCLUSION

25. The Federation is available to assist further at any time. We hope these submissions are helpful.