Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

CAUT Submission to the Standing Committee on Public Safety and National Security

Study of Bill C-59, an Act respecting national security matters

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Introduction

Established in 1951, the Canadian Association of University Teachers (CAUT) is the national voice for academic staff. Today, CAUT represents 70,000 teachers, librarians, researchers, general staff and other academic professionals at 122 universities and colleges across the country. CAUT is an outspoken defender of academic freedom and is actively working in the public interest to improve the quality and accessibility of post-secondary education in Canada.

Bill C-59, *an Act respecting national security matters,* is meant to be the government's implementation of its election promise to "repeal the problematic elements of Bill C-51, and introduce new legislation that better balances our collective security with our rights and freedoms." When it was introduced by the previous government, C-51 sparked major concerns about the potential impact on the basic civil liberties of all Canadians. CAUT has long called for the full repeal of Bill C-51.

CAUT opposed C-51 because, in our opinion, three elements of the law unnecessarily undermined academic freedom.

- The amendment to the Criminal Code created 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.
- The Act expanded Canada's security agencies' powers to share information, without proper oversight. Professors and students researching controversial or sensitive issues can be subjected to surveillance and information sharing without their knowledge.
- The Act expanded the power of the Canadian Security Intelligence Service (CSIS) to proactively disrupt undefined threats to the security of Canada. This could see academic staff prevented from publishing research, attending conferences overseas, or worse, if CSIS determines, however broadly and arbitrarily, that they may be a security threat.

It is these same concerns that inform our recommendations in regards to C-59.

Academic freedom is the right to teach, research, publish and express opinions without fear of political or institutional censorship. Universities and colleges contribute to the common good of society through research and the dissemination of knowledge and understanding; and through fostering free inquiry and free speech of academics and students alike. It is a pillar of a modern, robust democracy.

Whereas C-59 addresses some of our concerns regarding C-51, we recommend further changes to C-59 to better safeguard both the security of Canadians and academic freedom.

Summary of Recommendations:

- Provide explicit defences for educational and artistic displays and discussions as exists in the Criminal Code for other offenses.
- Narrow the scope of activities subject to information-sharing by specifying threats to the security of Canada.
- Require the National Security and Intelligence Review Agency (NSIRA) and the Intelligence Commissioner be appointed by a vote of two-thirds of parliamentarians; and be given fixed terms.
- Give NSIRA the power to make binding recommendations.
- Appropriately resource the NSIRA and the Intelligence Commissioner.
- Reduce the legislative review of the Act to four years.

Counselling Terrorism Offences

C-59 amends section 83.221 of the Criminal Code by modifying the offence of *advocating or promoting commission of terrorism offences* to one of *counselling the commission of a terrorism offence*. It makes corresponding changes to the definition of terrorist propaganda.

While being a more familiar criminal law concept than the previous notion of *advocating or promoting*, CAUT still feels this is problematic. At this point, it is worth noting that the Criminal Code already makes it an offence to counsel to commit a crime; so these amendments are creating a redundancy within the Code.

Yet, the scope of the current definition remains broader than that of similar offenses already provided for in the Criminal Code.

By making *counselling the commission of terrorist acts* an indictable offense, and given the breadth of this clause, academic staff members might still unwittingly be liable to prosecution.

An individual may be charged and prosecuted if he or she counsels the commission of terrorism offenses in general while not caring or being seen as careless whether or not these statements may result in the commission of any of the offenses.

For instance, the offense of terrorism is very broad: it includes financing, complicity, incitement and conspiracy to commit such an offense. The scope of the definition suggests an intention to include a wide range of activities that promote the concept of terrorism.

As a result, it may make it possible that charges of counselling terrorism offences be laid against academic staff for carrying out their academic duties of teaching and research.

As an example, a professor, in class or in research, leads a debate on whether terrorism is justified in certain circumstances, such as during the struggle against apartheid in South Africa. The professor would still not be certain of being protected from the scope of the legislation.

Another professor, in class or in research, who discusses the lack of resources for Yemeni insurgents, could unintentionally induce someone to send money to forces opposing the Saudi Arabian intervention. The professor could be deemed as knowing that some audience members may respond by sending money to the insurgency. Therefore, the professor's actions may constitute a criminal offense. The mere fact that members of the audience might react to teaching or research by sending money to insurgents is exposing the professor to the criminal act of counselling the commission of terrorism offenses for being reckless whether any of those offences may be committed.

The law currently does not provide for a public interest defense or educational objectives. While such protection exists in such cases as hate crimes and child pornography offences, Bill C-59 contains no public interest or artistic or educational defences related to the offense of *counselling the commission of terrorist offences.* These exemptions for artistic and educational expression are included in the amendments to the *Security of Canada Information Sharing Act*, although its application will remain very limited.

While common law developments on *counselling* could be considered to offer more protections to academic staff, we feel that it is vitally important that statutory defences in regards to section 83.221 be included in the legislation to protect academic freedom. **Educational and artistic displays and discussions should have their own explicit defences.**

Security of Canada Information Sharing Act

The *Security of Canada Information Sharing Act* grants strong powers to governmental security organizations to share information on broad grounds and without adequate oversight.

Professors, researchers, scientists, and students who study controversial topics may unwittingly be subject to surveillance and disclosure of information about them and their projects as a result.

The circumstances captured by the Act are so broad that academics and others have reason to avoid saying and doing things that could fall within the scope of the law. This threatens to hinder legitimate activities of expression and academic freedom.

The overbroad concepts of "activities that undermine the security of Canada" should be replaced with "threats" as defined by the CSIS Act. Whereas C-59 does clarify the exemption for protest, dissent and artistic expression, these activities can still be subject to surveillance and information sharing.

The thresholds for the sharing of information between government departments and agencies are overly lax, and could very well violate the privacy of Canadians

while being an impediment to academic freedom. That is especially true if information is also shared with foreign agencies.

Oversight of Security Bodies

The oversight mechanisms are not sufficiently robust. There is limited requirement to notify Canadians that their information has been shared among government institutions, or that their constitutional rights have been violated.

Improper sharing of information can be a threat to Canadians' civil liberties. The government has a massive repository of sensitive and private information about its citizens: information about income; investments; donations to political, charitable and social causes; criminal records; health information; and movement within and outside Canada. The possible devastating consequences of unaccountable information sharing are already well established.

If a Canadian citizen *undermines the security of Canada*, or if agencies are trying to detect, identify, prevent, investigate or disrupt activities *that undermine the security of Canada,* 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.

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 or any arms-length oversight, based on an overbroad concept of *undermining the security of Canada.*

CAUT understands that information sharing is essential for protecting national security interests and that government should be able to share information amongst its institutions in a very limited fashion, as strictly necessary to protect national security from threats.

However, this must be balanced with clear, strong safeguards and effective oversight mechanisms to prevent abuses. Those safeguards and mechanisms are absent in the Act.

Therefore, CAUT is pleased to see that Bill C-59 is conscious of this oversight problem. The creation of the NSIRA and of an Intelligence Commissioner who would have oversight specifically over surveillance activities are positive developments.

The creation of a NSIRA is the strongest improvement included in Bill C-59. This is something CAUT, along with other civil society organizations, has been calling for ever since it has been recommended by Justice Dennis O'Connor, following the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar in 2006.

One of Justice O'Connor's main points was that existing agencies were working in silos, isolated from each other. They could not communicate and share information, even regarding operations involving more than one agency. This created huge gaps in oversight and a total lack of accountability.

We applaud the fact that the NSIRA will provide for an integrated review mechanism that will look at all national security activities, have expansive access to information and extensive powers to compel witnesses, including security agencies officials.

To make the NSIRA more effective and more independent, however, **CAUT believes that Bill C-59 should be amended in order for its members to be appointed by a vote of two-thirds of parliamentarians for a fixed term.** Allowing the government to appoint the members who would be responsible for reviewing the security activities of the government creates the appearance of a conflict of interest or lack of independence: the NSIRA members could be portrayed or seen as being beholden to the government.

The NSIRA must be granted the powers to make binding recommendations. This is not currently the case with existing review bodies. The net result is that

government agencies either do not accept or will not follow the recommendations of the review bodies. This is a major flaw. The NSIRA will however incorporate a complaints mechanism, which is a good development.

CAUT also sees as a positive development the replacement of the Communications Security Establishment Commissioner by an Intelligence Commissioner. We support giving the new Commissioner the power to approve Ministerial authorizations for intelligence gathering before they become operational. Integrating oversight before undertaking a surveillance activity is a significant improvement and a stronger safeguard against abuse and fishing expeditions.

However, Bill C-59 could be amended to make this oversight much stronger. For instance, while the Intelligence Commissioner must report to the new NSIRA, we already pointed out that the NSIRA will not have the powers to make binding recommendations. It is unclear therefore what exactly the NSIRA can or will do with the reports from the Intelligence Commissioner.

As in the case of NSIRA members, we also believe that **the Intelligence Commissioner should not be appointed by the government but rather be appointed by a vote of two-thirds of parliamentarians for a fixed term.**

Finally, we struggle to understand why the Intelligence Commissioner would be established as a part-time position, considering the vast powers of the agencies to be overseen, the massive amount of information at play and the enormous responsibilities to be undertaken by the Intelligence Commissioner on behalf of Canadians for their protection and safety.

We must also emphasize that these new bodies, the NSIRA and the Intelligence Commissioner, must be provided with the appropriate resources to properly do their work. This should equally apply to the Security and Intelligence Review Committee, and the RCMP Civilian Review and Complaints Commission.

Currently, these surveillance bodies do not have enough human and financial resources to properly keep accountable the agencies they are responsible for. It is very important because of the scope of the powers these agencies were granted in 2015, in addition to the powers they already had.

The Powers of the Canadian Security Intelligence Service

There has been a long history of controversy concerning surveillance activities 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 turned the clock back on the modest gains of the past and opened up the possibility of increased surveillance on campus. CSIS' powers have been significantly expanded, while little was done to increase the existing powers or resources of the CSIS review body.

The trigger for CSIS' expanded authority remains too broad, and includes situations where academics are exercising academic freedom. Completely lawful activity, such as publishing a study on bird habitat destruction, could be covered by the current definition of security threats. Lawful protest, advocacy, dissent and artistic expression engaged in conjunction with an activity set out in the trigger are also covered by the definition, thus further extending the reach of CSIS' broad powers of interference and nullifying the protection granted for legitimate purpose.

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 the professor's conduct meets the definition of a threat to the security of Canada. If CSIS decides that the faculty member should be

prevented from attending a seminar in the US, they may take steps, in collaboration with the Canadian Border Services Agency (CBSA), to prevent the professor's departure. This would breach section 6 of the Charter of Rights and Freedom. This is the kind of measure that, with authorization, is permitted by the Act.

The law gives the CSIS the power to disrupt and interfere with activities that pose threats to the national security of Canada without defining these activities. Academic staff may be prohibited from publishing their research results or attending conferences abroad if CSIS determines that these activities are, even in the broad sense, a threat to the security of Canada.

This remains a major concern for CAUT members. Even more worrisome, CSIS is allowed to engage in activities against Canadian citizens that would contravene the Charter of Rights and Freedoms, the very Charter meant to protect them against these kinds of abuse from their governments.

We acknowledge that C-59 changes the language from *contravene* to *limit* the Charter and adds new limits on the exercise of CSIS' power to reduce threats to the security of Canada including, in particular, by setting out a list of measures that may be authorized by the Federal Court. It also does define the disruption powers a little more clearly and expands the list of non-authorized actions.

Still, we believe that CSIS should simply not have these powers, period. There is simply no evidence whatsoever that CSIS needs these powers to keep Canadians safe. CAUT is therefore calling for the legislation to be amended in order to completely eliminate the disruption powers from the law.

Legislative Review

Bill C-59 includes a legislative review to be started during the 6th year after its enactment and completed within the following year.

While including a legislative review of the Act is important, CAUT believes that six years is too long of a period for such an important safeguard. **We would suggest reducing it to four years.**

We are hopeful that this review will happen in a transparent and public fashion, with enough time for public consultations to be conducted in a very thorough manner.

Conclusion

Overall, the effect of Bill C-59 is to somewhat limit the powers and reach of Canada's security services, while not fully mitigating the overreach established by the adoption of Bill C-51. While definitions and clarifications are being added, broad and vague language is still in place, making it likely that legitimate expressive activities, including academic freedom, could still be construed as a threat and possibly sanctioned. This is why we must provide for a public interest defense for educational and artistic displays and discussions.

History has shown us that surveillance, censorship, and arrests of academic staff, researchers, students, and artists rarely, if ever, contributed to national security. Instead, such intrusions into the rights of citizens and academic staff delayed scientific and societal progress. Any changes to current laws should be cognizant of that history. Oversight of security agencies should be robust, transparent, and properly resourced. And the law itself must respect Canadian values of academic freedom, privacy, and free expression