

What does C-51 Mean for Academic Freedom & Campus Free Speech?

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Bill C-51, the federal government's *Anti-Terrorism Act*, has sparked serious concerns about the potential impact on the basic civil liberties of all Canadians. The proposed legislation would establish criminal offences that infringe upon the right to free expression. Security agencies would be granted unprecedented and intrusive powers to monitor and share information about Canadians, with no commensurate increase in oversight or accountability. While much of the focus of the debate has rightly centred on the infringements on civil liberties generally, there are also specific concerns about the impact of the legislation on academic freedom and free speech on university and college campuses.



Introduction

Bill C-51, the federal government's *Anti-Terrorism Act*, has sparked serious concerns about the potential impact on the basic civil liberties of all Canadians. The proposed legislation would establish criminal offences that infringe upon the right to free expression. Security agencies would be granted unprecedented and intrusive powers to monitor and share information about Canadians, with no commensurate increase in oversight or accountability.

While much of the focus of the debate has rightly centred on the infringements on civil liberties generally, there are also specific concerns about the impact of the legislation on academic freedom and free speech on university and college campuses. Academic freedom includes the right to teach, research, publish, and express one's opinions free from political and institutional censorship. Academic freedom allows universities and colleges to serve the common good of society through searching for, and disseminating, knowledge and understanding, and through fostering independent thinking and expression in academic staff and students. Robust democracies require no less.

However, three elements of Bill C-51 pose serious risks to the exercise of academic freedom:

- The legislation would amend the Criminal Code to create an ambiguous and sweeping new offence of advocating or promoting terrorism offences in general. Given the broad scope of the proposed offence, academics may be unwittingly exposed to prosecutions.
- Bill C-51 expands security agencies' power to share information, without proper oversight. Professors studying controversial topics could be subjected to surveillance and information sharing without their knowledge.
- The Bill expands the power of Canadian Security Intelligence Service (CSIS) to proactively disrupt undefined *threats to the security of Canada*. This could see academic staff prevented from publishing research or attending conferences overseas if CSIS determines, however broadly, there may be a security threat.

Advocating Terrorism Offences

C-51 amends the Criminal Code to create a new crime of *advocating or promoting commission of terrorism offences*. The new offence is vaguely defined and broadly worded. It will have a chilling effect on free speech, academic freedom, advocacy, and protest as academics and others may avoid saying things in order to avoid prosecution.

There are two steps to the new offence. An individual must be found to have knowingly advocated or promoted *terrorism in general*, while knowing or being reckless as to whether someone might commit a terrorist offence.

This new offence is broader than similar types of offences already in the Criminal Code. For instance, the crime of promoting of hate propaganda requires willful promotion (as compared with the new standard in C-51, which is being reckless that someone might commit an offence) of hate propaganda (which is a defined and specific concept, unlike *terrorism in general*). In addition, terrorism offences are much broader than actual terrorism: they include financing, complicity, incitement, and conspiracies directed towards those crimes. The use of such broad language to describe the offence suggests that this new offence is intended to capture a wide swath of activity which relates to advocating the concept of terrorism. This moves the definition of criminal conduct far beyond a prohibition on advocating for terrorism attacks.†

Academics could easily run afoul of this offence. As Forcese and Roach have suggested, imagine that during a lecture at a university an academic says:

We should provide resources to Ukrainian insurgencies who are targeting Russian oil infrastructure, in an effort to increase the political cost of Russian intervention in Ukraine.‡

The academic knows that in the audience there are people who may be sending money to forces opposing Russian intervention. By knowing that some audience members may respond to the lecture by sending money to the insurgency, the academic's actions may constitute the crime of promoting or advocating terrorism.

† C. Forcese and K. Roach, Backgrounder #1: The New Advocating or Promoting Terrorism Offence, (February 3, 2015), p.15, Available at www.nationalsecuritylaw.ca

‡ Ibid, p.4.

Importantly, there are no statutory defences for the new crime. Unlike the willful promotion of hatred and child pornography offences, Bill C-51 contains no public interest or educational defences. That is, academics could not claim that expressions captured by the new offence had a legitimate educational purpose. A professor leading a classroom debate about whether terrorism can be justified in some circumstances, such as during the struggle against apartheid in South Africa, may not be certain he/she is protected from the reach of the new legislation.

For academics, the offense of *advocating or promoting commission of terrorist offences* is troubling because of its breadth and vagueness. Its harmful effects lie not just in its broad scope and application, but also from its effect on academics whose exercise of self-censorship will shut down avenues for fruitful and important inquiries and discussions.

Academic Freedom and the Security of Canada Information Sharing Act

Part 1 of C-51, the Anti-Terrorism law, introduces a new legislation, the *Security of Canada Information Sharing Act*. The Act significantly expands the government's power to share information between institutions, without commensurate and sufficiently robust oversight mechanisms or measures to notify Canadians that their information has been shared among government institutions, or that their constitutional rights have been violated.

The possibility of broad and unaccountable information sharing will have a chilling effect on academic freedom and other forms of expression, advocacy, and protest. The circumstances captured by the Act are unprecedented and are so broad that academics and others will have reason to avoid saying and doing things that could fall within the scope of the law.

Improper sharing of information can be a threat to Canadians' civil liberties. The government has a massive repository of sensitive and private information about citizens. It stores information about income, investments, donations to political and social causes, criminal records, health information, and movement within and outside Canada.

It is already well established that the consequences of unaccountable information sharing can be devastating. The findings of both the O'Connor and Iacobucci Inquiries indisputably showed that inappropriate information sharing practices can lead to serious harm of citizens' rights.†

Nonetheless, as Justice O'Connor was quick to point out, information sharing is essential for protecting national security interests. Government should be able to share information amongst its institutions in a limited fashion, as strictly necessary to protect national security interests. However, this power must be accompanied by clear rules, meaningful safeguards, and effective oversight mechanisms to prevent the type of abuses experienced by Canadian citizens in the recent past. Those safeguards and mechanisms are absent in the new Act.

The information sharing provisions of the Act are triggered when one engages in *activities that undermines the security of Canada*. The concept is very broad and threatens to curtail legitimate expressive activity, such as:

- Non-permit demonstration against a planned LRT route near a suburban neighborhood (violation of municipal by-law).
- Placing posters on hydro poles regarding an upcoming demonstration (violation of municipal by-law and possible property damage).
- Distributing pamphlets in front of retail shops in protest of planned windfarm, pipeline, dam or nuclear reactor (trespass and anti-loitering by-law).
- Placement on Legislature's lawn during non-operating hours of satirical sculpture of Minister of Natural Resources drawing attention to her/his support of coal mining industry (trespass and possible property damage).
- Red food coloring thrown on Minister of Environment's car in protest of insufficient action taken to stop global warming (destruction of property).
- Graffiti painted on an overpass critical of city's acquiescence to allow rail transport of oil (anti vandalism by-law and/or property damage).‡

† For a summary of the findings of the Iacobucci and O'Connor Commissions see Appendix B

‡ For a clause by clause breakdown of the triggering provision see the Appendix A.

Lawful protest, advocacy, dissent and artistic expression are excluded. However, the exception of *lawful* dissent and protest is arguably of little use in protecting oneself from the Act. This is because *lawful* protest and dissent is limited to activities which do not contravene any law. As the previous examples illustrate, a protest march that occurs without a permit or a violation of an anti-loitering by-law would nullify this exception.

The information sharing consequences after one engages in an activity that *undermines the security of Canada* are unprecedented and harmful. Once triggered, the Act allows the sharing of information between 17 government institutions, including the Communications Security Establishment Canada, the Canadian Security Intelligence Service, the Royal Canadian Mounted Police (RCMP), the Canadian Border Services Agency, the Canada Revenue Agency, the Department of Foreign Affairs and International Trade, Transport Canada, and Citizenship and Immigration Canada. Importantly, the Act provides that this list can be expanded by regulation, thus allowing the information to be shared with a much broader group of agencies by way of a decision of Cabinet, without the scrutiny of Parliament.

Under the Act, if a Canadian citizen participates in a protest that did not have a permit, the RCMP can request information about that person from the listed 17 government institutions. This could include that person's tax return (Canada Revenue Agency), the number of times that person has left the country (Canadian Border Services Agency), and information on whether that person sponsored an immigrant for citizenship (Citizenship and Immigration Canada). No warrant is required for this information to be shared.

Canadians are protected by the Charter of Rights and Freedoms from unreasonable search and seizure, and current case law prohibits government institutions from sharing information freely. Case law currently provides that if information was gathered for administrative requirements by one agency, it cannot be transferred to another agency for law enforcement purpose without a warrant.

By contrast, the proposed Act provides for broad and unprecedented information sharing without any oversight, tracking or accountability mechanisms. As a

result, it is unlikely that cross institutional accountability will be a priority.[†] Compounding the problem is that citizens whose information is shared will be provided no notification of this, nor is there any requirement that the agencies track transfers of information.

The Act would also permit preemptive action, authorizing information to be shared if agencies are trying to detect, identify, prevent, investigate or disrupt *activit[ies] that undermine the security of Canada*. Using the example above of someone involved in a protest that did not have a permit, the citizen may not even have to participate in the protest in order for he or she to be captured by the Act. Because the broad information sharing powers in the Act are not limited to investigation of past activity that *undermined the security of Canada*, these powers can be brought to bear preemptively, and applied in the absence of any actual activity.

Once the information has been shared, section 6 of the Act permits the further sharing *to any person, for any purpose*. This presumably includes foreign intelligence agencies, and, as with domestic information sharing between government departments, the Act has no specific requirements limiting or setting out criteria or safeguards to be applied for the sharing of information. This is particularly troubling in light of several high-profile cases that highlight the dangers of sharing intelligence with foreign agencies. The FBI's decision to rendition Canadian citizen Maher Arar to Syria where he was imprisoned and tortured was based on inaccurate information provided by the RCMP. Similarly, the detention and torture of Canadian citizens Ahmad Abou-Elmaati, Abdullah Almalki and Muayyed Nureddin by Syrian authorities was based on information shared by Canadian government officials with US and Syrian authorities.[‡] The new Act, unaccompanied by appropriate and effective safeguards, arguably makes it more likely that such abuses will occur again.

Section 2(i) of the Act captures *activities that undermine the security of Canada* and that *undermine the security of another state*. This would, for example, arguably include

[†] C. Forcese and K. Roach, Backgrounder #3: Sharing Information and the lost lessons from the Arar Experience, (February 16, 2015), p.16. Available at: www.nationalsecuritylaw.ca

[‡] For a summary of the findings of the Iacobucci and O'Connor Commissions see Appendix B.

participants in a non-permit protest of the Chinese occupation of Tibet. Under the Act, the RCMP would be able to access all the information controlled by Citizenship and Immigration Canada, possibly including the names of participants at the demonstration who have dual citizenship and likely have family who still live in China. If the identity of a pro-independent Tibet protest participant, with family residing in China, was shared by the Canadian government with the security services of the Peoples' Republic of China (as permitted by section 5 of the Act), it is not difficult to imagine a situation where that Chinese family would face scrutiny from local security services. This situation is particularly relevant for Canadian academics, many of whom have personal and professional ties to foreign countries, some of which have repressive governments.

Section 9 of the proposed Act provides civil immunity for any person who shares information in good faith. It should be noted that Arar received \$10 million in compensation from the government after the O'Connor Inquiry and that the civil action of Almalki, Nureddin and Abou-Elmaati is still ongoing.

It is also disturbing that the Act contains no limitation on how long agencies can collect and share information on an individual, possibly resulting in indefinite tracking. There is no requirement that information be accurate, despite this being a key recommendation by the O'Connor Commission.

Expanded Powers for CSIS

There has been a long history of controversy concerning surveillance activities of Canadian security on university and college campuses. In 1961, Conservative Justice Minister E. Davie Fulton ordered the RCMP to halt all campus investigations in response to concerns about academic freedom and free speech. In 1963, Prime Minister Lester B. Pearson and CAUT President Bora Laskin reached an Accord intended to limit and provide oversight of RCMP activities on campus. While both Fulton's order and the Pearson-Laskin Accord were not entirely successful, the fact that both Conservative and Liberal governments took such steps highlights real concerns about the impact of intelligence operations on campus.

Unfortunately, Bill C-51 turns the clock back on the modest gains of the past and opens up the possibility of increased surveillance on campus. The new legislation significantly expands CSIS's power, while doing nothing to increase the existing powers or resources of the CSIS review body.

The trigger for CSIS's expanded authority is broad, and includes situations where academics are exercising academic freedom. CSIS is able to use its expanded powers when there are *threats to the security of Canada*, an existing term in the CSIS Act that has not been amended by C-51. This current definition of *threats to the security of Canada* includes:

foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person.

The term *foreign influenced* does not require direction from a foreign government or source.[†] Prohibited foreign influence could conceivably be in the form of funds from a grant, or discussions with a foreign protester and activist. That foreign influence must be secret or anonymous to satisfy the *clandestine* argument.

The term *detrimental to the interests of Canada* can be anything the government decides, including economic interests. Examples of activities of academics and students that could be captured under the definition of *threats* include:

- A scientist publishes a peer reviewed study detailing destruction of bird habitat as a result of oil sands development. The study received funding from an anonymous US environmental trust.
- A climate scientist publishes a peer reviewed study detailing climate forecast as a result of climate change. The study received anonymous funding from Greenpeace International.
- A student environmental group plans to disrupt a Canadian mining corporation recruitment event on campus to protest environmental damage from mining operation in El Salvador. The group received an anonymous donation from an El Salvadoran based NGO.

[†] C. Forcese and K Roach, Backgrounder#2: Extraordinary new CSIS Powers, (February 12, 2015), p.10, citing 1988 SIRC Annual Report. Available at www.nationalsecuritylaw.ca

The effect of the definition in the Bill is that completely lawful activity, such as publishing a study on bird habitat destruction, be covered by the current definition of *threats*. Lawful protest, advocacy, dissent and artistic expression engaged *in conjunction* with the activity set out in the trigger is also covered by the definition, thus further extending the reach of CSIS's broad powers of interference.

There is no definition of measures that may be taken to reduce a *threat to the security of Canada*, and the only limits on the power are the following:

- The measures are to be reasonable and proportional in the circumstances having regard to the reasonable availability of other measures to reduce the threat;
- CSIS is restricted from intentionally causing bodily harm to an individual, obstructing or perverting the course of justice or violating the sexual integrity of an individual; and
- Where measures to be taken violate the law or the Charter, a warrant must be obtained.

The requirement that a warrant must be obtained when CSIS's activities violate Canadians' Charter rights contradicts the purpose of the Charter which requires that judges review police actions to ensure compliance, and to exclude evidence or overturn convictions in cases where the Charter has been violated. Under the new legislation, Charter breaches will receive prior authorization from the courts. Moreover, CSIS must obtain a warrant only when it knows the Charter will be violated. This establishes a very narrow test for the requirement to obtain a warrant.

A faculty member whose research challenges the government's ongoing support for fossil fuel extraction and is funded by an anonymous foreign source may be watched by CSIS because his/her conduct meets the definition of *threat to the security of Canada*. If CSIS decides that the faculty member should be prevented from attending a seminar in the US where he/she is scheduled to speak, they may take steps, in collaboration with the Canadian Border Services Agency (CBSA), to prevent his/her departure. This would breach his/her s. 6 Charter rights. This is the kind of measure that, with authorization, would be permitted by the Act.

In the above example, CSIS would obtain a warrant in Federal Court to violate the academic staff member's Charter rights, in a secret proceeding where the court would apply the reasonable and proportional test with no notification to the individual involved. The long term result of judicially authorizing actions that violate Charter rights in secret proceedings will be a secret line of case law.

Conclusion

Overall, the effect of Bill C-51 is to increase the powers and reach of Canada's security services. In creating new offences or adding new powers for the security services, the legislation uses broad and vague language, making it more likely that legitimate expressive activities, including academic freedom, will be chilled, or worse, sanctioned.

While there are references to existing privacy law in C-51, the Privacy Act has not been reviewed since 1983 and has numerous exceptions. The most relevant is s. 8(2)(b), which permits exceptions to the Privacy Act by another Act of Parliament that authorizes its disclosure. In this case, this would include the Security of Canada Information Sharing Act, the CSIS Act and the Criminal Code.

The addition of significant powers for the security services are all the more troubling because C-51 does nothing to increase the inadequate, understaffed and under resourced review bodies for CSIS and the Communications Security Establishment. Other powerful agencies, like the CBSA, are not subject to the scrutiny of a review body.

In the last decade, four Canadian citizens were detained and tortured for months by foreign governments as a result of poor information sharing procedures, overzealous and inept security services personnel, and lack of oversight and review of the security services. The recommendations made by the O'Connor, Iacobucci and Major Commissions have not been implemented by successive governments and, if passed, Bill C-51 will increase the powers of the security services without any action to address or correct past practices and procedures that resulted in the shocking violation of Canadians' rights.

Appendix A

Criteria for government to share information under the Act extend far beyond what is necessary to protect security interests, and will interfere with Canadians' democratic rights.

In order to be captured by the information sharing provisions of the Act, one has to engage in *activities that undermine the security of Canada*.

Set forth below are excerpts from Bill C-51 which show how broad the language is and how it establishes a basis for unprecedented information sharing as a result of Canadians participating in activities which have, until now, been part of our democratic process.

Activities that undermine the security of Canada means:

Section 2(a)

any activity [that]...interfere[s] with the capability of the Government of Canada in relation to... public safety [that undermines the security ...of Canada]

Arguably captures:

- Illegal blocking of roadway in protest of construction of federal penitentiary (violation of municipal by-law and/or provincial Highway Safety Act).
- Anti-World Trade Organization protestors wander outside of route set out in permit for their demonstration (violation of municipal by-law).
- Postering of hydro poles regarding an upcoming demonstration (violation of municipal by-law and possible property damage).

Section 2(a)

any activity [that]...interfere[s] with the capability of the Government of Canada in relation to... the economic or financial stability of Canada [that undermines...the security...of Canada]

Arguably captures:

- Non-permit protest against Kinder Morgan Pipeline in Burnaby, BC (violation of municipal by-law, trespassing and possible property damage).
- Hypothetical anti-oil sands concert featuring Neil Young in Edmonton where permit was obtained (violation of noise pollution by-law).
- Non-labour board approved strike or work stoppage or work slow down by airline flight attendants, postal workers, dock workers or civil servants (violation of federal or provincial labour relations statute).
- Sit in during Canadian mining corporation shareholder meeting in protest of human rights abuses in Central America (trespass).

Section 2(a)

any activity [that]...interfere[s] with the capability of the Government of Canada in relation to... the economic or financial stability of Canada [that undermines...the territorial integrity or sovereignty of Canada]

Arguably captures:

- Non-permit protest by group advocating independence or increased autonomy or province or region, including first nations groups (Idle no more), Quebec separatists or the Alberta independence movement (violation of municipal by-law).

Section 2(b)

any activity [that]...chang[es] or unduly influenc[es] a government in Canada...by unlawful means [that...undermines the security of Canada]

Arguably captures:

- Non-permit demonstration protesting decision of municipal council to expropriate first nations burial ground (violation of municipal by-law).
- Graffiti painted on overpass critical of city's acquiescence to allow rail transport of oil (anti vandalism by-law and/or property damage).
- Placement on Legislature's lawn during non-operating hours of satirical sculpture of Minister of Natural Resources drawing attention to her/his support of coal mining industry (trespass and possible property damage).
- Red food coloring thrown on Minister of Wildlife's car in protest of insufficient action taken to stop sealing (destruction of property).
- Occupy movement protest (trespass and destruction of property).

Section 2(f)

any activity [that]...interfere[s] with critical infrastructure [that... undermines the security of Canada]

Arguably captures:

- Pamphletting in front of bingo hall in protest of planned windfarm, dam or nuclear reactor (trespass and anti-loitering by-law).
- Non-permit demonstration against planned LRT route near suburban neighborhood (violation of municipal by-law).

Section 2(i)

an activity that takes place in Canada [that...undermines the security...of Canada] and undermines the security of another state.

There is no limitation for deceptive or seditious behaviour, this section would arguably capture:

- Protest against beheadings in Saudi Arabia and Canada buys oil from Saudi Arabia.
- Non-permit protest advocating for freeing of dissident in a country with a repressive government where there are Canadian mining corporations.
- Non-permit protest against Chinese occupation of Tibet in Canada; Canada views its arms trade with China as important.

The definition of *undermining activity* also includes espionage, sabotage and proliferation of nuclear and biological weapons.

Appendix B

Iacobucci Inquiry — October 2008

The Iacobucci Inquiry investigated the allegations of detention and torture of three Canadian citizens by Syria and Egypt and the role of Canadian officials. The Inquiry found that:

- Ahmad Abou-Elmaati travelled from Canada to Syria in November 2001 for his wedding. Upon arrival he was detained by Syrian authorities for two months and then transferred to Egypt where he was detained for 24 months. Justice Iacobucci found that:
 - The sharing of information in three instances by Canadian officials indirectly resulted in Abou-Elmaati's detention in Syria;
 - Abou-Elmaati was mistreated and tortured during his detention in Syria and Egypt; and
 - The actions of Canadian officials contributed to his mistreatment.
- Abdullah Almalki travelled to Syria from Malaysia in May 2002; the stated purpose of the visit by Almalki was to visit his ill grandmother. Upon arrival, he was detained by Syrian authorities and remained in custody for 22 months. Justice Iacobucci found that:
 - It was possible that information shared by Canadian officials might have contributed to the Syrian authorities' decision to detain Almalki;
 - While in detention, Almalki was tortured and mistreated;
 - The mistreatment experienced by Almalki resulted indirectly from the sharing of information by the RCMP in a database about Almalki with US agencies.
- Muayyed Nureddin was returning to Toronto from Iraq through Syria in December 2003. He was detained by Syrian authorities for 33 days. Justice Iacobucci found that:
 - The sharing of information by the RCMP and CSIS with US and other foreign agencies indirectly resulted in the Nureddin's detention;
 - Nureddin was tortured and mistreated during his detention; and
 - The sharing of information by the RCMP and CSIS likely contributed to the mistreatment of Nureddin.

O'Connor Commission (Maher Arar) — September 2006

The O'Connor Commission investigated the actions of Canadian officials relating to the detention and imprisonment of Maher Arar, a Canadian citizen, for 12 months. The Inquiry found that:

- It is likely that the FBI's decision to detain Arar in New York and to remove him to Syria was based on information provided by the RCMP;
- The information provided by the RCMP to the FBI portrayed Arar in a unfair and inaccurate way; and
- Arar was imprisoned in Syria for nearly a year where he was tortured.

Canadian officials received information from Syrian authorities that they should have been aware was likely the product of torture.