



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

Legal Analysis of the Proposed Bill C-51, the Canadian *Anti-terrorism Act, 2015*: Potential Impact on Freedom of Expression

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1. Summary of Main Findings

This Analysis looks at the *Anti-terrorism Act, 2015*, or Bill C-51, from the perspective of the right to freedom of expression. It is based on international standards which form the basis of the mandate of the OSCE in relation to freedom of expression. These include the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, which Canada has ratified, and other OSCE commitments in this area.

It is recognised that States need to put in place effective systems to address terrorism and other threats to security. This is necessary, among other things, to uphold democracy and the whole system of respect for human rights, including freedom of expression. At the same time, international law establishes clear standards for how to balance security needs and the imperative of respecting freedom of expression, in particular by placing limits on the extent to which States may restrict freedom of expression.

Section 16 of the Bill seeks to introduce a number of direct restrictions on freedom of expression through amendments to the *Criminal Code*. These include a proposed section 83.221 of the *Criminal Code*, which would prohibit knowingly advocating or promoting the commission of terrorism offences while knowing that these offences will be committed or being reckless as to whether or not they may be committed. International standards, in recognition of their potential overbreadth, call for restrictions on freedom of expression in this area to be limited to direct and intentional incitement to terrorism, instead of broader notions such as advocating, promoting or encouraging, and they also rule out indirect intent requirements such as recklessness. This is potentially of particular concern to the media, which has a professional responsibility to report on terrorism and to ensure that the public are informed about terrorist threats and activities.

Section 16 of the Bill would also, through the addition of sections 83.222 and 83.223 to the *Criminal Code*, give the responsible minister the power to seize and otherwise suppress 'terrorist propaganda', defined as anything that advocates, promotes or counsels the commission of a terrorist offence. In addition to the problems with restricting material that merely advocates or promotes terrorism, this rule is problematical inasmuch as it enables administrative action to restrict freedom of expression which is triggered by the very low standard of having 'reasonable grounds' to believe the material is terrorist propaganda. Furthermore, there are no protections against the overbroad application of this rule, such as a requirement that dissemination of the material would be likely to incite a terrorist offence before it may be seized. Once again, these provisions are potentially of serious concern to the media, in particular due to the risk that professional reporting on terrorism may

require them to disseminate material which could be deemed to be terrorist propaganda.

Section 2 of the Bill establishes the *Security of Canada Information Sharing Act*, which substantially increases the power to share information among 17 different Canadian government institutions, including institutions that hold a tremendous amount of personal information about Canadians. The link between threats to privacy and to freedom of expression has been well established and the enabling of significantly greater internal sharing of information among government institutions may exert a chilling effect on freedom of expression. The same risk is present with the *Secure Travel Act*, which would be established by section 11 of the Bill. This gives the responsible minister the power to place anyone on a no-fly list where there are 'reasonable grounds to suspect' that they may threaten transportation security or travel for purposes of committing certain terrorist activities. Although intentional abuse of this provision is unlikely in the Canadian context, there is a real risk that individuals who are in no way associated with terrorism may be caught up in the scheme based on controversial comments they may have made about terrorism. Furthermore, individuals placed on the no-fly list may be prevented from going before a court to contest this action for up to 90 days.

2. Key Recommendations

- Proposed section 83.221 of the *Criminal Code* should be limited to *direct and intentional incitement* to commit terrorism offences.
- The definition of 'terrorist propaganda' in proposed section 83.222(8) of the *Criminal Code* should similarly be limited to material which incites others to commit terrorism offences.
- The standard for engaging the seizure or suppression measures in proposed sections 83.222 and 83.223 of the *Criminal Code* should be more stringent than mere 'reasonable grounds', for example by requiring there to be 'substantial grounds', and some risk of harm, such as a likelihood of incitement to terrorism, should be added.
- The proposed *Security of Canada Information Sharing Act* and *Secure Travel Act* should be reviewed to ensure that it strikes an appropriate balance between privacy (and freedom of expression) and the need to combat terrorism, including by limiting its scope to information that really is required to be shared to combat terrorism and by putting in place more robust oversight mechanisms.

3. Analysis

3.1 International Standards

This Analysis is based on the mandate of the OSCE in relation to freedom of expression, as established in international instruments including the *Universal Declaration of Human Rights*,¹ and the *International Covenant on Civil and Political Rights*,² to which OSCE participating States have declared their commitment.³

Canada acceded to the ICCPR on 19 May 1976. Article 19 of the ICCPR guarantees freedom of expression in the following terms:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The Mandate of the OSCE Representative on Freedom of the Media, based on OSCE principles and commitments, includes to observe relevant media developments in all participating States and to advocate and promote compliance with OSCE principles and commitments regarding freedom of expression and of the media.⁴ The OSCE has been committed to respect for freedom of expression since it was originally created (as the Conference on Security and Co-operation in Europe or CSCE), as reflected in the *Final Act of the Conference on Security and Co-operation in Europe*, adopted 1 August 1975 in Helsinki (also known as the Helsinki Final Act).

Important commitments were made in this regard in the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, adopted on 29 June 1999, specifically that:

- (9) The participating States reaffirm that

¹ UN General Assembly Resolution 217A(III), 10 December 1948.

² UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976.

³ Helsinki Final Act (1975), Part VII; reiterated e.g. in the Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension (1990) and later statements.

⁴ See Permanent Council Decision No. 193, adopted 5 November 1997, setting out the Mandate of the OSCE Representative on Freedom of the Media. Available at: <http://www.osce.org/pc/40131>.

(9.1) - everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.

The OSCE Charter for European Security, adopted at the adopted at the Istanbul Summit of the OSCE in November 1999, recognised the “importance of independent media and free flow of information” and made a commitment to “take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”⁵

As these commitments recognise, the right to freedom of expression is not an absolute right. However, any restrictions on this right must meet the conditions set out in international law and, in particular, the three-part test set out in Article 19(3) of the ICCPR, quoted above. This is a strict test which must be applied objectively and in a manner which ensures, among other things, that any restrictions are necessary and proportionate, taking into account both the importance of the objective or goal of the restriction and the likely impact it will have on freedom of expression.

3.2 Introduction

The *Anti-terrorism Act, 2015*, or Bill C-51, was tabled before the Canadian federal Parliament on 30 January 2015 and referred for review to the Standing Committee on Public Safety and National Security on 23 February 2015. That Committee returned the Bill with some relatively minor amendments to Parliament on 2 April 2015, where it is now awaiting final adoption. Bill C-51, along with another piece of legislation, Bill C-44 or the *Protection of Canada from Terrorists Act*, which received Royal Assent on 23 April 2015, will usher in some of the most significant changes ever to Canada’s legal regime governing terrorism.

This Analysis looks at Bill C-51 from the perspective of one human right, namely the right to freedom of expression. The Bill includes a number of provisions which directly restrict the right to freedom of expression, including by making it a crime to knowingly advocate or promote the commission of a terrorist offence and by allowing for the seizure and suppression of “terrorist propaganda”. It also provides for other measures which could indirectly impact on the right to freedom of expression. Both of these types of provisions are addressed in this Analysis.

Bill C-51 is a complex piece of legislation divided into five different parts, each with substantially different objectives. Part 1 (sections 2-10) would enact the *Security of Canada Information Sharing Act*, the main objective of which is to facilitate the

⁵ The Human Dimension, paragraph 26.

sharing of information among certain Canadian government institutions which have a role in promoting security. Part 2 (sections 11-14) would enact the *Secure Air Travel Act*, the primary objective of which is enhance the powers of the government to prevent individuals who are suspected of wishing to engage in a terrorist offence from travelling. Parts 3 (sections 15-39), 4 (sections 40-51) and 5 (sections 52-62) would introduce a wide range of amendments to, respectively, the *Criminal Code*, the *Canadian Security Intelligence Service Act*, and the *Immigration and Refugee Protection Act*.

3.3 Direct Restrictions on Freedom of Expression

The main direct restrictions on freedom of expression are found in section 16 of Bill C-51, which would add three new sections – sections 83.221-83.223 – to the *Criminal Code*, immediately after existing section 83.22, and which would therefore fall in Part II.1: Terrorism of the *Criminal Code*.

3.2.1 Advocating or Promoting Terrorism Offences

Section 83.221(1), the operative part of that provision, reads 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.

A ‘terrorism offence’ is defined in section 2 of the *Criminal Code* as follows:

“terrorism offence” means

- (a) an offence under any of sections 83.02 to 83.04 or 83.18 to 83.23,
- (b) an indictable offence under this or any other Act of Parliament committed for the benefit of, at the direction of or in association with a terrorist group,
- (c) an indictable offence under this or any other Act of Parliament where the act or omission constituting the offence also constitutes a terrorist activity, or
- (d) a conspiracy or an attempt to commit, or being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (c);

Sections 83.02 to 83.04 and 83.18 to 83.23, for their part, define a variety of offences, most of which relate to ‘terrorist activities’ or ‘terrorist group’, both of which are defined in section 83.01(1). The former refers to breach of a number of international conventions in this area, as well as acts committed for political, religious or ideological purposes, with the intention of intimidating the public, and which cause death or serious bodily harm, endanger a person’s life or cause a serious risk to health or safety, or which cause substantial property damage leading to one of the previous three results, or which cause serious interference with or

serious disruption of an essential service, There are some protections for protests and labour unrest which is not intended to cause one of the first three results.

Section 83.221(1) could be said to comprise two main elements which roughly correspond to the *actus reus* (the wrongful deed) and the *mens rea* (the criminal intent) of the offence:

1. communicating statements which knowingly advocate or promote the commission of terrorism offences in general; and
2. 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.

Both of these elements of the offence are problematical from the perspective of freedom of expression and media freedom. It is well established under international law that there is an important difference between mere advocacy or promotion of something, regardless of its harmfulness, and incitement to a harmful result. It is precisely through requiring a very close nexus between a statement and the risk of harm before the former may be prohibited – as is required by the term incitement – that international law ensures an appropriate balance between protecting free speech and protecting against harm.

An academic work, for example, may be said to advocate in favour of something by extolling its virtues and by setting out and weighing its relative benefits and drawbacks, and yet it would be rare for an academic work to incite others to harmful results. The media, which have a professional obligation to report in a timely and comprehensive manner on acts of terrorism, could be deemed by some to be promoting terrorism offences by doing so. The use by the Islamic State of social media to promote itself simply by distributing videos and images has been widely commented on. Such analysis could potentially be applied to media reporting on their activities. Similarly, a very strongly worded poem may advocate for something, and yet it would be rare for it to create a genuine risk of harm. Reflecting this idea, the European Court of Human Rights, in a case involving charges relating to public order in respect of an anthology of poems, stated:

[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.⁶

There is clear authority under international law for the need to maintain, at least in relation to restrictions on freedom of expression, a clear distinction between expression which incites and expression which merely advocates, promotes or praises. Thus, Article 20(2) of the ICCPR calls for the prohibition of “advocacy of national, racial or religious hatred”, but only where it “constitutes incitement”.

⁶ *Karatas v. Turkey*, 8 July 1999, Application No. 23168/94, para. 52.

Perhaps even more significant for current purposes, Article III(c) of the *Convention on the Prevention and Punishment of the Crime of Genocide*⁷ prohibits: “Direct and public incitement to commit genocide”. It intentionally avoids broader notions, such as advocating or promoting, notwithstanding the very extreme, precisely defined and limited nature of what constitutes genocide, as defined in Article II of the Convention. The same precision and clarity cannot be said to apply to the definition of ‘terrorism offences’ under Canadian law, so that the need for a clear link between the statement and the risk of harm is even greater.

In the case of *Prosecutor v. Nahimana, Barayagwiz and Ngeze*,⁸ the International Criminal Tribunal for Rwanda was very careful to interpret the requirement of incitement narrowly. The Tribunal, for example, distinguished between statements in the media which discussed ethnic consciousness and those which promoted ethnic hatred, giving as an example of the former a personal account of being discriminated against (at the hands of the group against which genocide was later committed). If statements of this sort did motivate listeners to take action, this was, according to the Tribunal, a result, “of the reality conveyed by the words rather than the words themselves.” The Tribunal also noted that, if a true statement generated ‘resentment’, this would be a result of the underlying factual situation, rather than the articulation of the statement as such, and the speech would be protected. Falsity, on the other hand, might provide evidence of the requisite criminal intent.⁹ It would be difficult to understand the terms ‘advocate’ or ‘promote’ in a similarly narrow (and hence appropriate) manner.

A number of international authorities have expressed themselves directly on this issue in the context of restrictions on freedom of expression with the objective of addressing the threat of terrorism. For example, the UN Human Rights Committee, in its General comment No. 34: Article 19: Freedoms of opinion and expression, has stated:

States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. [references omitted]¹⁰

Similarly, in their 2005 Joint Declaration the (then) three special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression – stated:

⁷ UN General Assembly Resolution 260(III)A, 9 December 1948, entered into force 12 January 1951.

⁸ 3 December 2003, ICTR-99-52-T (Trial Chamber).

⁹ *Ibid.*, paras. 1019-1021.

¹⁰ CCPR/C/GC/34, 12 September 2011, para. 46.

While it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as ‘glorifying’ or ‘promoting’ terrorism when restricting expression.¹¹

The same idea was reflected in the 2008 Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation, when the four special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information– stated:

The criminalisation of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them). Vague notions such as providing communications support to terrorism or extremism, the ‘glorification’ or ‘promotion’ of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised.¹²

Most recently, in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations, the four special mandates stated:

In particular, States should refrain from applying restrictions relating to ‘terrorism’ in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as glorifying’, ‘justifying’ or ‘encouraging’ terrorism should not be used.¹³

It should be noted that while the definition of ‘terrorism offences’ under the *Criminal Code* is probably sufficiently narrow to sustain a prohibition of incitement to such crimes,¹⁴ the addition of the term ‘in general’ after the term ‘terrorism offences’ adds an unfortunate element of uncertainty. It is unclear why this was added or what it is intended to add. On the other hand, there is a slight saving in terms of scope in section 83.221(1) inasmuch as it does not apply to itself. In other words, it is not a crime to advocate that someone else advocate the commission of a terrorism offence.

One way at least to mitigate partially the overbreadth of the terms ‘advocate’ and ‘promote’ would be to include defences or exceptions to the rule, for example for

¹¹ Adopted on 21 December 2005. All of the Joint Declarations, which are adopted annually, are available at: <http://www.osce.org/fom/66176>.

¹² Adopted on 10 December 2008. See also the 10th Joint Declaration, adopted on 3 February 2010, clause 8(a).

¹³ Adopted 4 May 2015, clause 3(b).

¹⁴ It may be noted that section 83.01(1) already includes the act of counselling within the definition of a terrorism offence.

true statements or for statements which were intended as part of a good faith discussion on a matter of religion, politics or some other issue of public interest. For example, the crime of hate speech under Canadian law covers both incitement to hatred and the wilful promotion of hatred. The latter, however, includes a number of defences along the lines noted above. In the case of *R. v. Keegstra*, decided by the Supreme Court of Canada, the majority upheld the constitutionality of the prohibition of hate speech. In doing so, however, they placed some reliance on the existence of the defences, noting:

To the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases. The line between the rough and tumble of public debate and brutal, negative and damaging attacks upon identifiable groups is hence adjusted in order to give some leeway to freedom of expression.¹⁵

There are also problems with the *mens rea* or intent part of the offence, in particular its extension to situations where the accused is merely “reckless as to whether any of those offences may be committed”. Once again, this is perhaps of particular concern to the media, which would presumably rarely if ever report on terrorism with the intention of promoting it but which might be deemed to have been reckless as to this possible result.

The issue of the requisite intention for an expressive offence has been dealt with extensively by the Supreme Court of Canada in the case of *R. v. Hamilton*.¹⁶ In that case, the issue was whether Hamilton – who had sold material over the Internet which instructed the buyer, among other things, as to how to commit credit card fraud – had the requisite criminal intent to be convicted for counselling fraud (among other offences).

In a six-three decision, the Supreme Court held that he did. Although the constitutionality of the *Criminal Code* provision, as a restriction on freedom of expression, was not explicitly in issue, this element of the case was clearly reflected in the reasoning of the decision. The provision did not explicitly refer to any particular *mens rea* but the majority held that the conviction was proper based on an understanding that the “*mens rea* consists in nothing less than an accompanying *intent* or *conscious disregard of the substantial and unjustified risk inherent in the counselling*”.¹⁷

The minority decision rejected even this standard stating:

¹⁵ [1990] 3 S.C.R. 697, pp. 779-80. Available at:

http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_otroscanada/r.%20v.%20keegstra.htm.

¹⁶ [2005] 2 S.C.R. 432, 2005 SCC 47. Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/2280/1/document.do>.

¹⁷ *Ibid.*, p. 444.

If mere recklessness as to the communication's potential power of persuasion were to suffice, some may argue that the publication of Shakespeare's Henry VI, with its famous phrase "let's kill all the lawyers", should be subject to state scrutiny!¹⁸

They held, instead, that to provide appropriate protection to freedom of expression, "the counsellor must, at the very least, intend to persuade the person counselled to commit the offence."¹⁹

Applying this analysis inevitably leads to the conclusion that the proposed Bill C-51 section 83.221(1) is very unlikely to withstand a constitutional challenge. This offence is explicit in requiring only mere recklessness as the *mens rea* element of the offence, which cannot be equated with the "conscious disregard of the substantial and unjustified risk inherent in the" activity that the majority in *R. v. Hamilton* found to be necessary to meet appropriate criminal standards of liability. Furthermore, counselling is much narrower in scope than advocating or promoting, suggesting that the *mens rea* requirements for the section 83.221(1) offence would need to be at least as strict as, if not stricter than, those applied to counselling.

Finally, it may be noted that section 83.221(1) creates a relatively serious type of offence under Canadian law, namely an indictable offence (as opposed to an offence punishable on summary conviction) for which the maximum penalty is a rather lengthy five years' imprisonment.

3.2.2 Controlling 'Terrorist Propaganda'

Sections 83.222 and 83.223 provide for the seizure and suppression (in the sense of the material no longer being stored on or made available through a computer system) of 'terrorist propaganda'. The standard for applying these measures is for a judge to be "satisfied by information on oath that there are reasonable grounds to believe" that any publication or material stored on a computer system, which are intended for public distribution, is terrorist propaganda. The latter is defined in section 83.222(8) as:

[A]ny writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general—other than an offence under subsection 83.221(1) — or counsels the commission of a terrorism offence.

There are provisions for court review within seven days (for seizures) and a reasonable time (for computer material), during which the matter will be decided on the civil standard of a "balance of probabilities" and the material either forfeited or returned to the owner. No proceeding under these sections can proceed without the Attorney General's consent.

¹⁸ *Ibid.*, p. 461.

¹⁹ *Ibid.*

It is immediately clear that the problems identified with the *actus reus* relating to the section 83.221(1) offence are also applicable here, inasmuch as the substantive definition of what constitutes terrorist propaganda is substantially similar (albeit with the additional ground of counselling). Although there is clearly a difference between establishing a criminal offence and allowing for the seizure of material, the risks in terms of over-inclusiveness, which is what the international law requirement of incitement, which is missing from the section 83.221(1) offence, aims to prevent, are the same. In other words, inasmuch as a criminal prohibition on advocating the commission of terrorism offences fails to pass muster as a restriction on freedom of expression because it is overbroad, the same applies to a rule that allows for the seizure of similar material.

In other respects, the section 83.222 and 83.223 regimes are far more offensive to freedom of expression than the section 83.221(1) offence for two reasons. First, the original seizure or suppression of the material is triggered by the very low standard of the existence of 'reasonable grounds' to believe it is terrorist propaganda. This is a very low standard indeed which would lead to the material being rendered publicly inaccessible for up to seven days or potentially even longer. This standard could capture a significant range of material which was ultimately deemed not to be terrorist propaganda. For a media outlet, having its material seized or suppressed for seven days would be extremely problematical. The original low threshold for seizure also triggers a procedure before the courts which would normally be significantly inconvenient for the owner of the material and potentially worse, and which could be expected to have a chilling effect on freedom of expression. Furthermore, the continuation of these measures on a permanent basis is on the civil standard of proof as compared to the section 83.221(1) offence, which would need to meet the criminal standard of beyond all reasonable doubt.

Second, unlike the section 83.221(1) offence, which incorporates the protection of a *mens rea* requirement, there are no conditions or protections against abuse of the 'reasonable grounds' standard. Given that this is analogous to an urgent action or interim measure (i.e. pending proper consideration by a court), which limits freedom of expression, it is incumbent on the legislator to include protective measures. These might, for example, require a showing that there is a clear risk of imminent dissemination of the material, along with a similar risk of incitement to an actual terrorism offence, or at least a real probability that the risk of such an offence would be decreased by taking the material down. In other words, this sort of measure should at the very least be treated as exceptional, and appropriate protections against abuse should be built into it.

3.4 Other Potential Risks to Freedom of Expression

3.3.1 Threats to Privacy and Hence Freedom of Expression

The *Security of Canada Information Sharing Act*, which is established by section 2 of Bill C-51, substantially increases the possibility of sharing information among 17 different Canadian government institutions, including institutions that hold a tremendous amount of personal information about Canadians, such as the Canadian Revenue Agency (which deals, among other things, with income tax reporting), the Department of Citizenship and Immigration and the Department of Health.²⁰ Pursuant to section 5 of the Act, the scope of information that may be shared, subject to restrictions on sharing in other laws, includes:

[I]nformation [that] 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.

An "activity that undermines the security of Canada" is defined extremely broadly in section 2 of the Act to incorporate such things as interfering with the capacity of the government in a range of areas including the administration of justice and economic stability, covert foreign-influenced activities, and activities that cause serious harm to a person's property because of that person's association with Canada. One does not have to be tremendously imaginative to envisage scenarios which would easily be covered by this which have nothing to do with terrorism or even security in the proper sense of that word.

The Canadian Privacy Commissioner, in his *Submission to the Standing Committee on Public Safety and National Security of the House of Commons*, was extremely critical of the privacy implications of this part of Bill C-51, stating:

[T]he scale of information sharing being proposed is unprecedented, the scope of the new powers conferred by the Act is excessive, particularly as these powers affect ordinary Canadians, and the safeguards protecting against unreasonable loss of privacy are seriously deficient. ... In its current form, Bill C-51 would fail to provide Canadians with what they want and expect: legislation that protects both their safety and their privacy.²¹

The link between privacy and freedom of expression is well established, as is the significant threat that surveillance poses to both privacy and freedom of expression.²² While information sharing among public authorities is nowhere near

²⁰ The Governor in Council (effectively the Cabinet) may, on the advice of the responsible minister, add or subtract bodies from this list. See section 10(3) of the *Security of Canada Information Sharing Act*.

²¹ *Bill C-51, the Anti-Terrorism Act, 2015: Submission to the Standing Committee on Public Safety and National Security of the House of Commons*, 5 March 2015. Available at: https://www.priv.gc.ca/parl/2015/parl_sub_150305_e.asp.

²² See, for example, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Frank La Rue, 17 April 2013, UN Doc. A/HRC/23/40, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf and Centre for Law and Democracy, *Submission to the Office of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression on Encryption and Anonymity in Digital*

as intrusive a threat to freedom of expression as surveillance, such an unprecedented increase in information sharing might still exert a chilling effect, for example on those who wish to discuss matters which are highly critical of the government.

3.3.2 Denial of Travel

The *Secure Air Travel Act*, established by section 11 of Bill C-51, provides for the establishment of what is effectively a no-fly list by the responsible minister. The standard for inclusion on the list is the existence of “reasonable grounds to suspect” that the person will engage in acts that threaten transportation security or travel by air with a view to committing certain terrorist activities, defined as offences in the *Criminal Code*.²³ There is a system of recourse, first to the minister and then, but only then, to the courts. However, the minister can take up to 90 days to render a decision, and the matter might go to the courts only after that.

Some commentators have welcomed the move to provide a statutory basis for such measures, which may be considered to be an improvement over the current Passenger Protect Program. At the same time, these commentators tend to be highly critical of the system of recourse, among other things because of limits in terms of access to information that it establishes.²⁴

It is unlikely that this facility would be abused by a minister in Canada for overtly political reasons, but it is by no means farfetched to imagine that individuals might be caught up by this scheme for expressions which, while perhaps extreme and edgy, in no way represented an actual threat to security. It is unclear why an individual targeted under this scheme could not, at least in an appropriate case, obtain an independent court review much more quickly than the (potentially) 90 days currently envisaged. It may be noted that for many individuals being unable to travel by air for 90 days and then however much longer a court review might take would be extremely inconvenient.

Communications, February 2015, available at: http://www.law-democracy.org/live/wp-content/uploads/2012/08/UN-SR.Encryption.Feb15.final_.pdf.

²³ See section 8 of the *Secure Air Travel Act*.

²⁴ See, for example, Amnesty International, *Insecurity and Human Rights: Concerns and Recommendations with Respect to Bill C-51, The Anti-Terrorism Act, 2015*, Submitted to the House of Commons Standing Committee on Public Safety and National Security, 9 March 2015, p. 13. Available at: http://www.amnesty.ca/sites/default/files/amnesty_international_brief_regarding_bill_c-51.pdf. The current system is described by Public Safety Canada at: <http://www.publicsafety.gc.ca/cnt/ntnl-scrtr/cntr-trrrsm/pssngr-prtct/index-eng.aspx>.