BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

By email: defenders@ohchr.org

15 June 2012

Ms. Margaret Sekaggya
Special Rapporteur on the situation of human rights defenders
Office of the U.N. High Commission for Human Rights
Palais Wilson
52 rue des Pâquis
CH-1201 Geneva Switzerland

Dear Ms. Sekaggya,

Re: Questionnaire on the use of legislation, including criminal legislation, to regulate the activities and work of human rights defenders

I am writing on behalf of the British Columbia Civil Liberties Association ("BCCLA"), an organization based in Vancouver, British Columbia. The BCCLA is the oldest and one of the most active civil liberties organizations in Canada. We have spent 50 years working to preserve, defend, maintain and extend civil liberties and human rights across Canada.

Please find below the response of the BCCLA to your questionnaire. As per your request, we have kept our responses brief and in point form where appropriate.

1. a) Please indicate if your country has a specific legal framework, laws or regulations that aim to facilitate or protect the activities and work of human rights defenders. Please cite the names of any such laws or regulations in full.

Canada does not have a *specific* legal framework, laws or regulations that are aimed at facilitating or protecting the work of human rights defenders *in particular*.

The *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("the Charter") enshrines as constitutionally protected a number of rights and freedoms that apply to all Canadians, including human rights defenders. These are listed below:

- **s. 2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;**

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- **s. 2(c) freedom of peaceful assembly;**
- **s. 2(d) freedom of association;**
- **s. 7 the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice;**
- **s. 8 the right to be secure against unreasonable search and seizure;**
- **s. 9 the right not to be arbitrarily detained or imprisoned.**
- **s. 12 the right not to be subjected to any cruel and unusual treatment or punishment.**

b) Please indicate how these laws and regulations are in line with international human rights standards, including, but not limited to, the Declaration on Human Rights Defenders.

The drafting of the Charter was influenced and inspired by international human rights documents, including the Universal Declaration of Human Rights. International human rights standards continue to guide Canadian courts' interpretation of the Charter. The use of international instruments as persuasive sources for interpreting Charter rights and freedoms was recognized by Chief Justice Dickson (as he then was) in *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 348 where it was observed that:

> **...The Charter conforms to the spirit of [the] contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions.**

Although not explicitly recognized as applying to human rights defenders, the Charter rights listed above in response to Question 1(a) provide protection to human rights defenders, in line with the Declaration on Human Rights Offenders ("the Declaration"). Canada has not enacted specific legislation to accord with its obligations under the Declaration.

c) Please also indicate what legal or administrative safeguards are put in place to prevent baseless legal action against and/or prosecution of human rights defenders for undertaking their legitimate work.

There are no such special safeguards in place in Canada to prevent baseless legal action against and/or prosecution of human rights defenders. On the contrary, strategic lawsuits against public participation, commonly known as SLAPP suits, are often used by corporate interests to censor, intimidate and silence people or groups who speak out about or take a position on an issue of public interest by burdening them with the cost of defending meritless actions, typically tort claims for defamation. While SLAPP suits have long been used by corporations, attempts have also been made by governments in Canada to bring SLAPP suits as a tool for silencing criticism. SLAPPs intend to silence individuals or groups by forcing them to redirect their energies and finances to defending a lawsuit and away from their original public criticism. Such suits may also discourage others from taking a similar position and therefore are intended to create a chill effect.

While some attempts have been made to enact legislation that would prohibit the use of SLAPPs, only in Quebec have such efforts been successful. In June 2009, the Quebec National Assembly assented to *An Act to Amend the Code of Civil Procedure to Prevent Improper Use of the Courts and Promote Freedom of Expression and Citizen Participation in Public Debate* (S.Q., 2009. c. 12). This legislation does not expressly provide specific rules to govern SLAPPs. Instead it strengthens existing provisions of the Quebec Code of Civil Procedure concerning abuse of the court's process.

For a few months in 2001, British Columbia also had anti-SLAPP legislation in the form of the *Protection of Public Participation Act*, which came into force in April 2001. However, this legislation was repealed in August 2001 shortly after a change in governing party. In April 2010, the Uniform Law Conference of Canada adopted a *Uniform Prevention of Abuse of Process Act*. Later that year, on October 28, 2010, an advisory panel commissioned by the Ontario Ministry of the Attorney General delivered a report recommending that the province enact legislation to address SLAPP suits. It remains to be seen whether Ontario will enact anti-SLAPP legislation. At present, the Quebec legislation is the only form of anti-SLAPP legislation in force in Canada.

Moreover, Canada continues to have on the books a criminal offence of defamatory libel (found at Sections 298-301 of the *Criminal Code* (R.S.C., 1985 c. C-46) ("the Code")) even though the constitutionality of such an offence has been seriously questioned. Although this offence is rarely used, it was recently invoked in May 2012 against a blogger who posted comments critical of a local police officer. The charges were eventually dropped but not before the individual was arrested, his home raided and computer equipment seized.

2. a) Please describe the measures taken, if any, to ensure that your country's national security-related laws (including laws on public order, public safety, respect for morals and counter-terrorism laws) are not used to unduly restrict the scope of activities of human rights defenders.

No measures have been taken in Canada to ensure that national security-related laws are not used to unduly restrict the work of human rights defenders. On the contrary, national security-related laws are unduly vague and overbroad, and thus have the potential to capture and criminalize legitimate forms of dissent. This issue is particularly timely as the constitutionality of the definition of "terrorist activities" found in Section 83.01(1) of the Code is now before the Supreme Court of Canada ("SCC") in the cases of *U.S.* v. *Sriskandarajah*, SCC Docket No. 34009; *U.S.* v. *Nadarajah*, SCC Docket No. 34013; *R.* v. *Khawaja*, SCC Docket No. 34103 (heard June 11, 2012; judgment reserved).

Another recent example of vague and overbroad legislation that has a chilling effect on expression, association and assembly is Quebec's *An Act to Enable Students to Receive Instruction from the Postsecondary Institutions They Attend* (L.Q., 2012, c. 12), commonly known as Bill 78. Bill 78 is an emergency law passed by the National Assembly of Quebec on May 18, 2012 in response to protests concerning the raising of tuition rates for university students in Quebec. Ostensibly framed as legislation protecting and promoting students' right to access higher education, the law has a repressive effect on fundamental rights and freedoms, by:

- **declaring illegal any picket or "form of gathering" within 50 meters of the "outer limits" of the "grounds" of any educational building;**

- **requiring student associations, associations/unions representing teachers, and college or university employees to "employ appropriate means to induce" their members to comply with its provisions or face prosecution;**
- **declaring illegal demonstrations of 10 or more people at any publicly accessible location in Quebec, unless the dates, times, duration and venue of the demonstration and its route, and the means of transportation to be used are not provided in writing to the relevant police force no less than eight hours before the beginning of the demonstration;**
- **empowering the police force serving the territory where the demonstration is to take place to order a change of venue or route of the demonstration, and requiring organizers of demonstrators and student associations or a federation of associations to comply with any such order;**
- **establishing a date by which all education employees must return to work and prohibiting them from taking any action (including job action) that "by act or omission" will prevent or impede students from receiving instruction or directly or indirectly contribute to slowing down, degrading or delaying instruction; and**
- **by fining offenders for infractions of the law, assessed per day of infraction, amounting to $1,000 - $5,000 for individuals; $7,000 - $35,000 for student or labour leaders or organizers and $25,000 - $125,000 for student or labour organizations.**

b) Please also indicate in particular how these national security-related laws respect the human right to freedom of expression and opinion.

Canada's national security-related laws do not respect the human right to freedom of expression and opinion. Rather, as argued by the BCCLA and others in the trio of cases noted above, the broad definition of "terrorist activities" in Section 83.01(1) of the Code may have a chilling effect on Canadians' right to free expression, including (but not limited) to political and religious speech. Likewise, the vague and overbroad provisions of Quebec's Bill 78, while not overtly enacted in the context of national security, raise serious concerns about the limitations that are placed on democratic dissent. Under Section 16 of Bill 78, the police are empowered to order significant changes to demonstrations where, in the view of the police, it is necessary to do so for the maintenance of "peace, order and public security." This broad power in the hands of police forces, who (as noted above in response to Question 2(a)) must be informed prior to the expressive activity taking place, is open to abuse in the name of "security".

3. a) Please describe the measures taken, if any, to ensure that provisions of the criminal code, or other national laws, are not ambiguous or too broad to allow their arbitrary use, thereby restricting the activities of human rights defenders.

No specific measures are taken in Canada to ensure that provisions of the criminal code, or other national laws, are not ambiguous or too broad to allow for their arbitrary use such that would thereby restrict the activities of human rights defenders. Please see our response to Question 2(a) and (b) for an example where ambiguous and overbroad provisions have the potential to restrict legitimate dissent.

b) Please indicate what legal or administrative safeguards are in place in order to ensure that human rights defenders are not discriminated against in the administration of justice, be it through the handing down of disproportionate sentences, the unreasonable prolongation of criminal or other trials, or any other means.

Apart from the application of the Charter, which places limits on the actions of government actors in Canada, there are no legal or administrative safeguards in place to ensure that human rights defenders are not discriminated against in the administration of justice. As in many other common law jurisdictions, Canadian law does provide for a tort of malicious prosecution which compensates individuals for the malicious, unfounded and unsuccessful institution of criminal or disciplinary proceedings. Plaintiffs will be successful in malicious prosecution claims only in rare and especially egregious circumstances, as there is a high standard to meet requiring proof of an improper purpose to determine malice.

4. a) Please indicate if your country has specific laws or administrative rules governing the registration, functioning and funding of non-governmental organizations. Please cite the names of any such laws or regulations in full.

In Canada, not-for-profit organizations can register under federal, provincial or territorial laws.

Federally, not-for-profit organizations are governed by the following legislation and regulations:

- ***Canada Not-for-profit Corporations Act* (S.C. 2009, c. 23)**
- **Canada Not-for-profit Corporations Regulations (SOR/2011-223)**

Each province and territory has legislation that governs the registration and functioning of such organizations. For instance, in British Columbia, not-for-profit organizations are governed by the following:

- ***Society Act* [RSBC 1996] c. 433**
- **Society Act Regulations, B.C. Reg. 4/78**

b) Please explain how these legal or administrative provisions comply with your country's international human rights obligations regarding the right to freedom of association.

These provisions do not overtly offend any of Canada's international human rights obligations regarding the right to freedom of association.

5. a) Are there criminal or other legal or administrative sanctions for human rights defenders who undertake activities on an individual basis or while the association they are members of is unregistered?

There are no criminal or other legal or administrative sanction for human rights defenders who undertake activities on an individual basis or while the association they are members of is unregistered.

b) If such a legal framework exists, does it restrict the type of activities that human rights defenders can undertake? If yes, please provide further details.

Not applicable.

6. Please indicate the measures taken, if any, to ensure that internal security and official secret-related laws are not used to deny freedom of information to human rights defenders and to prosecute them for their efforts to seek and disseminate information on the observance of human rights standards.

There have been no measures taken to ensure that internal security and official secret-related laws are not used to deny freedom of information to human rights defenders. On the contrary, there is at least one notable instance in which the freedom of information request mechanism was itself abused to intimidate and threaten critics of the government.

In February 2007, Professor Amir Attaran filed an access to information request for government documents about the Canadian military's treatment of Afghan detainees. In March 2010, Professor Attaran stated that he had seen documents revealing that the Canadian military was transferring detainees from Canadian to Afghan custody, even though the Canadian military knew that the Afghani prisoners were being tortured or otherwise treated inhumanely in Afghan custody. The federal government refused to release uncensored versions of the documents that Professor Attaran had seen. Professor Attaran and his colleague Professor Errol Mendes were publicly critical of the federal government's stance. In January 2011, Professors Attaran and Mendes were informed that anonymous persons were seeking extensive information about them through access to information requests, including information about their expenses and teaching records. Professors Attaran and Mendes, both outspoken critics of the government, believe that the government intended to use their personal information against them and that the requests for personal information were part of a conscious effort to chill academic criticism of the government.

7. a) Please indicate the measures taken, if any, to avoid the use of defamation, slander or blasphemy laws to unduly restrict the right to freedom of opinion and expression of human rights defenders.

No specific legislative measures have been taken to avoid the use of defamation, slander or blasphemy laws to unduly restrict the right to freedom of opinion and expression of human rights defenders. However, in *Grant* v. *Torstar Corporation*, 2009 SCC 61, the Supreme Court of Canada recognized a new defence of "public interest responsible communication." The Court ruled that the law of defamation should give way to the rights of a party to speak on matters of public interest provided that the party exercises a certain level of diligence and responsibility in trying to verify the potentially defamatory content. This defence is available not only to the press, but to anyone who publishes material of public interest in any medium. Canada does not have any anti-blasphemy laws.

Over the past several years, there have been a number of insidious ways in which voices of dissent have been silenced or intimidated in Canada. The list below provides only a few illustrations:

- **Peter Tinsley was the Chair of the Military Police Complaints Commission ("MPCC"). After Mr. Tinsley launched investigations into the controversy surrounding the transfer of Afghan detainees to local authorities despite risks of their being tortured, the government prorogued Parliament to halt inquiries into the scandal and after launching unsuccessful court actions to block investigations, decided not to renew Mr. Tinsley's appointment to the MPCC.**
- **Richard Colvin was a senior Canadian diplomat based in Afghanistan from April 2006 to October 2007, working as *chargé d'affaires* and second-in-command at the Canadian embassy in Kabul.**

For having raised concerns and testifying about the Canadian military's transfer of Afghan prisoners to Afghani security forces, Mr. Colvin was personally attacked and his credibility questioned by the government. Numerous attempts were made to prevent Mr. Colvin from testifying at a public inquiry into whether Canadian forces were aware that prisoner detainees transferred over to Afghani forces were being tortured by attempting to classify his testimony as vital to national security and refusing to pay his legal fees despite his status as a senior diplomat. Personal attacks on Mr. Colvin went so far as to suggest that his testimony was aided by the Taliban.

- Cindy Blackstock is the Executive Director of First Nations Child and Family Caring Society of Canada, a non-profit that supports First Nations child welfare organizations. When Ms. Blackstock's organization filed a discrimination complaint with the Canadian Human Rights Commission in 2007 alleging that the Canadian government discriminates against Aboriginal children, she was barred from attending meetings between the government and Aboriginal groups. Ms. Blackstock came to learn that she was under surveillance and that the government was monitoring her personal life, including government staffers being assigned to attend and monitor her public appearances.
- Attacks on human rights mechanisms include the chronic underfunding of the Canadian Human Rights Commission ("CHRC") resulting in the March 2010 shut down of its offices in Toronto, Vancouver and Halifax, locations which together accounted for 70% of the complaints received by the CHRC in 2008. The erosion of funding has a direct impact on how ably the CHRC is able to fulfill its mandate and how readily Canadians are able to file complaints. Another example is the 2006 decision of the government to abolish the Court Challenges Program, a small but significant program that funded test cases of national importance concerning the equality and linguistic rights of Canadians. Funding was restored for a small program covering linguistic rights in 2008; however equality rights challenges remain unfunded.
- A large number of non-profit organizations have been the victims of funding cuts as a result of politically-motivated decisions, such as the Sierra Club of British Columbia, the Canadian Council for International Co-operation, KAIROS, MATCH International and Canada Without Poverty.
- The government has initiated the use of widespread, large undercover surveillance operations to clamp down on demonstrations, dissent, expression, association and assembly, notably at the G-8 and G-20 meetings in Toronto and in response to anti-Olympic demonstrations in Vancouver:
    - Joint intelligence for the Olympics and the G-8 /G-20 meetings was the largest domestic intelligence operation in Canadian history, creating a climate of chill and fear of dissent for political activism or demonstration;
    - The vast majority of arrests were evidently arbitrary (*e.g.*, charges dismissed, dropped or stayed; journalists, legal rights monitors, passers-by and peaceful protesters being arrested en masse);
    - "Pre-emptive" arrests of demonstration organizers
    - Arbitrary and excessive use of force and unwarranted search and seizures;
    - Unprecedented surveillance and massive infiltration by undercover officers into organizations planning peaceful demonstrations (later disclosed to be part of the longest and most intensive undercover operation in Canadian history).

b) How is it enshrined that such laws, as well as laws on printing, publication and censorship, comply with international human rights standards and do not target human rights defenders carrying out their legitimate work?

Not applicable.

8. a) Please indicate if any other type of legislation is used to regulate the activities of human rights defenders in your country and how the application of the legislation mentioned affects the activities of human rights defenders. Please cite the names of any such legislation in full.

The BCCLA would like to call your attention to the following proposed legislation:

- ***Combating Terrorism Act*, Bill S-7, 1st Sess., 41st Parl., 2012 (first reading (House of Commons), June 5, 2012). This proposed legislation seeks to re-enact the power to hold investigative hearings and preventive arrest through recognizance with conditions.**
    - **Investigative hearings effectively render the court an investigative tool of the Canadian Security Intelligence Service ("CSIS") and the Royal Canadian Mounted Police ("RCMP"). Investigative hearings such as the ones proposed in Bill S-7 compromise judicial independence on an institutional level and do fundamental damage to the long-standing right to silence and the right against self-incrimination during police investigations. As the provision is currently drafted, the investigative hearing provision leaves open the potential for abuse and misapplication of the law.**
    - **Provisions in the proposed law concerning recognizance with conditions and preventive arrest without charge or conviction are deeply problematic and offend basic principles of fundamental justice. Detaining individuals based on predictions of future dangerousness is a troubling proposition. Because the requirements of proof are relaxed, there is an increased chance not only of error or abuse, but also of such errors or abuse going undetected and without remedy. Apart from the deprivation of liberty associated with preventive detention, there is the stigmatizing effect of being labeled a terrorism suspect or an individual associated with terrorist activities.**

- ***Jobs, Growth and Long-term Prosperity Act*, Bill C-38, 1st Sess., 41st Parl., 2012 (first reading, June 13, 2012), commonly known as the "omnibus budget implementation bill." Buried in the midst of this bill is the government's intention to abolish the Office of the Inspector General of CSIS.**
    - **Under the *Canadian Security Intelligence Service Act* (R.S.C., 1985, c. C-23), the Inspector General is appointed by the governor-in-council and is responsible to the deputy minister of public safety. The Inspector General monitors compliance by CSIS with its operational policies. To this end, the Inspector General is given full access to CSIS's information and he or she certifies whether the reports provided by the Director of CSIS are adequate and whether they reveal any action on the part of CSIS that the Inspector General views as an unauthorized, unreasonable or unnecessary exercise of its powers.**

- **The Inspector General has been an active watchdog and plays an important role as the public's "eyes and ears" reporting on the work of Canada's security intelligence agency. The Inspector General's functions will now be performed by the Security Intelligence Review Committee ("SIRC"); however there is no indication that the SIRC's capacity, resources or expertise will be supplemented to fulfill these new tasks. The SIRC is a body currently staffed by appointees with no legal training, no national security background and with sometimes apparent affiliations with the governing party.**
- **The erosion of accountability of CSIS evidenced by the government's desire to abolish the Inspector General is a particularly troubling development for a government that has recently been condemned for its complicity in torture and human rights violations by the United Nations Committee Against Torture (UN CAT, *Concluding observations of the Committee Against Torture: Canada*, 1 June 2012, CAT/C/SR.1087 and 1088).**

- ***Protecting Children from Internet Predators Act*, Bill C-30, 1st Sess., 41st Parl., 2012 (first reading, February 14, 2012), commonly known as the "lawful access bill".**

  - **Under this bill, telecommunications providers would be required to give the police subscriber information without a warrant. This legislation is similar to previous attempts introduced by the Conservative minority government designed to give police and intelligence officials expansive new powers to access digital communications. The proposed legislation threatens to violate privacy law and the protection against unreasonable search and seizure. Although it appears that the enactment of this bill into law has been put on hold, it is very likely that some version of this legislation will be back before the House of Commons eventually.**

In summary, Canada's long-standing record of respect for free expression, assembly and association is under threat by insidious efforts to silence criticism and to intimidate dissenters. These threats (in the form of funding cuts, name-calling, surveillance, crackdowns on protestors, and intentionally overbroad and ambiguous legislation open to abuse) are steadily chipping away at Canadians' fundamental rights and freedoms.

Thank you for providing the BCCLA with an opportunity to discuss our concerns with you in preparation of your report. I would be pleased to discuss our responses to this questionnaire with you in further detail. I can be reached at +1 (604) 630.9751 or via email at raji@bccla.org.

Yours truly,

Raji Mangat
Associate Counsel