



A Macdonald-Laurier Institute Publication

Commentary

March 2015

C-51: An Analysis Without the Hype or Hysteria

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Introduction

One of the most alarming aspects of the recent and growing terrorism attacks within Western societies is their Islamist ideological motivation and the assurances from the “bad guys” that there will be more to come. The people who lead these death cults have also figured out that they can advance their perceived cause by inspiring and instructing susceptible people in those same Western countries not simply to travel abroad to join them but rather to commit their horrific crimes in their own neighbourhoods so as to generate maximum fear value. Those same “bad guys” also realize that exploiting the freedoms of Western society is a tactic they can use and they actually hope that their atrocities will lead to alienation of Muslims in Western countries who they then hope to draw into the Islamist “us against the world” mindset. In short, it’s an incredibly complex situation that must be addressed.

These events and the continuing malevolent determination behind them have rightly led to a review of how we as a society are prepared and enabled to effectively detect and interdict these “home-grown” threats while respecting and preserving the very Western values that make us who we are. This effort now includes C-51, the anti-terror legislation recently introduced by the Government of Canada. This paper will attempt to offer a constructive analysis of the Bill with observations that may assist in its review.

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At the outset, it is important to remember that Bill C-51 is a legislative response to the relatively new manifestation of an existing terrorism security threat; namely domestic radicalization and the growing reality of terrorist action taken within Western societies, including Canada. As uncomfortable as it may be for some people, the existence of this threat is now undeniable and re-examining existing legislative tools to address this reality is an entirely appropriate action to take. While that doesn't mean automatically assuming what's in C-51 is necessary or the best approach, it does mean that there is a rationale for the Bill being put forward in the first place.

A second factor that must be kept in mind is that unlike the traditional criminal justice sector, in counterterrorism operations, success is measured in prevention rather than prosecution. This is especially so when it comes to preventing radicalization and detecting and interdicting those intent on causing us harm.

This inherently involves a greater proactive focus, which means increased access, sharing, and analysis of personal information by public officials. Such actions legitimately raise concerns that we must ensure that the nature of the threat does not needlessly result in undermining cherished aspects of Western society, such as privacy and freedom from government intrusion.

There is clearly no single solution and this effort will necessarily involve a balancing of interests to maximize targeted operational effectiveness while minimizing the potential for both mission creep and unnecessary violation of individual privacy rights. One of the best ways to achieve this difficult task is through specially crafted, purpose-based independent authorizations of operational activity with checks and balances that include ongoing operational oversight *and* after-the-fact mandated review with appropriate accountability mechanisms. The sufficiency of these measures in C-51 is a legitimate area of inquiry.

It is also entirely appropriate for proposed operational changes to be targeted to achieve specific results and for Government to provide that rationale for the changes that are proposed. This expectation of analytical precision works both ways as those challenging C-51's provisions should do more than present speculative criticism that is founded on assumptions of wrongdoing by public officials.

Contrary to some of the criticisms levelled against it, C-51 does contain a number of internal checks and balances intended to prevent the kind of abuse by government that is being raised. These measures exist throughout the various Parts of C-51 and they include defined criteria for action, mandated judicial oversight with defined criteria, applicability of existing measures, and increased after-the-fact review for new powers provided by C-51.

The Parliamentary Committee process can also serve to address the concerns expressed by both proponents and opponents of specific measures within C-51 as to their necessity and the potential for abuse as a result of how the Bill is drafted. A mandated, after-the-fact review in five years by a specially empowered Joint House-Senate Committee is a good example of how that can be achieved.

C-51 is clearly not the complete answer to improved capabilities to deal with these new terrorist threats to Canadian security. Non-legislative action is also required including prioritized funding allocations, deployment of capability-enhancing technologies, and ensuring ongoing interagency security operations coordination with appropriate reporting mechanisms for non-performance. These measures also merit ongoing review such as what is currently being undertaken by the Senate Committee on National Security and Defence or by a specially constituted Joint House-Senate Committee, should one be created.

This analysis will examine all five parts of C-51 with special emphasis on Part 1 (*Security of Canada Information Sharing Act*), Part 3 (Criminal Code), and Part 4 (*CSIS Act*), which have understandably attracted the most attention. It will include both observations and recommendations aimed at supporting the co-existing but not incompatible priorities of counterterrorism and civil liberties protection.

Part 1 – Security of Canada Information Sharing Act

A new Act is created called the *Security of Canada Information Sharing Act*, which essentially confirms authorization for federal government entities to share and receive information related to protecting Canada against activities that undermine the security of Canada.

Section 2 defines “activity that undermines the security of Canada” as

any activity, including any of the following activities, if it undermines the sovereignty, security or territorial integrity of Canada or the lives or the security of the people of Canada:

- (a) interference with the capability of the Government of Canada in relation to intelligence, defence, border operations, public safety, the administration of justice, diplomatic or consular relations, or the economic or financial stability of Canada;
- (b) changing or unduly influencing a government in Canada by force or unlawful means;
- (c) espionage, sabotage or covert foreign influenced activities;
- (d) terrorism;
- (e) proliferation of nuclear, chemical, radiological or biological weapons;
- (f) interference with critical infrastructure;
- (g) interference with the global information infrastructure, as defined in section 273.61 of the *National Defence Act*;
- (h) an activity that causes serious harm to a person or their property because of that person’s association with Canada; and
- (i) an activity that takes place in Canada and undermines the security of another state.

For greater certainty, it does not include lawful advocacy, protest, dissent and artistic expression.

Section 5 of the *Act* makes the information sharing discretionary and further restricts the requesting authority to 17 defined Departments and Agencies (in Schedule 3 to the *Act*). It further adds the qualification that the information sharing should be restricted to circumstances where “the information is relevant to the recipient institution’s jurisdiction or responsibilities under an Act of Parliament or another lawful authority in respect of activities that undermine the security of Canada, including in respect of their detection, identification, analysis, prevention, investigation or disruption.”

Thus, there are tangible restrictions on the new clarification of discretionary information sharing among government agencies with an express prohibition that the qualifying criteria of “activities that undermine the security of Canada” do *not* include “lawful advocacy, protest, dissent and artistic expression.” This deliberate inclusion is a clear reinforcement of the principle of the rule of law and critics of the section would do well to remember that no matter how important or noble they may think their particular cause is, they are not above the law.

Further, the existing authority of Government institutions to share personal information in security and law enforcement matters pursuant to sections 7 and 8 of the *Privacy Act* already permit much of what some critics claim is being “created” in C-51. The existing powers of complaint-based and self-initiated investigation by the Privacy Commissioner under the *Privacy Act*, including multi-agency examination, are also left intact, which serves as a further check on what is in C-51.

It appears from the Privacy Commissioner’s brief (Therrien 2015) and other public critiques of Part 1 that data retention rules would be desirable, which could be accomplished through the Regulations contemplated under the *Act*. Requiring reporting of the number of information sharing actions taken pursuant to the new

Act would also enhance transparency and accountability and this could be accomplished either by a small amendment to C-51 or subsequently to the *Privacy Act*.

Finally, the Privacy Commissioner appears to suggest in his critique of C-51 that the current reporting authority of his Office be transformed into a judicial-like direction authority. This larger issue is not one confined to Part 1 issues in C-51 and, as such, is best considered separately from it.

While this Analysis questions the Privacy Commissioner's interpretation and recommendations regarding C-51, they are without doubt substantive and from a critical player involved in these issues. As such, it is recommended that Parliamentary Committees take advantage of this unique expertise and ensure that he is provided an opportunity to present his views on these important subjects.

Part 2 – Secure Air Travel Act

The *Secure Air Travel Act* is created to provide a more relevant legislative framework under the Minister of Public Safety for identifying and responding to persons who may engage in an act that poses a threat to transportation security or who may travel by air for the purpose of committing a terrorism offence.

The most significant change in this new *Act* appears to be an appropriate upgrade of the criteria for entry on the No Fly list through s.8 to go beyond immediate threats to aviation security and to include specified terrorism offences as well as indictable offences that also constitute the broader "terrorist activity".

Section 8 contains a glaring defect, however, in that it omits "photographs" from information that can be included to assist in identifying persons on the list. This is no trivial matter because, like other countries, Canada is in the process of field testing and hopefully deploying face recognition biometrics technology at Class 1 airports to detect and interdict people using false documents who are inadmissible to Canada.

This technology can also be used to detect arriving and departing persons of national security interest and people who are on the No Fly list. Recent cases such as the unexplained departure of known security threats Ali Mohammed Dirie and Mohammed Monir El Shaer illustrate the importance of this technology deployment.

Part 3 – Criminal Code Amendments

The most significant amendments in this Part include:

- Creation of a new offence of knowingly advocating or promoting a terrorism offence while knowing or being reckless that such an offence will be committed;
- authorizing seizure of terrorist propaganda (defined) where approved by the Attorney General and authorized by court order;
- authorizing, where approved by the Attorney General, a court order directing the takedown of terrorist propaganda on a publicly available computer system (ISP) with a subsequent dispute process; and
- reducing the qualifying criteria for a court-ordered preventive recognizance (peace bond) in s.83.3 and new s.810.011 from "will commit a terrorism offence" to "may commit" and that such an order "will" prevent it to is "likely" to prevent such an offence as well as increasing the potential sentence for breach of the conditions and expanding the definition of "Attorney General" (whose consent is required to seek an order) to include the federal AG, which will permit specialized prosecutorial participation.

It is important to note the presence of both AG approval and judicial authorizations that are required under these preventive measures. The terrorism propaganda takedown provision is also likely to be extremely important in preventing radicalization, recruitment, and assisting jihadi travel. One area that is unclear is how broadly this will apply as, hopefully, it will include all Internet-based communications, including social media, and not just websites hosted in Canada.

There has been criticism of the new advocating or promoting terrorism offence as being overly broad or unnecessary but the wording chosen contains an extremely high burden of proof and the counselling or advocating nature of certain offences, or generally, already exists. Parliament is simply expressing that same principle in the specific context of terrorism offences presumably for a deterrent and denunciatory purpose.

Part 4 – CSIS Act Amendments

Part 4 amends the *CSIS Act* by significantly expanding the mandate of the agency from its traditional information gathering and analysis role into a clear operational role with a mandate to “reduce the threat to the security of Canada”. The rationale for this dramatic change has not been fully explained but it likely includes a conclusion that expedited action may be necessary to deal with domestic terrorism threats. An inevitable consequence of this new CSIS operational role will be an increased need for interagency coordination, which remains an issue of concern.

Part 4 also includes changes related to the increased CSIS mandate, including:

- A defined process whereby CSIS must obtain approval of the Deputy Minister pursuant to s.7(2) to seek a judicial order under new s.12.1 authorizing actions which, without judicial approval, would be contrary to the law or a *Charter* breach (akin to the 2014 Supreme Court ruling in the *Spencer* case) with specific actions being expressly prohibited pursuant to s.12.2 and with defined criteria in new s.21.1 to obtain the order; and
- a mandatory after-the-fact reporting obligation pursuant to new s.6(5) on CSIS to both the Minister and the Security Intelligence Review Committee (SIRC) with regards to the new operational authorities provided by C-51.

These oversight and review mechanisms are further supported by existing review procedures under the *CSIS Act* whereby SIRC can investigate and review the activities of CSIS in three separate scenarios. It should also be noted that SIRC does appear to have express statutory authority under the *CSIS Act* in defined circumstances to summon and question representatives from other agencies or Departments beyond CSIS and, with some restriction to seek relevant information from them (see sections 6(4); 40(2); 38(c); 41; 59).

C-51 may also be an opportunity for a small amendment to expand the multiagency investigative mandate of SIRC so as to include the new judicially authorized operational activities created by the new s.21.1 in the existing s.39(2)(b) of the *CSIS Act* where full information access is authorized.

Part 5 – Immigration and Refugee Protection Act Amendments

This Part amends the security certificate sections of the *Immigration and Refugee Protection Act* to permit the Minister to seek judicial approval to withhold information from the special advocate and with the authority to appeal rulings of the Federal Court without their designation by the Court that they are of sufficient “importance” for an appeal.

Although these amendments increase the authority of the Minister with respect to withholding information and decrease the ability of the Federal Court to prevent appeals, they have received little attention. This may be because the security certificate regime has failed to actually expedite the removal of persons on security grounds from Canada.

Conclusions

C-51 provides a series of legislative amendments designed to improve the ability of officials to deal with the new reality of domestic terrorism. This is a challenging issue because it is focused on proactive interdiction rather than after-the-fact prosecution, which means an emphasis on information sharing and intelligence.

Concurrent with these new authorities, C-51 creates specialized criteria for their application as well as new oversight and review procedures. Because of the important privacy principles involved, all of these measures merit close scrutiny and substantive analysis from a full range of perspectives.

The following observations and recommendations are offered:

- The existing oversight and review provisions referenced in this analysis should also be fully considered in assessing the impact of any new authority granted under C-51;
- consideration should be given to how measures to create data storage rules can best be enacted and whether mandatory reporting of information sharing under the *Security of Canada Information Sharing Act* to the Privacy Commissioner is necessary;
- Section 8 of the proposed *Secure Air Travel Act* should be amended to include “photographs” to the information authorized to be kept;
- clarification should be sought to determine the scope of the new court-ordered Internet take down orders in relation to online terrorism propaganda;
- clarification should be sought as to whether the new court authorization created by s.12.1 of the *CSIS Act* simply pertains to situations where such activities would be unlawful or a *Charter* breach in the absence of judicial authorization as per the Supreme Court decision in *R. v. Spencer*;
- consideration should be given to amending the *CSIS Act* to expand the multi-agency investigative mandate of SIRC so as to include the new judicially authorized operational activities created by the new s.21.1 in the existing s.39(2)(b) of the *CSIS Act* where full information access is authorized; and
- consideration should be given to adding a clause to C-51 to create a mandatory review of the Bill’s provisions and related issues in five years, ideally conducted by a Joint House-Senate Committee specially created and empowered for this purpose.

C-51 has attracted considerable criticism precisely because, by necessity, it deals with matters that potentially impact important Canadian values and principles that are rightly cherished and protected. These events and these issues clearly generate strong emotion that has manifested itself on both sides of the debate on several issues which, hopefully, will not derail the necessary analysis and action in confronting this threat in an effective but balanced way. While the terrorist threat must not be exaggerated, neither must the potential privacy or liberty intrusions be overstated or based on speculative assumptions of misconduct.

Security and liberty can, and must, co-exist and, in fact, each, when properly balanced, are the best guarantors of the other.

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About the Author



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Scott Newark's 30-year criminal justice career began as an Alberta Crown Prosecutor, with subsequent roles as Executive Officer of the Canadian Police Association, Vice Chair and Special Counsel for the Ontario Office for Victims of Crime, Director of Operations for the DC based Investigative Project on Terrorism, and as a security and policy advisor to both the Ontario and federal Ministers of Public Safety.



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