

June 23, 2017

## National Security, Bill C-59, and CSIS's Continuing Power to Act Disruptively in Violation of the *Charter*

By: Michael Nesbitt

**Legislation Commented On:** [Bill C-59, An Act Respecting National Security Matters, 2017; Anti-terrorism Act, 2015, SC 2015, c 20](#)

**Government Report Commented On:** [Protecting Canadians and their Rights: A New Road Map for Canada's National Security](#), SECU Committee Report, May 2017, 42<sup>nd</sup> Parliament, 1<sup>st</sup> Session.

### Introduction/Overview of Bill C-59 & CSIS's Disruptive Powers

On Tuesday, June 21, 2017, right before Parliament rose for the summer break, the Liberal government released its long-awaited national security legislative update, marketed in part as a response to the Conservative government's controversial *Anti-terrorism Act (2015)*, known as Bill C-51. The Liberal government's response came in the form of Bill C-59 and not only did it address many—though not all—of the perceived issues with Bill C-51, it went much farther afield. In general, we are all better off for that.

I will provide more detailed thoughts on Bill C-59 as a whole in short order, after I collect my thoughts. But first I want to address one issue that I see as potentially very controversial and—if Twitter can be trusted, an admittedly dubious proposition—that remains one of the least understood elements of the new (and old) anti-terror legislation: CSIS's powers under both Bills to act disruptively (physically) to counter threats, including taking actions in breach of the *Charter* or of other Canadian laws.

Before getting into the details of CSIS's disruptive powers, I want to state up front some general points about what Bill C-59 does and does not do in order to correct the misconceptions that I perceive are out there.

First, Bill C-59 does not *repeal* section 12.1-3 of the *Canadian Security Intelligence Service Act, RSC 1985, c C-23* (*CSIS Act*), which by virtue of Bill C-51 gave CSIS “disruptive” powers for the first time. That was one of the most controversial aspects of Bill C-51 and, given time, it will likely remain so under Bill C-59. Second, neither does Bill C-59 repeal the grant of power that would allow CSIS to act unlawfully or otherwise infringe the *Charter* when acting disruptively. Those powers remain—though their scope has been clarified, as we shall see. Third, and [contrary](#)

[to several newspaper reports](#), Bill C-59 does not “introduce” independent judicial oversight to the scheme. That (limited) oversight already existed under Bill C-51 in much the same form as it exists under Bill C-59. Finally, at this early stage, nothing written here or elsewhere on the new disruptive powers should be taken as the final word, because as we shall see, the language of the scheme and the subsequent “clarifications” by government officials and government releases are anything but clear. More study and likely information is needed.

What Bill C-59 does do is explicitly limit the scope of CSIS’s exercise of power by way of a closed list enumerating in more detail the situations in which CSIS might exercise its power—and expanding when it may not do so. In so doing, Bill C-59 puts Bill C-51’s pre-existing threat reduction scheme—otherwise largely reproduced—on firmer constitutional footing. But to be clear, the constitutional survival of this new threat reduction scheme is by no means a slam dunk. The government was walking on water under the old threat reduction scheme; as a result, today’s “firmer” footing should not be read as “firm” footing.

Moreover, the characteristics that made Bill C-51 so controversial arguably remain. Under the new scheme, CSIS retains the ability to infringe the *Charter* with warrant authorization. No independent checks on the warrant process were added to the scheme that did not already exist, and the whole grant of power remains unusual in Canadian law, at least so far as I can see. None of this makes the new scheme necessarily unconstitutional, and there is a strong argument for CSIS retaining at least some of the proposed powers—though, again, the checks and limits on those powers will be key. Rather, the point of this introduction is to clarify that the newly proposed disruption scheme should be seen most simply as making explicit what was problematically implicit in the old scheme, and not as a meaningful change in intention. Let’s examine these assertions in more detail. I will start with the introduction of these threat reduction powers via the old, highly controversial Bill C-51 and provide a brief overview of the concerns with that scheme. I will then introduce the new Bill C-59 disruptive powers and the new legal limitations the Bill imposes on CSIS’ actions. Finally, I will conclude with a brief analysis of the challenges that remain and the steps that might be taken to put CSIS’s threat reduction powers on still firmer constitutional footing.

## **The Introduction of CSIS’s Threat Disruption Powers in Bill C-51**

I have [written on this topic](#), [blogged on this topic](#), and testified before the [Standing Parliamentary Committee on Public Safety and National Security](#) on this topic, so my detailed assessment is out there for all to see. If you are looking for an in-depth investigation of CSIS’s disruptive powers under Bill C-51 I encourage you to consult those sources, or the excellent [book by Craig Forcese and Kent Roach](#), which examines the issue in great detail. What I will provide here is the Cole’s Notes version to set the stage for the analysis of Bill C-59.

Bill C-51 gave CSIS the power to act disruptively for the very first time. Prior to that, there was an explicit and intentional divide of powers between CSIS and the RCMP, whereby all disruptive

powers—like the power to detain, arrest, take action against, etc.—resided in the RCMP’s jurisdiction.

So when Bill C-51 was introduced there was some initial controversy with respect to whether CSIS should even have disruptive powers, or whether they should be encouraged to work more closely with the RCMP—a cooperative relationship best described as “it’s complicated”—to help ensure that disruptive actions lead to criminal charges and punishment. Acting alone, CSIS still does not have the power to arrest, so if they act disruptively rather than the RCMP doing so, then there are legitimate concerns about the government’s ability to pursue subsequent legal action. (Note that one amendment under Bill C-59 seems to have this fact in mind and looks to preempt or perhaps limit the circumstances in which we might see such problems. See section 12.1(3))

Nevertheless, there are good reasons for CSIS to have disruptive powers. Unfortunately, at the time of Bill C-51 CSIS did not do a great job of making the case, preferring to keep secret most justifications for the new powers, how and when they intended to use them, etc. This might have been the right call internally, but grand new powers legislated with limited debate and justification were never going to sell well publicly. The net effect was probably to harm an otherwise strong case for new CSIS disruptive powers.

In any event, what became truly controversial was the legislative scheme as it applied to the powers to conduct disruptive activities unlawfully or in breach of the *Charter*. Once again, there was—and is—probably a good justification for granting such powers. For example, as we now know (thanks to the Bill C-59 scheme, section 21.1(1.1)), CSIS intended to use its disruptive powers to, for example, alter or take down websites. Yet if CSIS altered a website but failed to make changes in both French and English, would it be in breach of the *Official Languages Act*? Or would changing the wording on a website be seen as an infringement of the website author’s right to freedom of expression? Those examples might seem a little far-fetched, but one can see why CSIS would be worried. Indeed, CSIS should be commended for recognizing the legal implications of their actions and working to ensure that they had explicit legal cover to take their intended actions. Any time a government agency goes out of its way to ensure that they are clearly operating within the confines of the law, as opposed to “going rogue” and hoping nobody will notice, it is a good reminder to rejoice that you live in Canada.

So for many of us, it was not the new disruptive powers *per se* but rather the new section 12.1 legal scheme from Bill C-51 that controlled the use of these new disruptive powers that was particularly problematic. (Again, others will surely take issue with whether CSIS should even have such powers in the first place, but that is likely more of a policy issue rather than a legal issue.) So what was wrong with this legal scheme?

The central problem was that the scheme gave CSIS very broad authority to act with very few legislated limits. Section 12.1 of the *CSIS Act* said that the government could breach any *Charter* right and gave no hint about the type of disruptive actions CSIS might take. The limits were

primarily internal constraints: the measures had to be reasonable and proportional and could not include anything that would result in bodily harm, obstruct or pervert justice, or “violate the sexual integrity of an individual” (see section 12.2(2)).

Generally speaking, the government cannot simply give itself such broad powers to breach any constitutional right with any action and very few legal limits, and then claim that all such actions undertaken under that power are legally authorized. Put another way, we have the constitution’s “notwithstanding clause”, section 33 of the *Charter*, for a reason. If the government wishes to broadly exempt itself from the *Charter* it should resort to that clause, not do an end-around by enacting legislation purporting to give itself the unrestrained power to bypass the *Charter*, then purport to act under that new legislation to exempt itself from *Charter* limits.

Instead, in Canadian law, if the government wants to breach a specific constitutional right (or rights), it must be very clear, direct and specific about what it wants to do, why and how it wishes to do it, and to what ends. The old rule of law requirements of ‘clarity’ and ‘transparency’ in legislation are built right into our constitutional tests. The result is that we have rights as spelled out in the *Charter*. Section 1 of the *Charter* then says that all of those rights are subject to *reasonable* (read, thoughtfully justified) limits as *prescribed by law*. A very specific—and demanding—test set out in *R v Oakes*, [1986] 1 SCR 103, [1986 CanLII 46 \(SCC\)](#) then helps the courts interpret section 1 and gives the government guidance on what it has to do in advance to make a case that *Charter* rights are reasonably limited. So the government can indeed infringe a *Charter* right, but the process must be specifically prescribed by law, its justifications must be clear, and its reasoning must be sound; in the end, the justification for the breach must be proportional to the harm caused, and so on. In this way, a judge can determine whether the government’s proposed limit is “reasonable” and “demonstrably justified in a free and democratic society.”

In order to meet the needs of the demanding section 1 regime, Bill C-51 did offer one further external constraint on government action, and this seemed to be the government’s primary basis for supporting the constitutionality of section 12.1. Section 21.1 was added to the *CSIS Act* by Bill C-51, which required that CSIS seek authorization of a warrant from a Federal Court judge if its proposed disruptive activities might breach a *Charter* right.

But this judicial warrant process should not be seen as a limit prescribed by law. Rather, it is better seen as a broad invitation for a judge to authorize a warrant—in essence legislate—specific CSIS actions in breach of the *Charter*. It was the judge who decided what *Charter* rights could be violated, when, why, to what ends, what limitations existed, etc. That is not a legislative limit; it is an indeterminate legislative scheme emptied of content with the consequence that responsibility is deferred to the judiciary (acting in secret and without review). Put in terms of legal tests, the section 12.1 legal scheme purporting to authorize *Charter*-breaching powers was an empty vessel, not specifically “authorized” by a sufficiently specific law, and not meaningfully “prescribed by law”.

The government's response at the time seemed to be that judges do this very thing all the time. Every time police seek a search warrant, they must go to a judge for authorization to breach section 8 *Charter* rights to privacy. The same might be said of arrest warrants and section 9 *Charter* protections against arbitrary detention.

But the parallel was poorly drawn. The rights against search and seizure are qualified by the term “unreasonable”: one has only a more limited right against “unreasonable” search and seizure. Similarly, section 9 *Charter* rights are constrained by the qualifier “arbitrary”—protecting not against all detention, but only against arbitrary detention. So in the context of these warrants, the judge does not authorize a *Charter* breach. Instead, the judge confirms that the proposal contained in the warrant would be “reasonable” or not “arbitrary”. As a matter of procedure, this is why the judge doesn't “give a warrant” as is often mistakenly said, but rather “authorizes” a warrant which is in actuality prepared by the police and explains for the judge the proposed action and why it is reasonable. Moreover, what precisely must be contained in various warrants for various types of activity, how they should be prepared, what evidence is needed and when they might be granted, is all legislated (“prescribed”) throughout the *Criminal Code*—for example in Part VI. In other words, the process is highly prescribed and the judges never pre-emptively authorize future possible *Charter* breaches. On close legal inspection, the process looks nothing like the section 12.1 warrant authorizing regime.

Moreover, there were other legal shortcomings in the sections 12.1 and 21.1 scheme when compared to the process that applies to police action. The warrant authorization process, like all such processes, was to be *in camera* (closed, in secret) and *ex parte* (with only CSIS present). This is standard procedure for the judicial warrant process even as it relates to police. But in the context of CSIS's disruptive activities, the oversight function of the warrant-authorizing judge was limited in other ways that might not be readily apparent, and any comparisons to the usual warrant-authorizing process—for example that under Part VI of the *Criminal Code*—seem quaint. For example, a warrant-authorizing judge acting under the *Criminal Code* will usually act knowing that the warrant will eventually be reviewed—and often challenged—in open court. The very point of the warrant is to collect evidence or a person for eventual prosecution. But in the context of CSIS, this subsequent open-court review (if of a redacted document) was never going to happen, for surely the idea was for CSIS to act secretly and disruptively; and, if CSIS was acting and not the RCMP, then there would be no arrest. So there would be nobody to challenge the warrant and no follow-up on the warrant.

The practice in the context of secretive CSIS actions has two practical implications as related to legal oversight. First, the usual process by which courts can confirm the propriety of a warrant is almost completely absent, for there will never be a court challenge or judicial review. Second, the usual process by which, in a criminal trial, the judge will review the subsequent actions of the police to determine if they actually acted in compliance with the warrant will also be absent. In the context of CSIS, once the warrant is issued there is no provision for continued judicial oversight, so we just have to assume that the agency carries out the warrant in the manner originally authorized. If the criminal-police context is any indication, no such assumption should

ever be justified, and that is meant kindly. It is simply the case that mistakes happen. A judge can make a mistake authorizing a warrant. The scope of the authorization can be misconstrued. The actions of the enforcing official can be accidentally off-side the authorization. Oversight exists to correct for mistakes as much as for bad behaviour. But in the context of the CSIS disruptive scheme, it is hard to imagine how one would ever become aware of those mistakes in order to correct them.

So now we have a power for CSIS to do who knows what, when or how. The Security Intelligence Review Commission (SIRC)—which Bill C-59 would replace with the National Security and Intelligence Review Committee (NSIRA)—could review CSIS’s actions, but it could never review all of them. The best it could do would be to take CSIS to task—usually through a public though censored report—about past actions that would not necessarily correct any wrongs done.

### **Bill C-59 and CSIS’s Disruptive Activities**

Bill C-59 did not change the fact that CSIS is authorized to act disruptively. Neither does it purport to change the authority to act unlawfully or in breach of the *Charter*. It would still require CSIS to obtain a judicial warrant before breaching the *Charter*, though no changes to the C-51 scheme are offered. Put another way, the scope of *judicial* oversight under C-59 is as limited as it was under C-51.

So what has Bill C-59 proposed?

First, Bill C-59 would add to section 12.1 of the *CSIS Act* the requirement that, “Before taking measures under subsection (1), the Service shall consult, as appropriate, with other federal departments or agencies as to whether they are in a position to reduce the threat” (Bill C-59, section 12.1(3)). Presumably this speaks to the general concern, mentioned above, that CSIS’s disruptive actions would not lead to criminal prosecutions, that they would replace RCMP actions rather than complement them where necessary. If under this new provision CSIS is required to consult with, say, the RCMP before taking disruptive action, then presumably CSIS’s new disruptive activities would be a sort of last resort.

The problem is that there is no requirement for deference to other options or agencies, even if those alternatives could be proven to be “better”—e.g. more likely to lead to criminal prosecutions. So one might reasonably ask what the intention behind this new requirement is: does it mean that CSIS should defer, or does it simply mean that CSIS shall “inform when we’ve already made the decision to act”, or something in between? That will be up to CSIS—hopefully in consultation with others like the RCMP—to decide. Unfortunately, there is little about the history of information sharing between CSIS and the RCMP that would make one highly confident that this new “consult” requirement will be treated as a requirement to cooperate, as opposed to merely inform. We shall see.



Second, Bill C-59 would add a new subsection (3.1) to section 12.1 of the *CSIS Act*, which would state: “The *Canadian Charter of Rights and Freedoms* is part of the supreme law of Canada and all measures taken by the Service under subsection (1) shall comply with it.” This is pretty language that would seem to be of little substance. Of course the *Charter* is part of the constitution, the supreme law, and of course all government agencies must comply with it. I would read this less as a substantive legal clause, for it is hard to describe precisely what substantive purpose the clause might serve other than, one supposes, a slightly randomly placed reminder of how Canada’s laws work. Rather, at first blush this new section reads like a statement from a salesperson you just met who begins the pitch with, “trust me, I’m a good guy.” One might take that at face value—it might even be true—but most of us will parse whatever comes next really closely. So what does come next? Well, that is interesting indeed. The remainder of the new disruptive scheme works, in broad brushstrokes, as follows. The new subsection 12.1(3.2) affirms that CSIS may act to “limit”—perhaps a nice way of saying infringe—a *Charter* right, provided that a warrant is authorized under section 21.1 of the *CSIS Act*. This is new language, but it harkens back to the same general process as existed under Bill C-51. Put another way, this is where we see that we still have the same general *Charter*-infringing authority under Bill C-59 as existed under Bill C-51.

But there are some meaningful differences between the two regimes. Most salient to the immediate issue is new subsection 12.1(3.3), which states that the judge may authorize the warrant only if “satisfied that the measures... comply with the *Canadian Charter*...” At first blush it is hard to know what to make of this new requirement. On the one hand, of course the judge may only authorize *Charter*-compliant action—that is how Canadian law works. So perhaps the provision—like the supreme law provision before it—serves only as a reminder of all judges’ constitutional obligations (or more cynically as a marketing tool for the legislation). In this case, subsection 12.1(3.3) merely repeats a pre-existing obligation. On the other hand, perhaps it should be taken at face value as, in some way, a newly-incorporated limitation on the warrant authorizing process. But if this is the case then taken at face value the judge is faced with an interpretive conundrum. The only reason a judge would be authorizing a warrant is if CSIS’s proposed action would “limit” a *Charter* right. But the scheme seems to maintain the position that the judge is authorizing the *Charter* breach: CSIS proposes an action that would limit a *Charter* right and seeks a warrant to authorize that action. CSIS cannot act until the warrant is authorized *because* the proposed action is *prima facie* in violation of the *Charter*. Again, there is no need to seek a warrant if there is no *Charter* limitation. In this situation, up until the time that the warrant is authorized, the proposed action is unconstitutional as would be any newly proposed limit on some individual’s *Charter* right. So the proposed action does not become *Charter* compliant until the judicial “authorization”, but the judicial authorization cannot take place—as per subsection 12.1(3.3)—unless the action is *already Charter* compliant. As worded, the unique circularity of the authority means that a judge should never be able to authorize a *Charter*-limiting disruptive activity. The power to infringe the *Charter* as found in subsection 12.1(3.2) is thereby ironically rendered moot by the terms of its own statute.

There is an alternative, though it is really just an extension of what would happen if you took seriously the “first hand” proposition, above, that subsection 12.1(3.3) is largely redundant. That is, subsection 12.1(3.3) technically says that the judge must be satisfied that the proposed action is *Charter* compliant, which of course can mean either that it does not limit a *Charter* right at all or that the *Charter* limitation is reasonable on a section 1 analysis. But such an interpretation would have its own set of flaws, as follows.

This process admits that there is a proposed *Charter* infringement and that it would have to be made *Charter* compliant by a judicial save. Follow along. CSIS in this case only goes to the judge if it thinks the proposed disruptive activity limits somebody’s *Charter* rights. We thus have state conduct infringing the *Charter*—a *Charter* infringement. To make it *Charter* compliant, as per subsection 12.1(3.3) (and the constitution), the judge would therefore have to satisfy himself or herself that the proposed *Charter* limit was saved under section 1. This leads any warrant-authorizing judge to conduct a case-by-case analysis of the proposed *Charter* breaches to see if those case-specific limits *would be* reasonable—to see if they could be saved under section 1. But while legislative schemes or entire regimes (Acts of Parliament, say) can be saved under section 1 in a general sense, discrete *Charter*-infringing state actions cannot be prospectively authorized by a judge. Getting back to the critique of Bill C-51, the prospective authorization of any *Charter* violation on a case-by-case basis is not how the *Charter* or the warrant system generally works.

Even if this is incorrect and prospective authorizations are legal, there remains a serious problem with the scheme, which also existed under Bill C-51: the new *Charter* “limiting” scheme continues to seek the warrant authorizing process behind closed doors, *ex parte*, and without the prospect of judicial review. This, as any lawyer knows, is neither how *Charter* litigation works nor how it should work. Without an adversarial section 1 process, who is to challenge the “reasonableness” of the limits proposed by CSIS? What if the trial judge gets it wrong? There is no avenue for challenge, appeal or redress, and again we are talking about the violation of someone’s *Charter* rights. Simply put, under the scheme’s existing circumstances, the section 1 *Charter* analysis cannot properly proceed before a warrant-authorizing judge. In the result, even allowing for prospective case-by-case authorizations of *Charter* breaches, there is no way under the existing scheme to conduct a proper section 1 hearing required to make that authorization.

One might then “read down” the whole disruptive activities scheme in the following way. Theoretically, the scheme might still permit authorizations that implicate *Charter* sections 8 or 9 because in those cases the judge is not asked to do a section 1 analysis, nor is he or she asked to prospectively authorize future *Charter* breaches. Again, here the judge is merely asked to determine whether the proposed action is “reasonable” under section 8 or not “arbitrary” under section 9. But, Bill C-59 specifically bars CSIS from engaging in detentions as one of the new limits on CSIS’s disruptive powers (see subsection 12.2(1)(e)). So at best we are really only talking about wiretaps or searches and seizures under section 8 of the *Charter*. The subsection 12.1(3.2) authority to limit *Charter* rights is read down to be no right to violate the *Charter* at all but, rather, merely a section 8 warrant authorizing process.



But even read down to this degree, we still have a failure to address some of the primary concerns that existed with respect to Bill C-51. In particular, because the process is *ex parte* and *in camera*—completely in secret really—in practice it is very different from the police warrant schemes we are used to seeing. Under Bill C-59 there is still no meaningful independent judicial oversight, no opportunity to correct for mistakes before it is too late, no opportunity for someone whose rights are infringed to challenge the actions or seek recompense, no assurances against both mistakes and bad behaviour.

There is an avenue whereby the government might disagree with this analysis, though in the circumstances I fail to see how it helps the legal case. It goes as follows. The real problem with Bill C-51's disruptive powers regime was the “prescribed by law” issue, that the scope of CSIS's authority to act and the instances in which CSIS could act were really confined by a judge, not prescribed by law. The warrant-authorizing judge did the prescriptive work while the legislation left completely open what CSIS might do, in what circumstances it might act, and largely what limitations it might have.

This is why the major amendment proposed by Bill C-59 is to “prescribe” the law to a much greater degree. Bill C-59 clarifies a host of situations in which CSIS is not entitled to act, including under subsection 12.2(1) to detain or torture an individual, etc. But it also clarifies, through a closed enumerated list, the types of situations in which CSIS might act. This includes acting to disrupt a financial transaction (presumably to counter terrorist financing), altering or removing communications (presumably changing website content), and most controversially, interfering with the movement of a person (see section 21.1(1.1)). The actions that CSIS can and cannot take in “limitation” of *Charter* rights are thereby prescribed by law, at least to a greater degree than under Bill C-51.

Unfortunately we must come back to this rabbit hole of prospective authorizations of *Charter* breaches. Bill C-59 offers a list of *general* situations where CSIS might and might not act. But the scheme still seems to contemplate case-by-case determinations by a judge about whether specific actions that fit within the general type are constitutional. In other words, the judge is still making a constitutional determination that otherwise *Charter*-infringing behavior is reasonable—i.e. saved—in the circumstances.

There is (at least) one response available to the government as I see it. It goes as follows. The warrant-authorizing judge is in fact not authorizing *Charter* limitations or even, generally, considering them at all. Quite the contrary, all of CSIS's disruptive activities that fit within the types enumerated (prescribed) in Bill C-59 are *prima facie* permitted—saved as a scheme under section 1—and as a result the judge is merely determining that the proposed CSIS actions fit within the available types. Put another way, the scheme as a whole has sufficiently prescribed government action such that all CSIS actions that fall within those prescribed types are *Charter*-compliant. The warrant-authorizing judge is then reviewing the process not to determine on a case-by-case basis whether the proposed activities are *Charter* compliant, but merely whether they are of the “type” permitted under the Bill. Presumably the judge would also be reviewing

“reasonable and proportional in the circumstances”, requirements laid down by the Bill for a warrant to be authorized (see section 12.1(2)).

This seems like the strongest argument for the government, though it will not be uncontentious; at least four assertions will have to be supported for it to be successful. First, the government will have to explain why the wording throughout the statute seems to contemplate the warrant-authorizing judge making determinations about *Charter* compliance and decisions about when to issue a warrant based on those decisions. If the scheme is saved as a whole, and if the government is to get around the issue of prospective *Charter* authorizations, then the government’s argument must be that there is no need to do a case-by-case *Charter* analysis. Second, the government will have to argue that the scheme is sufficiently “prescribed” such that there indeed is no need to do case-by-case analyses and prospective authorizations. That would mean making the argument that, for example, any CSIS interference with the movement of a person that is reasonable and proportional to a perceived threat is presumptively *Charter* compliant given the rest of the Bill C-59 scheme. That strikes me as a tough sell, though not impossible, with the result being that the argument is not sure to succeed. Third, the government will likely have to justify the scheme as a whole as having sufficient protections to allow for general *Charter*-infringing CSIS behavior so long as it is of a certain type (the enumerated types). Once again, the fact that these decisions are made behind closed doors without challenge or the likelihood of judicial review will play against the government. The government has added the provision to Bill C-59 that all warranted disruptive activities shall be reported to the new NSIRA for its possible review (see subsection 12.1(3.5)). The quality of review – though not *oversight* – will thus depend on the capacity of the new NSIRA to keep up with CSIS’s disruptive activities as well as all other issues that arise in Canadian national security. Whether it is sufficient or not is thus unclear, though it can be clearly surmised that a requirement to report activities is not tantamount to independent and continued judicial scrutiny. Nor is it an assurance that the CSIS agents’ subsequent actions in furtherance of the warrant were in fact carried out in accordance with the authorization. Fourth and finally, for the government to rely on the argument that the “scheme is constitutional, so any individual activities that fall within it are constitutional”, surely it will have to be willing to defend a general *Charter* challenge to the scheme as a whole.

This fourth concern raises a final dilemma, which is: how would one ever determine the constitutionality of the scheme as a whole? Because judicial review and the adversarial process are non-existent in the scheme, and the warrants secret, the best that can be hoped for is a judge, with only CSIS agents present, determining that the new scheme is constitutional without ever having that scheme challenged in regular courts. Moreover, because the warrant would remain secret, presumably the constitutionality of the scheme, which at minimum should be in question even if one finds it salvageable, would have to be re-litigated each time a warrant is sought. For there would be no precedents, no capacity to look at previous “judgements”, no Supreme Court pronouncement. It would seem that without a serious change to the scheme—adding in an adversarial process and judicial review—there is no way for warrant-authorizing judges to conclusively determine the validity of the scheme. And, again, they can only authorize warrants

for *Charter*-limiting behavior under subsection 12.1(3.3) if the scheme is constitutional (something that of course is generally true in law).

So presumably we would have to see a public interest challenge to the legislation in order to uphold its constitutionality. Or, better yet, knowing that its argument rests on the assertion that *Charter* infringements are widely permitted by Bill C-59 so long as they are of enumerated types, and that this legislation will need to be saved by section 1 of the *Charter*, the government should proceed with a Supreme Court reference, with a special advocate to oppose the government's position. Of course, perhaps ironically, in doing so the government will have to put forward the strange argument that in order to make the *Charter* rights infringing scheme constitutionally compliant, what was actually done was to make virtually any action of an enumerated type permissible. Instead of the Bill C-51 scheme where proposed actions were evaluated case-by-case to determine their *Charter*-compliance, Bill C-59 set-up a scheme that, while authorizing fewer types of general actions, actually makes virtually all actions of the enumerated type permissible—no case-by-case *Charter* compliance review needed. That actually does make for a better argument legally, but we are left to wonder how it will sell politically.

## Conclusions

CSIS and the government are in quite the conundrum. On the one hand, we can see why they want—even need—the ability to act in ways that might limit *Charter* rights. On the other hand, finding a way to prospectively allow for *Charter* violations in the context of CSIS's needs is difficult indeed.

It would seem that the balance, like it or not, has not been met by Bill C-59, or at least the scheme will have to be saved by section 1 of the *Charter* before regular courts of law. One might say the law is an ass, but one would not be the first to say so. Like it or not, there's a serious legal dilemma here.

Nevertheless, this is not the end of the story—and of course I could very well be wrong. Either way, there are some fairly obvious steps that the government might take when the House sits again in the fall of 2017 to put the whole process on yet firmer constitutional footing. First, whatever scheme they come up with should be sent to the Supreme Court for a *Charter*-compliance reference. Get that tricky decision about the legality of the *scheme* as a whole out of the way—and allow the Supreme Court to give direction to warrant-authorizing judges—so that those judges can focus on CSIS's case-by-case proposals. Second, there needs to be a security-cleared special advocate present to represent the person whose *Charter* right is to be infringed. If CSIS is to violate non-section 8 rights in particular, and if its actions are unlikely to be challenged during subsequent criminal proceedings, then the proper balancing cannot take place outside the adversarial process. Nor should it. Third, CSIS should be required to report back to the warrant authorizing judge on the actual actions taken to ensure that they proceeded—or more importantly are proceeding—in accordance with the warrant. Finally, the government should consider the possibility of appeals in complex cases, if only to a panel of specially-designated

Federal Court judges. The lack of judicial oversight of a regime that purports to give wide latitude to breach the *Charter* (and allows for simultaneous unlawful actions) should not be sustained.

Even with these recommended additions, I do not think there's a guarantee of constitutionality here, but there's a better chance that such a scheme would be viewed as constitutional. It's worth a try. While cumbersome, it gives CSIS a shot to do the things they say they need to do. I'm not sure that the same can be said for Bill C-59's scheme.

---

This post may be cited as: Michael Nesbitt “National Security, Bill C-59, and CSIS’s Continuing Power to Act Disruptively in Violation of the *Charter*” (23 June, 2017), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2017/06/Blog\\_MN\\_BillC-59.pdf](http://ablawg.ca/wp-content/uploads/2017/06/Blog_MN_BillC-59.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

