THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

November 28, 2014

Via email: SECU@parl.gc.ca

Daryl Kramp
Chair, Committee on Public Safety and National Security
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Kramp:

Re: Bill C-44, *Protection of Canada from Terrorists Act*

The Canadian Bar Association's National Immigration Law and Criminal Justice Sections appreciate the opportunity to comment on Bill C-44, *Protection of Canada from Terrorists Act*. The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The National Immigration Law Section comprises lawyers whose practices embrace all aspects of immigration and refugee law. The National Criminal Justice Section represents a balance of Crown and defence lawyers from across Canada.

In this letter, we address four primary aspects of the Bill:

- defining "human source,"
- prohibiting the disclosure of information that would identify a "human source,"
- creating a "human source" class privilege, and
- addressing Canadian courts' jurisdiction to issue warrants for extra territorial investigative activities by Canadian officials.

Bill C-44 would undermine established practices that balance national security against fundamental rights, and potentially call into question Canada's compliance with its international law obligations. In addition, the proposed amendments reduce existing protections against disclosure of information that may identify confidential informants.

Defining "Human Source"

Bill C-44 would amend section 2 of the *Canadian Security Intelligence Services Act* (CSIS Act) to add the following definition:

> "human source" means an individual who, after having received a promise of confidentiality, has provided, provides or is likely to provide information to the Service

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél. : 613.237.2925 | **toll free/sans frais :** 1.800.267.8860 | **fax/téléc. :** 613.237.0185 | www.cba.org
Membership/Adhésion : memberservice@cba.org | **PD/DP :** pd@cba.org | **Sections :** cba.sections@cba.org | **General/Générale :** info@cba.org

The key to the proposed definition is the promise of confidentiality. There are no standards for deciding that someone is a "human source", other than that promise. Not all people provide information with this caveat; information is sometimes received without a request or expectation of confidentiality. In those cases, a person might be considered a "human source" as the phrase is commonly understood, but not as defined in Bill C-44.

As Bill C-44 appears clearly directed at "human sources" of a confidential nature, we suggest this intention be made explicit by including "confidential" before the phrase "human source".

Non-disclosure

The proposed amendments to section 18.1 begin with the statement that "[t]he purpose of this section is to ensure that the identity of human sources is kept confidential." However, the amendments will in fact reduce some protections currently afforded to confidential informants.

Section 18(1) of the CSIS Act prohibits disclosure of information obtained by someone in the course of their duties and protects both confidential informants and employees of the Service engaged in covert activities:

> 18. (1) Subject to subsection (2), no person shall disclose any information that the person obtained or to which the person had access in the course of the performance by that person of duties and functions under this Act or the participation by that person in the administration or enforcement of this Act and from which the identity of
>
> > (a) any other person who is or was a confidential source of information or assistance to the Service, or
> >
> > (b) any person who is or was an employee engaged in covert operational activities of the Service can be inferred.

Bill C-44 would provide separate sections for the two classes of protected persons. The amended section 18(1) would deal solely with employees engaged in covert operation:

> 18 (1) Subject to subsection (2), no person shall knowingly disclose any information that they obtained or to which they had access in the course of the performance of their duties and functions under this Act or their participation in the administration or enforcement of this Act and from which could be inferred the identity of an employee who was, is or is likely to become engaged in covert operational activities of the Service or the identity of a person who was an employee engaged in such activities.

The protection offered by the amended section mirrors that in the current legislation and prohibits disclosure of information, but only as it relates to the identity of someone who is, was or is likely to be engaged in covert operational activities.

In contrast, disclosure of information relating to confidential human sources appears to be limited to disclosure of information during the course of judicial proceedings. The proposed amendments to section 18 do not include any general prohibition against disclosure of information outside the judicial proceedings, such as found in section 18(1). Accordingly, if a confidential human source provides information about a matter that does not result in a judicial hearing, the CSIS Act would no longer prohibit disclosure of either the information or the identity of the source.

To achieve the stated purpose of the amendments and provide greater protection for confidential human sources, Bill C-44 should include protection from disclosure not only in the context of hearings but in other settings too. As worded, it provides *less* protection than currently available, as general disclosure of information relating to confidential human sources is no longer prohibited.

Human Source Privilege

Bill C-44 creates a class privilege similar to police informer privilege that blankets all types of procedures regardless of their nature, scope, source of information or existing protections for informants. In our view, this fails to strike a balance between national security and fundamental rights and does not respond to the nuances of different types of proceedings in which the information may be used, such as criminal prosecution, immigration or security certificate proceedings.

In *Harkat*,[1] the Supreme Court of Canada pointed out the fundamental difference between intelligence gathering done by CSIS and evidence collection in the course of ordinary police work:

> While evidence gathered by the police was traditionally used in criminal trials that provide the accused with significant evidentiary safeguards, the intelligence gathered by CSIS may be used to establish criminal conduct in proceedings that — as is the case here — have relaxed rules of evidence and allow for the admission of hearsay evidence. The differences between traditional policing and modern intelligence gathering preclude automatically applying traditional police informer privilege to CSIS human sources. [para. 85]

In security certificate proceedings, for example, the Special Advocate regime is a carefully crafted approach to address the profound challenge of balancing the constitutional rights of a person subject to a security certificate with the public interest in national security and the secrecy that is essential in that area. Special Advocates are counsel who have received security clearance, are prohibited from sharing secret evidence with the person concerned, and in many cases, prohibited from communicating with that person at all once they have seen the secret evidence. The Supreme Court upheld the Special Advocate regime in *Harkat*, but recognized the delicate balance involved, acknowledging that there are limits to secrecy when an individual's *Charter* rights are at stake.

The use of secret evidence and Special Advocates represents a substantial departure from fundamental principles of Canada's judicial system, notably the principle that courts operate in an open and public manner. In *Charkaoui,*[2] the Supreme Court accepted that national security concerns could justify procedural modifications, including limits on the open court principle, but indicated that those concerns "cannot be permitted to erode the essence of s. 7", and that "meaningful and substantial protection" is required to satisfy section 7. In *Suresh,*[3] the Supreme Court concluded that an individual facing deportation to torture must be informed of the case to be met and given the opportunity to challenge the Minister's information. Omitting flexibility by creating a class privilege applicable in any type of proceeding may result in constitutional challenge to Bill C-44, revisiting issues already decided in *Charkaoui* and *Harkat*.

---

1 *Harkat v. MCI* 2014 SCC 37.

2 *Charkaoui v. MCI* 2007 SCC 9.

3 *Suresh v MCI* 2002 SCC 1.

The creation of this privilege is also unnecessary in light of the existing protections for CSIS informants. In *Harkat*,[4] while the Supreme Court declined to recognize a class privilege for CSIS informants, it did say that judges in security certificate and other national security proceedings ought to give significant weight to concerns that appear to also underlie Bill C-44:

> […] The designated judge has the discretion to allow the special advocates to interview and cross-examine human sources in a closed hearing. This discretion should be exercised as a last resort. The record before us establishes that a generalized practice of calling CSIS human sources before a court, even if only in closed hearings, may have a chilling effect on potential sources and hinder CSIS' ability to recruit new sources. In most cases, disclosure to the special advocates of the human source files and other relevant information regarding the human sources will suffice to protect the interests of the named person. [para. 89, emphasis added]

In our view, this clear direction from the Supreme Court provides sufficient guidance to ensure that the interests of human sources are met, while balancing those interests with the *Charter* rights of the persons concerned. Only in exceptional circumstances will the identity of a human source be disclosed to a security-cleared Special Advocate.

However, Bill C-44 would create a blanket prohibition on disclosure, even to a Special Advocate. More problematically, the proposed legislation leaves no room outside the criminal context for exceptional circumstances akin to the "innocence at stake" exception to informer privilege set out in the proposed section 18.1(4)(b) but restricted to criminal prosecutions. There is no way to go behind the "confidential informant" designation in immigration proceedings. This is precisely the type of exception that was foreseen by the dissent in *Harkat* [5] in recognizing a class privilege:

> [137] But given the intensity of the interests at stake in the security certificate context, we acknowledge that it would be appropriate to recognize a limited exception specifically crafted for the security certificate process which would address only disclosure to the special advocate, not to the subject of the proceedings. Identity should be disclosed only if the reviewing judge is satisfied that other measures, including withdrawing the substance of the informant's evidence from consideration in support of the certificate, are not sufficient to ensure a just outcome.

We oppose the creation of a new class privilege for CSIS human sources, given the extensive protections already in place for them. Should a class privilege be created, we suggest that a judge be permitted to order disclosure of the identity of the human source to Special Advocates in the circumstances described by the Supreme Court in *Harkat*.

Warrants Beyond Canada's Borders

Canadian courts have recognized that they lack jurisdiction to authorize warrants for the operation of the CSIS agents beyond Canada's borders.[6] Section 8(2) of Bill C-44 would amend section 21 of the CSIS Act to explicitly provide Canadian courts with that extra territorial jurisdiction:

---

4 *Supra*, note 1.

5 *Ibid.*

6 See for example: X (Re), 2013 FC 1275 (CanLII) at para 27; *Canadian Security Intelligence Service Act* (Re), 2008 FC 301 (CanLII) at para 55.

> (3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada.

We support increased judicial oversight of Canadian security investigative activities. However, we urge caution in adopting an approach that could suggest Canada is disregarding its obligations under international law.

The proposed extra territorial jurisdiction appears to include activities that could be in violation of a foreign state's domestic legal regime. This approach could undermine the mutual cooperation and respect between nations that contributes to the safety and security of all participating nation states. Further, it could be used by other states to justify activities on Canadian soil that may not be in compliance with Canada's fundamental rights and freedoms. While we commend efforts to enhance judicial oversight over security and intelligence activities, we suggest that the proposed amendments in Bill C-44 be approached cautiously and advanced only after further consultation and debate.

We trust that our comments will be helpful, and thank you for considering the views of the Canadian Bar Association.

Yours truly,

(original signed by Gaylene Schellenberg for Deanna Okun-Nachoff and Eric Gottardi)

Deanna Okun-Nachoff
Chair, Immigration Law Section

Eric Gottardi
Chair, Criminal Justice Section