

(Signed by Director 2008 01 15)

NS

TO: Minister of Public Safety

FROM: Director of CSIS (signed 2008 01 15 and delivered 2008 01 15)

SUBJECT: Opposition Amendment to C-3 (Security Certificates)

BACKGROUND:

Prior to the current Parliamentary recess, The House Standing Committee on Public Safety and National Security (SECU) adopted an amendment to Bill C-3 (proposed by Liberal MP, Ujjal Dosanjh) stating that the definition of "information" in the Bill "does not include information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of Section 269.1 of the *Criminal Code* or cruel, inhumane or degrading treatment or punishment within the meaning of the Convention Against Torture."

The amendment is of significant concern to the Service, as it can easily be interpreted to mean that "derivative information" (i.e. information collected and/or corroborated lawfully and independently by the Service following from a lead provided by a foreign state or agency thereof whose human rights record is questionable) is inadmissible on grounds that, since the origin is unreliable, everything that follows is therefore also tainted. As a result, the Government's ability to act in the interest of public safety on threat-related information or advice provided by CSIS could be significantly and negatively affected by this amendment.

This amendment, if interpreted to mean that "derivative information" is inadmissible, could render unsustainable the current security certificate proceedings. Even if interpreted more narrowly to exclude only information obtained from sources and foreign agencies who, on the low threshold of "reasonable grounds," may have obtained information by way of torture, the amendment would still significantly hinder the Service's collection and analysis functions. The legal interpretation of "reasonable grounds" requires only a serious possibility based on credible evidence, as opposed to the higher civil standard of "balance of probabilities," which requires that it is more likely

than not that information was derived from torture.

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DISCUSSION:

Impact on CSIS Operations

Beyond considering a country or agency's overall human rights record, it is very difficult, if not impossible, for the Service to confirm whether information is derived from mistreatment or torture. If, in the course of pursuing a lead, concerns emerge regarding torture, the Service would further investigate the information in order to corroborate or negate it, and advise its partner departments and agencies accordingly.

The Service must maintain this ability to receive information from a wide range of countries and agencies if it is to properly carry out its functions. A Government submission made recently to the Iacobucci Inquiry supports this position, stating that "the Government of Canada must maintain relationships with 'non-traditional' allies, some of whom have poor human rights records, in order to assist in the fulfilment of its domestic and international obligations to combat terrorism... It must also equip [investigative] agencies... with the ability to engage, and share information, with all countries... ."

With these facts in mind, the recent amendment to Bill C-3 is of significant concern to the Service, as it could be interpreted to mean that the Service's use of information that was lawfully collected would be compromised due to allegations that it derived from information that may initially have been obtained by mistreatment. It is believed that this would significantly and negatively undermine the Service's intelligence gathering and analysis functions, as the threshold to be met for "reasonable grounds to believe" could result in the inadmissibility of any and all information provided by agencies in countries whose human rights records are in question - of which there are many.

For example, Amnesty International's 2007 State of Human Rights Report lists specific cases of several countries violating or being complicit in the violation of human rights, in some cases including torture. This list includes such countries as NS

NS [redacted]

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Of particular concern, a Special Advocate could go so far as to argue that information obtained from NS - should be inadmissible. Although seemingly extreme, such a position would be buttressed NS

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As a consequence of the "reasonable grounds" amendment being ratified, and/or a broad judicial interpretation that would prevent the use of "derivative information," it is not inconceivable that a Court could require CSIS to certify that all intelligence gathered in support of Certificates was done without resort to torture. This would almost certainly result in the Security Certificates regime falling into disuse as a consequence of its unworkability, thus denying the Government a legitimate and important tool for protecting Canadians and national security.

Impact on Current Certificate Cases

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LP Although it is possible that most of the Certificates will be upheld by information collected independently by the Service, much of that information corroborates, or is corroborated by, NS which under this interpretation of the amendment may no longer be admissible.

If, on the other hand, the amendment is interpreted to render inadmissible only information that may, on reasonable grounds, have been obtained directly from torture, the implications would be less severe but nonetheless significant, as assessed below.

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Status of Bill C-3 and Potential Compromise

Bill C-3 is currently at Report Stage in the House of Commons, where we believe it could be amended in a manner consistent with the spirit of the Dosanjh amendment, but in such a way that it would not unduly hinder the Government's ability to act on information or advice provided by the Service.

For example, an amendment proposed by the Bloc Québécois during clause-by-clause consideration could strike a proper balance by amending Section 83(1)(h) of the bill to state that "the judge may receive into evidence anything – other than a statement obtained

under torture – that in the judge’s opinion is reliable and appropriate... .” This amendment is consistent with current jurisprudence and practice, and given the composition of the House of Commons, would likely be adopted if proposed.

CONCLUSION

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- The Government’s ability to act in the interest of public safety on threat-related information or advice provided by CSIS could be significantly and negatively affected as a result of this amendment.
- There remains opportunity for the Government to move amendments to the Bill which could satisfy both the opposition parties and Government concerns.

c.c.: Margaret Bloodworth, Associate Secretary to the Cabinet and National Security Advisor to the Prime Minister

c.c.: Suzanne Hurtubise, Deputy Minister, Public Safety

c.c.: Richard Fadden, Deputy Minister, Citizenship and Immigration Canada

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