

Public Consultations, Anti-Terrorism Law, & Canada's National Security Framework

By: Michael Nesbitt

Legislation Commented On: *The [Anti-Terrorism Act, 2015](#)* SC 2015, c. 20

Report Commented On: The Government of Canada's [Our Rights, Our Security: National Security Green Paper, 2016](#)

Sitting in opposition during 2014 through the beginning half of 2015, the Liberal Party of Canada chose to support the Conservative Government's controversial Bill C-51, which became the *Anti-Terrorism Act, 2015* on 18 June 2015 ([SC 2015, c. 20](#)). While the New Democratic Party voted against the Bill, the Liberals promised to pass, then revisit the Bill should they win the 2015 Federal Election. The Liberals did (win), and they have (begun to revisit Bill C-51).

The first step in this review has been the issuance of a "Green Paper" on Canada's "National Security Framework" followed by a multi-pronged approach to public consultations on national security law and policy in Canada. There are a plethora of legal and policy considerations that deserve close governmental and public scrutiny during this process. However, this post focuses on the need to consult with and take seriously the views of Canada's younger generations, including but not limited to law students, in deciding how best to balance Canadian's rights with our security interests. In an effort to ensure these voices are heard, the Faculty of Law's *Terrorism Law & Reform* lab will be posting on *ABlawg* in December a series of self-generated, student-authored legal and policy recommendations on three of the more controversial aspects of Canada's national security framework. As a primer to this initiative, this post offers background on the Government's consultative process as well as my remarks as prepared as testimony for the *Standing Committee on Public Safety and National Security*. These comments focus briefly on national security oversight and review and then in a little more detail on *CSIS's* new "disruptive" powers as authorized by Bill C-51.

Background on the Government of Canada's "National Security Framework Review"

Almost from the outset Bill C-51 was a controversial and extraordinarily broad piece of legislation to say the least. It was passed in response to the tragic 22 October 2014 Parliament Hill shooting of Corporal Nathan Cirillo by Michael Zehaf-Bibeau, as well as the 20 October 2014 Saint-Jean-sur-Richelieu attack by Martin Couture-Rouleau that killed Patrice Vincent and injured a second person, both of whom were members of the Canadian Armed Forces. Very little public consultation took place during the drafting of the Bill and the debate in the House of Commons was equally perfunctory. (An excellent overview of the Bill, its passage, and its controversies was written post-haste by Canada's leading legal experts on national security law, Professors Craig Forcese and Kent Roach. See *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto: Irwin Law, 2015).)

Both as a first step in fulfilling its campaign promise and in response to the perceived shortcomings with the drafting and consultation process associated with Bill C-51, on 8 September 2016 the Liberal Government produced a so-called “Green Paper”, called “[Our Rights, Our Security: National Security Green Paper, 2016](#)” The idea was to set the stage for a broad-based public discussion on national security in Canada by making available a background document – the Green Paper – which was rolled out with a series of associated questions on which the public could provide input ([see here](#) for background on the idea and the Government consultations). Public feedback was initially solicited via “online consultation” – ostensibly an online survey (see [here](#)). It should be noted that the Government is accepting online submissions up until December 15 – so click the previous hyperlink and have your say!

In addition, the *Standing Committee on Public Safety and National Security* has undertaken a tour across parts of Canada, with stops in Vancouver, Calgary, Toronto, Montreal, Halifax and Ottawa. The idea behind the tour is to discuss Canada’s “National Security Framework”, a topic that includes but can be broader than Bill C-51, with the Canadian public and select “experts” in the field (the website on the Standing Committee, its hearings, and its purpose, can be found [here](#)).

In practice, the Standing Committee has held at least two consultation sessions in each city on the tour. At one of those meetings, the Standing Committee would open the door to members of the public and hear what they had to say on Bill C-51 and the newly produced “Green Paper”. A separate meeting – open for viewing to the public – was arranged as between the Standing Committee and invited “witnesses”, consisting usually of heads of interest groups, important stakeholders, or academics who work in the field of national security. More often than not the Standing Committee appears to have met with two panels of three such “witnesses” – meaning about six people per city.

The invited witnesses were given about 10-minutes to provide oral testimony of their thoughts on the extraordinarily large omnibus Bill C-51 and the Green Paper, followed by a question and answer period led by the Standing Committee members, who by all accounts have been tremendously engaged and open to input.

As a result of time restrictions, common with Parliamentary and Standing Committee hearings, less tends to be more when it comes to witness testimony. You can access minutes of the meeting I attended [here](#). The “Evidence” before the Standing Committee – meaning the actual transcript – can be found [here](#).

Reproduced below are the remarks that I prepared for my witness testimony before the Standing Committee. These remarks focused on two critical aspects of Canada’s national security framework: (1) the need for better oversight and review of Canada’s security institutions; and, (2) the problematic aspects of an amendment to the *Canadian Security Intelligence Service Act* ([RSC 1985 c. C-23](#), (*CSIS Act*)). The aforementioned amendment to the *CSIS Act* allowed CSIS, for the first time in the institution’s history, to conduct “disruptive activities” against perceived terrorist threats.

Even the grant of such “disruptive” authority was controversial. (For a review of the history of the creation of CSIS, its powers and why the change is controversial today, see the McDonald Commission: Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law* (Ottawa: Supply and Services, 1981); and, Forcese & Roach, *False Security: The Radicalization of Canadian Anti-terrorism* (Toronto:

Irwin Law, 2015) at Chapter 2 and Chapter 8, page 248.) However, perhaps more controversial was the fact that Bill C-51 empowered CSIS to act unlawfully or to obtain a warrant to breach the *Charter* in fulfillment of its new powers, with very few legislative constraints on such activity. I have written a lengthier analysis of these new powers in a forthcoming article for the *Canadian Human Rights Yearbook* (website [here](#)), but for now my brief comments below should provide an introduction to the legal reasoning behind this controversy.

The Future of National Security Law

Before providing my comments before the Standing Committee I did want to offer one final thought – which serves also as a plug to come back to *ABlawg* in December. My comment goes as follows. I have spent a long time working in and studying national security law in Canada. But what I deem most important is really of marginal relevance. It is informed by the past and by the law, so it is relevant in that way, but whether or not what I choose to focus on is more important than something else is truly indeterminate (at least by me). The people that the federal government should be seeking out first and foremost in these public consultations are our youth. In particular, those who feel affected by our laws and policies and those that have informed themselves of the issues. Our up-and-coming generation of lawyers and policy-makers is a great place to start. The simple reason for this is that we know that there is no “profile” for a terrorist in Canada. As a result, it is difficult to “profile” an interest group. Instead, we must look not to those groups that we think will produce the next terrorist – we simply do not know who this is – but those groups that have been particularly affected by our national security response to terrorism. In this regard we can safely say that our younger generation(s) are the ones that will live with the decisions that we make today for the longest. The culture that is created from the balancing of rights and security that we decide on over the next year or two will last long into the future, likely after I am gone. But that is not true of our students. As a result, if one is looking for a “profile” for consultation purposes, look first to those particularly affected by the laws, and one will see (at least) our next generation.

In an effort to speak to the need for greater engagement on national security law in law schools and by law students, and more importantly in an effort to give a voice to those whose opinions arguably matter the most, the University of Calgary, Faculty of Law, has introduced a new *Criminal Law & Policy Lab: Terrorism Law & Reform* (Full disclosure: I teach this course.) The idea is to introduce national security law and its practice in Canada as well as the controversies associated with Bill C-51 in particular. The class then follows along in real-time as the Government strives to address these controversies. Students study the law, policy and theory behind the various legislative endeavors. But students also hear from police, CSIS agents, those responsible for the review of our national security institutions (including this year the Executive Director of the *Security Intelligence Review Committee*, the body that reviews CSIS activities), and other practitioners and policy-makers. The idea is then to put the learning in practical context by requiring the students to work together in a “lab” setting with the goal of self-generating policy-reform recommendations, which they defend through a series of skills-based learning assessments, such as mock elevator pitches, briefing notes to the “Minister”, and policy-reform papers. In other words, the idea is not just to teach the law and theory but the skills necessary for Canada’s up-and-coming generation of lawyers to make their ideas heard in policy and government circles. The end product will be three short policy-reform papers, with an analysis of the law and practice as well as recommendations for reform. In an effort to reach the greatest number of people possible, at minimum these papers will be published on *ABlawg* in December. So if you are interested in some of the other legal controversies that flow from Bill C-51, please

check back and see what the next generation of lawyers from the University of Calgary, Faculty of Law thinks of Canada's National Security Framework!

Introduction to Remarks before the Standing Committee:

It is truly an honor to sit here before you and I must begin by thanking all of you for affording me this privilege.

To my mind, there are two critical issues that demand consideration in your review of Canada's national security framework.

The first is Bill C-51's unprecedented grant of authority for *CSIS* to move beyond its traditional role as an information collection and analysis agency to one that is authorized to conduct disruptive activities, including the specific authority for *Charter*-infringing and unlawful activities.

The second is the desperate need for better review and oversight of Canada's national security bureaucracy. I say this based on my experience as a lawyer and policy advisor within Ottawa's civil service as much as I do as an academic: too often the effectiveness of our bureaucracy is limited by the fact that decisions are made – and information is passed-up to Ministers and reviewed, if at all – in departmental silos. Cross-cutting issues can thus evade cross-cutting review and oversight.

And let me be very clear: review and oversight are not solely about protecting against possible abuses or correcting mistakes, though this is obviously important. Review and oversight are also desperately needed to improve the coordination and effectiveness of our institutions in responding to national security threats. In this regard, Parliamentary review of national security matters of the type that has now been proposed is a crucial first step to bring us in line with our Five Eyes allies, but it is not enough. Internal review of national security operations that stretches government-wide is needed. Greater central coordination, or the possibility thereof, for example in the hands of the National Security Advisor, is also needed.

The Three Legal Difficulties with *CSIS*'s Disruptive Power:

With that in mind, I will spend the remainder of my brief talk on the first element that I mentioned, that being Bill C-51's amendment to the *CSIS Act* to grant the Department new "disruptive" powers.

In particular, I will focus on three troublesome aspects of this new disruptive power, including: (1) the authority to breach the *Charter*; (2) the authority to act "unlawfully"; and, (3) the limited opportunity for any independent party, but particular the courts, to review the legality of *CSIS*'s exercise of these disruptive powers.

To be very clear from the outset: I do not necessarily take issue here with the objective of the new disruptive powers nor with the specific determination that *CSIS* must have such powers. To my mind we the public simply do not have sufficient information to make a determination on that ground. Rather, my concerns relate to the scope of the grant of power as it was legislated.

1. Authority to Breach the *Charter*

First, to perhaps the most clear-cut of the issues: *CSIS*'s new authority to breach any *Charter* provision so long as it obtains a warrant. No other body in Canada can obtain prior authorization to breach the *Charter*, let alone any section of the *Charter*. Such authority is completely unique and is found nowhere else in Canadian legislation and for good reason: it is very likely unconstitutional.

This authority to conduct unlawful activity has been compared to the process by which police obtain a warrant to search a home or seize goods, actions that would otherwise seem to run counter to section 8 of the *Charter* which protects against unreasonable search and seizure.

But let us be clear: when police have a warrant judicially authorized it is done to confirm the “reasonableness” of the proposed search or seizure. Quite the opposite of authorizing a *Charter* breach, the normal warrant process confirms that police are indeed acting legally and in compliance with *Charter* obligations. Put another way, the process is meant to ensure the prevention of *Charter* breaches in the first place, not to authorize future breaches.

Moreover, this normal process only applies to section 8 of the *Charter* because it is the only section wherein the right is qualified by the term “unreasonable”. And yet, *CSIS* is nevertheless now empowered to request authorization for a breach of any section of the *Charter*.

One other argument I have heard is that section 1 of the *Charter* provides for reasonable limits to *Charter* rights, so the *CSIS* warrant process is really no different. But section 1 requires that the Government legislate specifically and clearly when introducing a legislative provision that might breach the *Charter*. It is incumbent on the Government to articulate the specific objective, its scope and its limitations. An open-ended invitation to judges to undertake this legislative process *ex parte* and *in camera* to determine when and how state actions might infringe the *Charter* is, once again, a very different animal.

My suggestion would thus be to remove from the *CSIS Act* the authority to breach the *Charter*.

2. Authority to Conduct “Unlawful” Activities

Second, under its new disruptive powers *CSIS* is authorized to conduct “unlawful” activities. Such a power is not without precedent: under the *Criminal Code* the police have a similar power in theory (sections 25, 25.1, 25.2, 25.3 and 25.4 of the *Criminal Code of Canada*).

Yet again there are some striking differences in practice, even if the wording sounds similar.

First, police power is constrained by about four pages of legislation in the *Criminal Code*, including specific limitations on the types of unlawful activity like the loss of or serious damage to property, and the requirement to file a specific report on the unlawful activity as well as detailed annual reports on all such activities.

The *CSIS Act* does not offer anything close to the same protections, does not require any reporting, and does not limit the scope of what unlawful activity might be in the way that the *Criminal Code* does.

Although I am not convinced one way or the other that there needs to be authority for *CSIS* to engage in “unlawful” activity, if *CSIS* makes a specific and compelling case that such authority to conduct unlawful actions should remain in the *CSIS Act*, then many of the protections and limitations that apply to the police under the *Criminal Code* should be introduced to the *CSIS Act*.

3. Oversight and Review of *CSIS*’s Disruptive Activities

This brings me to the third difference between the exercise of police powers and the exercise of *CSIS* disruptive powers. When the police act, they act with the goal of making an arrest. The result is that the situation goes to court, and police warrants and the exercise of police power is challenged by the defence and reviewed by the courts. If there is a mistake, it can be appealed again. In other words, if there are defects with the police actions or warrants then the courts are available to review and correct the behavior.

CSIS is in a very different situation. Even if their actions do become known, by their own admission and given their mandate, *CSIS* activities are highly unlikely to form a part of a criminal prosecution and thus unlikely to be challenged in the same way as police activities. The idea is for one to be public, the other secret. As excellent a job as the Security Intelligence Review Committee [known as the SIRC, the body that reviews *CSIS*’s activities] does, it is not an adequate substitute for layers of judicial oversight and adversarial challenge, particularly in these circumstances.

Again, there is a solution available, or a partial one at least. A so-called special advocate responsible for providing a challenge function to *CSIS* requests should be specifically built into the *CSIS Act*, just as it exists in the *Immigration and Refugee Protection Act* (section 85). The idea would be to compensate for the fact that *CSIS* warrants are a different animal than police warrants in that they are unlikely to be challenged by a defence lawyer at a criminal trial, they are unlikely to be reviewed by a court, and the subsequent implementation of the warrant by *CSIS* is unlikely ever to be reviewed by a court or made public.

With these inherent differences in mind, the special advocate would need authority not just to challenge a warrant but to follow-up on the *CSIS* action to ensure its subsequent compliance with the terms of the judicial warrant and, where abuse or a mistake is suspected, request subsequent judicial review. To be very clear here: my primary concern is an innocent mistake or misunderstanding, either by the warrant authorizing judge or in the execution of the warrant. Where the matters are serious, rights are affected, and the pressure of national security is great, innocent mistakes will be made. As it stands, there is very little that would provide review or oversight of *CSIS* actions that could correct for mistakes or ensure they do not become systemic; because these mistakes could include unlawful behaviour, vigilance with respect to meaningful judicial review of the actions is paramount.

Thank you.

This post may be cited as: Michael Nesbitt “Public Consultations, Anti-Terrorism Law, & Canada’s National Security Framework” (14 November, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/11/Blog_MN_BillC51_Nov2016.pdf



To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)