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Bill C-51: A Legal Primer

Overly broad and unnecessary anti-terrorism reforms could criminalize free speech

By Clayton Ruby, C.M., and Nader R. Hasan

Six Muslim young adults stand in front of a mosque late at night in heated discussion in some foreign language. They may be debating the merits of a new Drake album. They may be talking about video games, or sports, or girls, or advocating the overthrow of the Harper government. Who knows? There is no evidence one way or the other. Just stereotypes. But the new standard for arrest and detention—reason to suspect that they *may* commit an act—is so low that an officer may be inclined to arrest and detain them in order to investigate further. And now, officers will no longer need to ask themselves whether the arrest is necessary. They could act on mere suspicion that an arrest is *likely* to prevent any terrorist activity. Yesterday, the Muslim men were freely exercising constitutional rights to freedom of expression and assembly. Today they are arrestable.

Overview: *The Anti-Terrorism Act*

Bill C-51, the *Anti-Terrorism Act, 2015*, would expand the powers of Canada's spy agency, allow Canadians to be arrested on mere suspicion of future criminal activity, allow the Minister of Public Safety to add Canadians to a "no-fly list" with illusory rights of judicial review, and, perhaps most alarmingly, create a new speech-related criminal offence of "promoting" or "advocating" terrorism. These proposed laws are misguided and many of them are likely also unconstitutional. The bill ought to be rejected as a whole. Repair is impossible.

New offence of promoting terrorism

Bill C-51 creates a new criminal offence that likely violates s. 2(b) of the Charter. Newly proposed s. 83.221 of the Criminal Code provides as follows:

> Every person who, by communicating statements, knowingly advocates or promotes the commission of terrorism offences in general—other than an offence under this section—

> while knowing that any of those offences will be committed or being reckless as to whether any of those offences may be committed, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years.

The new offence will bring within its ambit all kinds of innocent speech, some of which no doubt lies at the core of freedom of expression values that the Charter was meant to protect. As Professors Kent Roach and Craig Forcese point out, the new offence would sweep within its net the following scenario:

> Take just one hypothetical: An academic or foreign affairs columnists opines "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 speaker says this knowing that her audience includes support groups who may be sending money to those opposing Russian intervention.[1]

Providing resources to a group, one of whose purposes is a "terrorist activity," is a terrorism offence. And causing substantial property damage or serious interference with an essential service or system for a political reason and in a way that endangers life, to compel a government to do something, is a "terrorist activity." This is so even if it takes place abroad. So a criminal prosecution of the columnist in the above-described hypothetical situation is a real possibility under the new law. It is constitutionally unacceptable and dangerous.

The new offence is broader than existing terrorism offences in the Criminal Code. Unlike these other offences, this new offence does not require an actual terrorist purpose. So someone can be guilty of this offence—like the columnist—despite completely innocent purposes, such as attempting to provoke democratic debate, or proposing a solution to an intractable international conflict. The speaker's purpose does not matter; they are liable if they are reckless as to the risk that a listener "may" thereafter commit an unspecified terrorism offence.

Criminal culpability would extend beyond the speaker of the impugned words. Like all criminal offences, a person can be guilty if they aid or abet the individual who actually commits the offence. Not only the columnist, but also their editors, publishers, and research assistants become criminals.

It should be noted that there are other "promoting" and "advocating" offences in the Criminal Code. The Code contains a prohibition on willful promotion of hatred.[2] It also contains a prohibition on advocating sexual activity with underage children.[3] But hate propaganda and sexual activity with underage children are much narrower than the vague reference to "terrorism offences in general." In addition, unlike willful promotion of hatred, which contains an express exception for communications made in private, the proposed new offence can be applied to statements made in private. This is all the more concerning given the Canadian Security Intelligence Service's (CSIS) expansive anti-terror wiretap and surveillance powers.[4]

Another truly bizarre aspect of the new offence is the use of the term "terrorism offences in general—other than an offence under this section." The Criminal Code already contains 14 broadly worded terrorism related offences. "Terrorism activity" is a defined term under s. 83.01 of the Criminal Code, but this is broader. It applies to more speech than speech advocating or promoting terrorist activity, or the 14 terrorism offences in the Criminal Code. The new offence is meant to include speech promoting and advocating "terrorism in general," a deliberately opaque and unknowable term.

Even if the government exercises restraint in laying charges and arresting people, the result is an inevitable chill on speech. Students will think twice before posting an article on Facebook questioning military action against insurgents overseas. Journalists will be wary of questioning government decisions to add groups to Canada's list of terrorist entities.

New CSIS powers

CSIS was created in 1984 by an Act of Parliament. Prior to 1984, security intelligence in Canada was the purview of the Royal Canadian Mounted Police (RCMP) Security Service.[5] However, in the 1970s there were allegations that the RCMP Security Service had been involved in numerous illegal activities. In 1977, as a result of these allegations, Justice David McDonald was appointed to investigate. The McDonald Commission published its final report in 1981, with its main recommendation being that security intelligence work should be separated from policing, and that a civilian intelligence agency should be created to take over from the RCMP Security Service.[6] CSIS was created to be that civilian intelligence agency. At the time of its creation, CSIS was subject to general oversight review by a new body, the Security Intelligence Review

Committee (SIRC), which has been starved of resources, as well as by the Office of the Inspector General, which was abolished and disbanded in 2012.

The idea behind CSIS was that abuses of power were less likely to occur if intelligence gathering was separated from law enforcement. Bill C-51 erodes the distinction between CSIS's traditional intelligence gathering role by giving it broad new powers to engage in law enforcement–type activities. Under Bill C-51, CSIS would have broad powers to take "measures" to reduce threats to the security of Canada. For example, s. 12.1(1) of the proposed act states,

> If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.

The power under s. 12.1 is broadly defined, giving CSIS virtually unfettered authority to conduct any operation it thinks is in the interest of Canadian security. The definitions are so broad that they could apply to almost anything, including measures to disrupt or interfere with non-violent civil disobedience.

Only the following activities are explicitly excluded from these new powers, as per s. 12.2(1) of the act:

> In taking measures to reduce a threat to the security of Canada, the Service shall not
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> (a) cause, intentionally or by criminal negligence, death or bodily harm to an individual;
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> (b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or
>
> (c) violate the sexual integrity of an individual.

These limited exclusions leave CSIS with incredibly expansive powers, including water boarding, inflicting pain (torture) or causing psychological harm to an individual. The government has pointed out that in order for CSIS to take measures under s. 12.1, CSIS must first apply for a warrant. Under the warrant provision, a judge may issue a warrant if satisfied that there are reasonable grounds to justify the belief that the requested measures are required to enable CSIS "to reduce a threat to the security of Canada," and are "reasonabl[e] and proportiona[te]."[7]

This is an odd standard, which judges will find difficult, if not impossible, to apply. The ordinary standard for issuance of a warrant is based on reasonable grounds to believe that a criminal offence has been committed (in the case of a warrant to arrest)[8] or reasonable grounds to believe that the search of a place will afford evidence of an offence (in the case of a search pursuant to judicial warrant).[9] These are determinations that can be made objectively, based on the evidence, by an impartial judicial officer. By contrast, whether a given measure would proportionately "reduce the threat to the security of Canada" is not like these other tests. It amounts to asking judges to look into a crystal ball to determine if Canada will be safer in the future if a CSIS officer takes some measure. This is not a determination that judges are equipped to make. The limits will vary with the judges chosen by CSIS, not with the evidence.

The expansion of CSIS's powers is troubling given the RCMP's notorious history of commingling intelligence gathering and law enforcement. It is also troubling for the additional reason that there is very little oversight of CSIS activities. At present, CSIS is accountable only to the SIRC. CSIS has a budget of over $500 million annually.[10] SIRC has an annual budget of $3 million and is staffed by four part-time committee members.[11] It no longer has a director general who watches the watchers. By contrast, spy agencies in other countries are supervised by powerful parliamentary or congressional committees. The sweeping new powers, coupled with the woeful lack of oversight, risks turning CSIS into a dangerous "secret police force."

Preventive arrest powers

The current anti-terrorism sections of the Criminal Code already contain provisions for preventive arrest, preventive detention and preventive restraints on liberty. Preventive detention is at odds with our legal tradition of only prosecuting and punishing crimes that have been committed already, and only after those offences have been proven by the prosecution beyond a reasonable doubt. Preventive detention—i.e., detention on the suspicion that someone may or will commit a crime at some point in the future—is the opposite of that legal tradition and is inconsistent with the constitutionally protected right to be presumed innocent until proven guilty.[12]

Prior to the enactment of the 2001 anti-terrorism provisions, the only other preventive detention scheme in the Criminal Code was the dangerous offender regime.[13] But to be found a dangerous

offender or a long-term offender under Part XXIV of the Criminal Code, an offender must have been already convicted of a serious personal injury offence, and there must be evidence that the individual constitutes a threat to the life, safety or physical and mental well-being of other persons based on evidence of repetitive or persistent serious criminal behaviour.[14] By contrast, the anti-terrorism Criminal Code provisions permit the arrest and detention of individuals (who have not been convicted or even charged with any offence) based on what they might do.

The current preventive detention scheme is already constitutionally suspect. The proposed amendments in Bill C-51 will further lower the threshold for preventive arrest and detention, increasing the risk that entirely innocent people will be swept up on mere suspicion. Under the current s. 83.3(2) of the Criminal Code, a peace officer is empowered to lay an information and bring an individual before a provincial court judge if the officer:

> (a) believes on reasonable grounds that a terrorist activity will be carried out; and
>
> (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.[15]

Where exigent circumstances exist, or where laying the information would be impractical, the individual may be arrested without a warrant.[16]

The new measures would allow law enforcement agencies to arrest somebody if they suspect that a terrorist act "may be carried out," instead of the current standard of "will be carried out." Bill C-51 also substitutes "likely" for "necessary" such that s. 83.3(2) would now enable a peace officer to lay an information or effect a warrantless arrest if the officer:

> (a) believes on reasonable grounds that a terrorist activity ~~will~~ **may** be carried out; and
>
> (b) suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is ~~necessary~~ **likely** to prevent the carrying out of the terrorist activity.[17]

Both changes result in a significant lowering of the standard for arrest and detention.

The changes to the law are significant in two respects. The substitution of "may" for "will" is a significant watering down of the standard. "Will," when coupled with "reasonable grounds to believe", denotes evidence-based probability,[18] whereas "may" denotes mere possibility.

The shift from "necessary" to "likely" is equally important. "Necessity" in this context suggests that the police officer suspects that no measure other than arrest will prevent a terrorist act. Likelihood is not necessity. Under the new provision, the police officer need only suspect that the arrest is more likely than not to prevent terrorist activity.

Canadians do not want government to arrest individuals based on religious and ethnic stereotypes. But under the new standard, it will be nearly impossible to challenge their decisions.

No-fly list powers

Bill C-51 codifies the Minister of Public Safety's power to put Canadians on a so-called no-fly list, which prevents them from getting on an airplane. The minister can add anyone to the no-fly list on mere suspicion that he or she will engage in an act that would threaten transportation security or travel by air for the purpose of committing an act of terrorism.[19]

Putting someone on the no-fly list is a significant restraint on liberty. And once on the no-fly list, the procedure to have one's name removed from the list is complex and difficult. Someone on the no-fly list has the right to appeal the minister's decision to a judge of the Federal Court, but it is a very narrow and futile appeal. It is not nearly enough for the individual to show that the minister was wrong to put them on the no-fly list; they must also show that the minister has acted *unreasonably*.[20]

Moreover, Bill C-51's review procedures for challenging the no-fly list designation incorporates the procedure from the Immigration and Refugee Protection Act's byzantine security certificate regime. This means the minister can ask the Court to hold part of the hearing in secret—the individual challenging his or her no-fly list designation, their lawyer and the public are excluded from the courtroom when the government presents its case.[21] The judge hearing the appeal can base his or her entire decision on evidence that was presented during the secret portion of the hearing.

In 2007, the Supreme Court held that this procedure was unconstitutional under s. 7 of the Charter when applied to the judicial review of the detention of a non-citizen detained pursuant to a security certificate.[22] Although being put on the no-fly list is a less serious restraint on liberty than being subject to a security certificate, s. 7 of the Charter is still triggered, and thus the core protections of s. 7, such as the right to know the case to meet, should apply. The currently proposed procedure unequivocally violates that right.[23]

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[1] Roach, Kent and Forcese, Craig, "Bill C-51 Backgrounder #1: The New Advocating or Promoting Terrorism Offence" (February 3, 2015). Available at SSRN: <http://ssrn.com/abstract=2560006>.
[2] *Criminal Code*, R.S.C., 1985, c. C-46, s. 319(2).
[3] *Criminal Code*, s. 163.1(b).
[4] *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23, s. 21.
[5] Government of Canada, Canadian Security Intelligence Service, "History of CSIS", online: <https://www.csis.gc.ca/hstrrtfcts/hstr/index-en.php>.
[6] *Ibid*.
[7] ATA, s. 21.1(2).
[8] *Criminal Code*, s. 504.
[9] *Criminal Code*, s. 487.
[10] Government of Canada, Canadian Security Intelligence Service, Public Report 2011-2013, online <https://www.csis.gc.ca/pblctns/nnlrprt/2011-2013/PublicReport_ENG_2011_2013.pdf>.
[11] Government of Canada, Security Intelligence Review Committee, "SIRC at a Glance", online: <http://www.sirc-csars.gc.ca/anrran/2013-2014/sc4-eng.html#sc4-1>.
[12] *Charter of Rights and Freedoms*, s. 7 and s. 11(d).
[13] *Criminal Code*, Part XXIV.
[14] *Criminal Code*, s. 753.
[15] *Criminal Code*, section 83.3(2).
[16] *Criminal Code*, S. 82.3(4).
[17] ATA, s. 17.
[18] See *R. v. Brown* (2012), 92 C.R. (6th) 375 (Ont. C.A.) (for discussion of "reasonable grounds").
[19] ATA, s. 8.
[20] ATA, s. 16(5).
[21] ATA, 16(6)(a).
[22] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 at paras. 53-64.

[23] *Ibid.*