CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

SUBMISSION TO THE STANDING SENATE COMMITTEE ON NATIONAL SECURITY, DEFENCE AND VETERANS AFFAIRS REGARDING BILL C-70, *AN ACT RESPECTING COUNTERING FOREIGN INTERFERENCE*

CANADIAN CIVIL LIBERTIES ASSOCIATION

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I. Opening Remarks and Concerns with Respect to the Rushed Public Consultation Process

The Canadian Civil Liberties Association ("CCLA") is an independent, national, nongovernmental organization that was founded in 1964 with a mandate to defend and foster the civil liberties, human rights, and democratic freedoms of all people across Canada. Our work encompasses advocacy, research, and litigation related to the criminal justice system, equality rights, privacy rights, and fundamental constitutional freedoms.

The CCLA wishes to highlight to the Members of the Standing Senate Committee on National Security, Defence and Veterans Affairs ("Senate Committee") its deep concerns about the way the study of Bill C-70, An Act respecting countering foreign interference, is currently taking place. This bill, which is almost 100 pages long, went through its second reading in the span of one day, on May 29, 2024. The very next day, the Standing Committee on Public Safety and National Security ("House Committee") began studying it and convoking witnesses, with a deadline for hearing witnesses set to 5 business days later: June 6, 2024.

Despite the calls from several civil society organizations, including the CCLA, to slow down the legislative study's pace so meaningful public consultations may take place, the House Committee is set to begin its clause-by-clause review of Bill C-70 on June 10, 2024. On the same day, the Senate Committee will simultaneously undertake its pre-study of the same bill.

Bill C-70 is a multifaceted bill which touches on complex legislation related to national security, as well as intelligence and criminal justice systems, in addition to introducing a foreign influence transparency registry ("Registry"). While the CCLA acknowledges the importance of addressing any threat to Canada's democracy, our review of this complex bill identifies several Charter issues that must be addressed before the bill passes into law.

For instance, Part 4 of the bill, which purports to create the Registry, leaves crucial questions to future regulations, including which classes of persons[1] and arrangements[2] will fall outside of the Registry's scope and which information will have to be disclosed in the Registry[3]. This approach – which does not comply with the principle of democratic accountability – coupled with the vague and broad language used to define key terms within the bill, give reason to fear that the Registry could allow the government to monitor and surveil not only foreign influence specifically, but also the international engagement of various actors. For instance, it is possible that an individual who has been in contact with a foreign state-owned media or academic institution and who has then engaged with the public with respect to a Canadian political process would be required to provide detailed information to the Registry as to the individual's activities.

Our submissions below further develop on our specific concerns arising from Parts 2 and 4 of the bill.

[1] Bill C-70, Part 4, s. 6(1)(c).
[2] Bill C-70, Part 4, s. 6(2)(c).
[3] Bill C-70, Part 4, s. 5(1).

II. Part 2: Amendments to the *Security of Information Act* and *Criminal Code*

Section 52.1(1)

Bill C-70 introduces the new offence of sabotage to essential infrastructure (s. 52.1(1)) under the *Criminal Code*. The CCLA is of the view this provision is unnecessary, overbroad, and should be removed from the bill for several reasons. If, however, the provision remains part of Bill C-70, at a minimum we propose two amendments to address its most serious risks.

Background and Context

Section 52(1) of the *Criminal Code* currently criminalizes the offence of sabotage:

> **52 (1)** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who does a prohibited act for a purpose prejudicial to
>
> **(a)** the safety, security or defence of Canada, or
>
> **(b)** the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada.
>
> **Definition of *prohibited act***
>
> **(2)** In this section, ***prohibited act*** means an act or omission that
>
> **(a)** impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing; or
>
> **(b)** causes property, by whomever it may be owned, to be lost, damaged or destroyed.

Bill C-70 proposes creating a new sabotage offence relating to essential infrastructure, reproduced below.

> **52.1 (1)** Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who interferes with access to an essential infrastructure or causes an essential infrastructure to be lost, inoperable, unsafe or unfit for use with the intent to
>
> **(a)** endanger the safety, security or defence of Canada;
>
> **(b)** endanger the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada; or
>
> **(c)** cause a serious risk to the health or safety of the public or any segment of the public.
>
> **Definition of *essential infrastructure***
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> **(2)** In this section, ***essential infrastructure*** means a facility or system, whether public or private, that provides or distributes services that are essential to the health, safety, security or economic well-being of persons in Canada, including the following:

(a) transportation infrastructure;

(b) information and communication technology infrastructure;

(c) water and wastewater management infrastructure;

(d) energy and utilities infrastructure;

(e) health services infrastructure;

(f) food supply and food services infrastructure;

(g) government operations infrastructure;

(h) financial infrastructure; and

(i) any other infrastructure prescribed by regulations.

Risks

First, the proposed sabotage (essential infrastructure) offence is unnecessary given the existing sabotage offence and other provisions of the *Criminal Code*. The existing offence of sabotage (s. 52) already criminalizes prohibited acts, including damage or destruction of property, done for a purpose prejudicial to the safety, security, or defence of Canada.

The proposed sabotage (essential infrastructure) offence would expand the scope of prohibited acts to include anything which "interferes with access to an essential infrastructure or causes an essential infrastructure to be lost, inoperable, unsafe or unfit for use" under s. 52.1(1).

To the extent the objective of the proposed new offence is to ensure essential infrastructure in Canada is protected, it is unclear how the current sabotage and other existing *Criminal Code* offences are not sufficient. By way of example, mischief under s. 430(1) of the *Criminal Code* criminalizes the following conduct:

430 (1) Every one commits mischief who wilfully

(a) destroys or damages property;

(b) renders property dangerous, useless, inoperative or ineffective;

(c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or

(d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

On its face, the mischief provision would protect essential infrastructure in the appropriate case.

Second, the proposed sabotage (essential infrastructure) offence carries a significant risk of deterring and suppressing peaceful protest. For context, the proposed new offence does not contain language around foreign interference as an element of the offence, and is therefore applicable in wholly domestic matters. Among our concerns are that,

- what constitutes a "a serious risk to the health or safety of the public or any segment of the public" under s. 52.1(1)(c) is undefined, and could therefore capture conduct that

does not pose a direct or imminent risk of bodily harm, e.g. it may be argued that a protest that disrupts major vehicular intersections in a city poses a serious risk because it interferes with police or ambulance response times;

- the definition of what constitutes "essential infrastructure" under s. 52.1(2) is open-ended because it can be expanded by regulations, which could criminalize activity related to other locations or places, e.g. during the 2010 G20 summit in Toronto, the Government of Ontario issued O. Reg. 233/10 under the *Public Works Protection Act* to classify the entire summit zone as an area of public works, prohibiting access to protestors;[4]

Third, the proposed safeguard in the sabotage (essential infrastructure) offence to ensure advocacy, protest, or dissent is not criminalized would be ineffective in certain cases. The new offence exempts the following conduct from criminal liability (s. 52.1(5)):

> **(5)** For greater certainty, no person commits an offence under subsection (1) if they interfere with access to an essential infrastructure or cause an essential infrastructure to be lost, inoperable, unsafe or unfit for use while participating in advocacy, protest or dissent but they do not intend to cause any of the harms referred to in paragraphs (1)(a) to (c).

However, the harms enumerated under s. 52.1(1)(a) to (c) are undefined and may be construed broadly, thereby supressing certain forms of advocacy, protest, or dissent. For example, an environmental protest group which blocks a road to a significant natural resource development may impede access to energy and utilities infrastructure (s. 52.1(2)(d)) and could be accused of seeking to endanger Canada's security (under proposed s. 52.1(1)(a)). Or, a civil rights group whose protest blocks several major vehicular intersections in a city may impede access to transportation infrastructure (proposed s. 52.1(2)(b)), which, it may be argued, represents a serious risk to public safety (proposed s. 52.1(1)(c)). These are not speculative examples. A broad definition of national safety is contained in other federal legislation. Under s. 3(1) of the *Security of Information Act*, for example, a "purpose prejudicial to safety...of the State" includes adversely affecting "the stability of the Canadian economy…without reasonable economic or financial justification".[5]

It is also important to note the distinction between motive and intent in the criminal law to appreciate the limited scope of the s. 52.1(5) criminal liability exemption. Even if a person acted with the purpose of protesting or advocating on a particular issue, they satisfy the requirement to act with intent if they were certain or substantially certain their act would cause any of the harms enumerated under proposed s. 52.1(1)(a) to (c).[6] In such cases, the sabotage (essential infrastructure) offence would still apply to them.

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[4] https://www.ontario.ca/laws/regulation/100233/v2.
[5] *Security of Information Act*, SC 1985, c. O-5.
[6] *R. v. Chartrand,* [1994] 2 S.C.R. 864, at pp. 889-90.

Accordingly, if the provision remains part of Bill C-70, at a minimum we propose the two amendments below to address its most serious risks:

- Amend s. 52.1(5) by removing the strikethrough text noted below.

  (5) For greater certainty, no person commits an offence under subsection (1) if they interfere with access to an essential infrastructure or cause an essential infrastructure to be lost, inoperable, unsafe or unfit for use while participating in advocacy, protest or dissent. ~~but they do not intend to cause any of the harms referred to in paragraphs (1)(a) to (c).~~

- Strike s. 52.1(2)(i) and s. 52.1(6), which permit the Governor-in-Council to issue regulations that expand what constitutes essential infrastructure.

Section 20.2(1)

Bill C-70 introduces the offence of committing an indictable offence at the direction of, for the benefit of, or in association with a foreign entity, which carries up to a life sentence of imprisonment (s. 20.2(1)) under the *Security of Information Act*. The CCLA is concerned about the scope of this provision and its exceptional penal consequences.

This offence results in life imprisonment – a potential sentence for criminal offences that are otherwise punishable by far lower sentences. For example, a person convicted of mischief in relation to property for the benefit of a foreign entity faces up to life imprisonment, instead of a maximum sentence of two years less a day. While foreign interference is a legitimate policy concern, it should not oust reasonable sentencing ranges for criminal offences which fall toward the lesser end of the spectrum. The CCLA suggests the amendment below.

- Amend s. 20.2(1) to carry a maximum sentence equivalent to the maximum sentence for the predicate indictable offence.

III. Part 4: New *Foreign Influence Transparency and Accountability Act*

Part 4 of the bill, which purports to create a foreign influence Registry, includes vague and broad language that contravenes the principle of democratic accountability. This language also raises concerns about the potential use of the Registry as a tool that could allow the government to monitor not only foreign influence specifically, but also, more generally, the international engagement of various actors, including foreign state-owned or funded media, academic institutions and charities, as well as international organizations such as the United Nations. These considerations potentially involve freedom of the press and privacy issues, as well as questions as to the place reserved for international organizations in Canada's ecosystem.

As Bill C-70 stands, any person who enters into an "arrangement" with a "foreign principal" under which they undertake to carry out activities listed in relation to a "political or governmental process" in Canada must, within 14 days, provide the Foreign Influence Transparency Commissioner with a list of information to be specified at a later stage by regulation.[7]

[7] Bill C-70, Part 4, s. 2 and 5(1).

The term “foreign principal” means a foreign entity, a foreign power, a foreign state or a foreign economic entity[8] as those terms are defined in subsection 2(1) of the *Security of Information Act*.[9] This last term (foreign economic entity) is particularly broad, as it includes a foreign state, a group of foreign states, and any entity that is controlled (in law or in fact) or substantially owned by a foreign state or group of foreign states.[10]

Since the bill leaves to future regulations which classes of persons will fall outside of the Registry’s scope,[11] this broad definition of “foreign principal” may capture an international organization made up of member states, such as the United Nations. One cannot rule out that this definition may also capture foreign state-owned or funded media, charities and academic institutions.

There is more. Bill C-70’s definition of “arrangement” is also broad and notably includes an arrangement under which a person undertakes, “in association with” a foreign principal, to communicate by any means information related to a political or governmental process.[12] The term “in association with” is not defined, and the comprehensive list of arrangements that will fall outside of the Registry’s scope is again left to future regulation.[13] This vague language, which does not require a subordinate relationship between the foreign principal and the person, could possibly capture individuals engaging with the public while being or after having been in contact with foreign state-owned or funded broadcasters, charities, organizations, or academic institutions, in addition to international organizations such as the United Nations.

Finally, since Bill C-70 also relies on future regulations to delineate the scope of the Registry, including as regards the information that would have to be registered in it,[14] it is currently impossible to assess how this Registry would be used by the State and what impact it could have on democracy, freedom of the press and privacy rights. In view of the broad definitions discussed above, there is a concern that the Registry could be used to surveil international engagement instead of fulfilling its declared purpose, which is to act as a tool to lessen foreign interference in the affairs of Canada. For instance, it is possible that any individual who has been in contact with a foreign state-owned media or academic institution and who has then engaged with the public with respect to a Canadian political process would be required to provide detailed information to the Registry as to their activities.

IV. Conclusion

The CCLA looks forward to the opportunity of discussing further its concerns with respect to Bill C-70 with the Senate Committee through oral submissions. That being said, the CCLA strongly opposes the rushed way in which the legislative study of this important bill is currently unfolding. We reiterate our call to extend the time allocated to this crucial step, so that meaningful public consultations can take place.

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[8] Bill C-70, Part 4, s. 2.
[9] R.S.C., 1985, c. O-5.
[10] *Security of Information Act*, SC 1985, c. O-5, s. 2(1).
[11] Bill C-70, Part 4, s. 6(1)(c).
[12] Bill C-70, Part 4, s. 2.
[13] Bill C-70, Part 4, s. 6(2)(c).
[14] Bill C-70, Part 4, s. 5(1), 6(1)(c), 6(2)(b) and 27.