The Price of Freedom: Is the Anti-terrorism Act, 2015 (Bill C-51) Constitutional?

This article was written by a law student for the general public.

Introduction

The *Anti-terrorism Act, 2015* (formerly Bill C-51) came into force June 18, 2015. It was introduced as an omnibus bill. This means it changed existing laws, as well as created new ones. Political parties, legal professionals, and members of the public have criticized the *Anti-terrorism Act* and suggested that certain parts of it may not be constitutional.

The constitutionality of the *Anti-terrorism Act* is important because it raises questions about balancing security and freedom. How far should the federal government go to keep Canadians safe? This article looks at the sections of the act that affect rights protected in the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution.

Direct *Charter* Violations by CSIS

Section 42 of the *Anti-terrorism Act* gives the Canadian Security Intelligence Service (CSIS) the power to reduce "threats to the security of Canada." That power includes taking actions that violate the *Charter* if CSIS gets a warrant from a Federal Court judge. Allowing CSIS to violate *Charter* rights in this way is problematic.

In general, the reason for getting a warrant is to make sure that the police or an agency such as CSIS has sound and valid reasons for conducting a search or seizure. Warrants ensure that state actions are legal, and therefore consistent with Section 8 of the *Charter*, which protects against unreasonable search and seizure. When police want to search someone, they must get a warrant to make sure the search is "reasonable" and therefore legal. However, the *Anti-terrorism Act* allows judges to give warrants for actions that are not consistent with the *Charter*. Other *Charter* rights do not have a reasonableness requirement. Therefore, getting a warrant to violate those rights does not make the violation legal.

If the government takes action that limits *Charter* rights, those actions can only be permitted if the limitations are included in a written law.[1] Those laws can then be challenged in court. Courts balance the limitations set out in a law with the *Charter* rights. The problem with the *Anti-terrorism Act* is that it permits judges to give warrants that allow *Charter* violations, rather than prevent them.[2] Furthermore, these violations are not specified in any written laws. The *Anti-terrorism Act* allows CSIS to violate any *Charter* right without specifying which *Charter* rights are being violated and why. Lastly, the *Anti-*

terrorism Act does not provide an opportunity to challenge those violations in court.

***Criminal Code* Amendments**

The *Anti-terrorism Act* adds two offences to the *Criminal Code*. First, the act criminalizes knowingly communicating statements that advocate or promote "terrorism offences in general," when the person making the statements is aware that someone "may" commit a terrorist offence in response.[3] The penalty for this can be up to five years in prison.

The *Anti-terrorism Act* also allows courts to order the deletion of information believed to be "terrorist propaganda."[4] Terrorist propaganda includes "any writing, sign, visible representation or audio recording that advocates or promotes the commission of terrorism offences in general." [5] These new offences potentially limit freedom of expression and the right to liberty.

Freedom of Expression

Section 2(b) of the *Charter* protects "freedom of expression."This includes any activity that expresses meaning, unless the activity causes harm.[6]The *Anti-terrorism Act* might limit expression because the meaning of "terrorism offences in general" is unclear, and could be overbroad. A law that is overbroad is one that goes "beyond what is required to achieve its objective."[7] This new offence could penalize more statements than it originally meant to include.

For example, imagine a university student writes on Facebook: "We should be sending support to groups who are fighting ISIS, whether or not they have terrorist associations. ISIS is the biggest threat to Middle East security, and the enemy of my enemy is my friend." The student might be aware that someone could see his message and send financial support to militant groups in response. Under the *Anti-terrorism Act*, this student could be charged, even though he was just trying to spark a discussion about Middle Eastern security. A court could also order the deletion of the student's Facebook post if it is considered terrorist propaganda. This example shows that the new laws could include statements or materials even when they were not written or created for a terrorist purpose.[8]

There are no defences that could protect people from being captured by these new laws. The *Anti-terrorism Act* does not allow the defences of education, public debate, or religious belief.[9] That means people might be discouraged from having open conversations about terrorism. This problem is worsened because the new offence potentially includes private statements, as well as non-verbal communication.

Right to Liberty

Section 7 of the *Charter* protects "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The *Anti-terrorism Act* could violate this right because people could be sent to prison even though they did not intend their actions to have a terrorist purpose. People could be prosecuted because the phrase "terrorism offences in general" is too broad. This

means that the new law might penalize people who allegedly make statements that support "terrorism offences in general," even though penalizing those individuals likely would not serve the purpose of preventing terrorism. The *Criminal Code* already prohibits counselling or helping people commit terrorist offences, but the *Anti-terrorism Act* might expand the application of these laws in ways that are overbroad.[10]

Information Sharing

Unreasonable Search or Seizure

Section 8 of the *Charter* protects against "unreasonable search or seizure." Courts have held that this right guarantees a "reasonable expectation of privacy," though it is not absolute.[11] Expectations of privacy can be outweighed by the public interest in certain circumstances.[12]

The *Anti-terrorism Act* creates the *Security of Canada Information Sharing Act* (*Information Act*). The *Information Act* allows personal information collected by a government institution to be shared with other government institutions if it relates to "activities that undermine the security of Canada."[13] The institutions that can share information include, for example, the Department of Health and the Department of Employment and Social Development. The Anti-terrorism Act also allows the Canada Revenue Agency to share tax information with the head of any government institution.[14] Threats to the "security of Canada" include the "security of the people of Canada" and the "economic or financial stability of Canada."[15]

Legal experts have expressed concern over this broad language. [16] It also appears that almost any information about a person can be shared, and without his or her knowledge or consent.[17] Finally, there is no independent oversight or safeguards to ensure that the information shared is actually reliable.[18]

Conclusion

The *Anti-terrorism Act* has been heavily criticized and will likely be challenged in court. The act's language is very broad and far-reaching, and appears to violate our *Charter* rights. Members of the public and legal community had made many suggestions for changes to the bill but the Conservative government accepted very few of them before passing the new law.

The security of Canadians is an important issue that the government has a legitimate interest in protecting. Security will sometimes require limiting our freedoms. However, at what point does the cost of those limits outweigh the benefit of security? Canadians will have to ask themselves how much freedom they are willing to give up in the name of security.

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[1] Section 1 of the *Canadian Charter of Rights and Freedoms* says that limits to *Charter*

rights must be “prescribed by law.”

[2] Canadian Bar Association, “Bill C-51, *Anti-terrorism Act, 2015* Executive Summary” (2015).

[3] *Criminal Code*, RSC 1985, c C-46, s 83.221, as amended by *Anti-terrorism Act, 2015*, SC 2015, C 20, s 16.

[4] *Criminal Code*, RSC 1985, c C-46, s 83.222, as amended by *Anti-terrorism Act, 2015*, SC 2015, C 20, s 16.

[5] *Ibid*.

[6] See *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

[7] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 35.

[8] Canadian Civil Liberties Association, “Understanding Bill C-51: The Anti-Terrorism Act, 2015” *Canadian Civil Liberties Association* (19 May 2015), online: CCLA < https://ccla.org/understanding-bill-c-51-the-anti-terrorism-act-2015/>.

[9] *Supra* note 3.

[10] *Ibid*.

[11] *Hunter v Southam*, [1984] 2 SCR 145 at para 159.

[12] *Smith v Canada*, [2001] 1 SCR 20, affirming FCA

[13] *Security of Canada Information Sharing Act*, s 5(1), being Part I of the *Anti-terrorism Act, 2015*, SC 2015, C 20

[14] *Excise Tax Act*, s 295(5.05), as amended by *Anti-terrorism Act, 2015*, SC 2015, C 20, s 3.

[15] *Security of Canada Information Sharing Act*, s 2(a), being Part I of the *Anti-terrorism Act, 2015*, SC 2015, C 20.

[16] Kent Roach and Craig Forcese, “Bill C-51: Roach and Forcese Submissions to the Senate Standing Committee” *Canadian Anti-terrorism Law Audit* (2 April 2015), online: Canadian Anti-Terrorism Law Audit <https://cdnantiterrorismlawaudit.wordpress.com/2015/04/>

[17] *Supra* note 10.

[18] *Ibid*.