BILL C-59 AND CSIS'S "NEW" POWERS TO DISRUPT TERRORIST THREATS: HOLDING THE *CHARTER*-LIMITING REGIME TO (CONSTITUTIONAL) ACCOUNT

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In 2017, the Liberal government released Bill C-59, which was its update to the national security legislation that was introduced by the previous government via Bill C-51. Bill C-59's goal was to address the criticisms of its predecessor, including the new "kinetic" powers granted to the Canadian Security and Intelligence Service (CSIS) to actively disrupt threats to the security of Canada. While Bill C-59 made some improvements to ensure that CSIS's new powers are exercised in accordance with the Charter, *there are still deficiencies to be addressed. This article reviews the changes brought in with Bill C-59, examines how those amendments may not avoid constitutional challenge, and outlines what a section 1* Oakes *justification may look like. Ultimately, to address the* Charter *implications of the new legislation, further changes are required, including the use of court-appointed special advocates to ensure an adversarial system and further oversight of CSIS's new, disruptive authority.*

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I. INTRODUCTION

On Wednesday, 21 June 2017, right before Parliament rose for the summer break, the Liberal government released its long-awaited national security legislative update, marketed during its election campaign as its response to the Conservative government's highly controversial *Anti-terrorism Act, 2015*, which became colloquially known simply as Bill C-51.[1] The Liberal government's June 2017 response came in the form of Bill C-59, *An Act*

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1 *Anti-terrorism Act, 2015*, SC 2015, c 20 [Bill C-51].

respecting national security, which received Royal Assent — and thus became an Act of Parliament — on 21 June 2019; not only does it address many — though not all — of the perceived issues with Bill C-51, it goes much farther afield.[2]

Perhaps the most controversial aspect of Bill C-51[3] was the unprecedented powers it granted the Canadian Intelligence Security Service (CSIS), through an amendment to the *Canada Security Intelligence Service Act*, which enabled the agency to act disruptively (kinetically) to "reduce threats to the security of Canada,"[4] including taking actions that would limit *Charter*[5] rights or otherwise breach Canadian laws.[6] Previously, CSIS acted as the quintessential watchers, with the powers to investigate and monitor threats to the security of Canada but without any police-like powers to take physical (kinetic) actions, which could include anything from changing the content of a website to physically preventing individuals from approaching a building. The legal and public outcry to the Bill C-51 regime was quick and resounding in this regard. Interestingly, the biggest concern seemed not to be that CSIS might now act physically to disrupt terrorist activity in a broad variety of ways,[7] which was itself an unprecedented turn of events. Rather, the central critique centered on the fact that CSIS's new-found authority to act kinetically was too broad and legally (and procedurally) unconstrained. As such, academics that weighed in on the regime found it to be very likely unconstitutional and thus, for CSIS's purposes, it became largely unusable.[8]

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2 Bill C-59, *An Act respecting national security matters*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 13 [Bill C-59]. For an overview of Bill C-59, see Craig Forcese & Kent Roach, "The Roses and the Thorns of Canada's New National Security Bill," *Maclean's* (20 June 2017), online: <www.macleans.ca/politics/ottawa/the-roses-and-thorns-of-canadas-new-national-security-bill> [Forcese & Roach, "Roses and Thorns"]; Craig Forcese, "A Law for New Seasons: Bill C-59 from the 'Big Picture' Perspective of National Security Reform" (24 June 2017), online (blog): *National Security Law* <craigforcese.squarespace.com/national-security-law-blog/2017/6/24/a-law-for-new-seasons-bill-c-59-from-the-big-picture-perspec.html>; Craig Forcese & Kent Roach, "A Report Card on the National Security Bill" (22 June 2017), online: *Institute for Research on Public Policy* <policyoptions.irpp.org/magazines/june-2017/a-report-card-on-the-national-security-bill>.

3 At the time, Craig Forcese and Kent Roach led the opposition with their book *False Security*, particularly at Chapter 8, which deals with CSIS and section 12 (Craig Forcese & Kent Roach, *False Security: The Radicalization of Canadian Anti-Terrorism* (Toronto: Irwin Law, 2015)). See also Craig Forcese & Kent Roach, "Bill C-51 Backgrounder #2: The Canadian Security Intelligence Service's Proposed Power to 'Reduce' Security Threats through Conduct that May Violate the Law and Charter" (2015) [unpublished], online: <ssrn.com/abstract=2564272> [Forcese & Roach, "Bill C-51 Backgrounder #2"]; Michael Nesbitt, "CSIS's New Distributive Powers, Grey Holes, and the Rule of Law in Canada" (2015) 1 Can YB Human Rights 87 [Nesbitt, "Grey Holes"]. For news coverage on CSIS's kinetic powers in Bill C-51, see "Taking the 'I' out of CSIS," *The Globe and Mail* (17 February 2015) A10; "National Post View: How to Salvage Bill C-51," *National Post* (4 April 2015), online: <nationalpost.com/opinion/national-post-view-how-to-salvage-bill-c-51>.

4 CSIS's new kinetic powers were introduced by clause 42 of Bill C-51, which added the powers under section 12.1 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 [*CSIS Act*].

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

6 *CSIS Act*, *supra* note 4, s 12.1(3).

7 Kent Roach and Craig Forcese, for instance, agreed that CSIS needed threat reduction powers, although they believed the powers afforded to CSIS under Bill C-51 were far too permissive (and poorly drafted) to pass constitutional muster (Forcese & Roach, "Roses and Thorns," *supra* note 2; Forcese & Roach, *False Security*, *supra* note 3 at 247–68). However, both the Canadian Civil Liberties Association (CCLA) and the British Columbia Civil Liberties Association questioned whether CSIS should have kinetic powers in the first place (see Micheal Vonn, "The 'New' CSIS – A De Facto Secret Police" (7 October 2016), online (blog): *British Columbia Civil Liberties Association* <bccla.org/2016/10/new-csis-de-facto-secret-police>; "Understanding CSIS Disruption Powers in Bill C-59" (12 September 2017), online (blog): *Canadian Civil Liberties Association* <ccla.org/understanding-csis-disruption-powers-bill-c-59/>).

8 See Forcese & Roach, *False Security*, *supra* note 3 at 263; Nesbitt, "Grey Holes," *supra* note 3 at 94. In 2017, *The Star* reported that CSIS had used its new threat disruption powers but not for an activity that, in the Service's opinion, breached the *Charter,* which would require a warrant authorization under the new section 21(1) of the *CSIS Act* (Alex Boutilier & Tonda MacCharles, "CSIS Waiting on Liberal

Perhaps as a result of the response and particularly where that response tended to focus its critique, Bill C-59 does not then unravel CSIS's new kinetic powers. Bill C-59 still provides for a return to the pre-1984 *CSIS Act* days where one agency (CSIS in this case, the RCMP pre-1984) has both intelligence (watching) powers and kinetic powers to disrupt.[9] (The problems — indeed perceived incompatibilities — associated with one agency maintaining both intelligence and kinetic-policing functions was the very circumstance that led to the creation of the McDonald Commission and, subsequently, its recommendation that CSIS be created so as to separate the RCMP's policing (and disruptive) functions from covert intelligence functions.)[10] Nor does it unravel CSIS's authority to act in limitation of *Charter* rights or breach of Canadian laws; it remains true that no other security agency — not even the RCMP — can limit *Charter* rights with as much leeway and as little oversight as CSIS now has.[11] In the result, CSIS's unprecedented powers to act kinetically remain unaltered under the new Act — and arguably provide no more than CSIS ever wanted under the old regime[12] — as does its unparalleled authority to do so in ways that would limit any *Charter* provision.

Rather, it is the legal and legal-procedural issues most commonly associated with Bill C-51 — specifically the *Charter* issues — that Bill C-59 purports to address. And it must be

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Reforms Before Using Threat-Disruption Powers," *The Star* (12 April 2017), online: <thestar.com/news/canada/2017/04/12/csis-waiting-on-liberal-reforms-before-using-threat-disruption-powers.html>; Tonda MacCharles, "CSIS Used Bill C-51 Powers Several Times to Disrupt Suspected Terrorists, Senate Hears," *The Star* (7 March 2016), online: <www.thestar.com/news/canada/2016/03/07/csis-used-bill-c-51-powers-several-times-to-disrupt-suspected-terrorists-senate-hears.html>). *The Star* reported that CSIS was intentionally refraining from seeking a section 21(1) warrant until the Trudeau government completed its amendments to the *CSIS Act* (Boutilier & MacCharles, *ibid*). The Security Intelligence Review Committee (SIRC) has confirmed, in two of its annual reviews of CSIS's activities since the kinetic powers were introduced in 2015, that CSIS has not received a warrant under subsection 21(1) of the *CSIS Act*: Security Intelligence Review Committee, *Annual Report 2015–2016: Maintaining Momentum* (Ottawa: Public Works and Government Services Canada, 2016), online: <sirc-csars.gc.ca/pdfs/ar_2015-2016-eng.pdf>; Security Intelligence Review Committee, *Annual Report 2017–2018: Building For Tomorrow: The Future of Security Intelligence Accountability in Canada* (Ottawa: Public Services and Procurement, 2018), online: <sirc-csars.gc.ca/pdfs/ar_2017-2018-eng.pdf> [SIRC, *2017–2018 Annual Report*].

9 For a brief history of the activities of the RCMP that led to the creation of CSIS and the separation of kinetic powers (RCMP policing) from national security surveillance, see Forcese & Roach, *False Security*, *supra* note 3 at 38–40, ch 8; Forcese & Roach, "Bill C-51 Backgrounder #2," *supra* note 3.

10 Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, second report, vol 2 (Ottawa: Minister of Supply and Services Canada, 1981) at 1089, online: <publications.gc.ca/collections/collection_2014/ bcp-pco/CP32-37-1981-2-2-3-eng.pdf> [McDonald Commission, vol 2].

11 Section 25.1 of the *Criminal Code* permits the RCMP to break the law in discrete situations (RSC 1985, c C-46). But this framework does not extend to *Charter* violations, and includes more oversight and procedural protections. For instance, section 25.2 of the *Criminal Code* requires that an officer who breaks a law under the authority of section 25.1 report the law-breaking to a senior police official. Moreover, section 25.1(8) requires that the law-breaking occur during an investigation of criminal activity, a context — policing — where the activity will more likely come to light as criminal charges result and the policing tactics are challenged in open court. The same cannot be said for CSIS activities, which tend to operate in the shadows and whereby the goal is to keep those activities from ever seeing the light of day. Another part of the problem is that CSIS wishes to use these powers anonymously and as a third party to any judicial proceeding that results from their use (see Leah West, "The Problem of 'Relevance': Intelligence to Evidence Lessons from UK Terrorism Prosecutions" 41:4 Man LJ 57; Kent Roach & Craig Forcese, "Intelligence to Evidence in Civil and Criminal Proceedings: Response to August Consultation Paper" (12 September 2017) [unpublished], online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3035466>).

12 For instance, Craig Forcese and Kent Roach wrote that "[l]ike many others, we dispute that [CSIS] needs (or even wanted) threat reduction powers as extreme as those provided in C-51" (Forcese & Roach, "Roses and Thorns," *supra* note 2).

said that, as we shall see, Bill C-59's amendments[13] are a meaningful and thoughtful attempt to *Charter*-proof CSIS's new kinetic powers regime such that the agency may actually use those powers — and the public may be more comfortable with the agency doing so. Seen in this light, Bill C-59's legal amendments, while not changing much in the way of CSIS's ultimate kinetic powers, are important both for national security — because they allow CSIS to actually act in ways that it has maintained are necessary in the modern world — and for civil liberties — because they are an attempt to ensure thorough *Charter* compliance coupled with sufficient oversight of government actions.[14]

Presuming *ad arguendo* that CSIS should indeed have such powers, or at least asking that such debates be held in abeyance for the purposes of this legal paper, the central question then becomes whether Bill C-59's amendments to the *CSIS Act* accomplish the *legal* task of ensuring *Charter* compliance and proper judicial oversight of otherwise far-reaching state powers. This is precisely the legal question to which this article turns.

In particular, this article will begin in Part II with an introduction into CSIS's threat reduction powers under the old, highly controversial Bill C-51 and provide a brief overview of the concerns with that scheme, the most important of which carry over into the new Bill C-59 regime. In Part III, this article will then introduce Bill C-59's amendments to the disruptive powers regime and how it continues to exhibit defects first introduced in the Bill C-51 regime. Part IV will then address what I see as the three most salient legal questions that flow from the analysis of the Bill C-59 regime; it will also offer a series of steps that might have been taken during consideration of Bill C-59, or indeed that might now be taken by way of law reform, to put CSIS's threat reduction powers on still firmer constitutional footing.

II. BILL C-51'S CONTROVERSIAL MOVE TO ENABLE CSIS'S "DISRUPTIVE POWERS"

Bill C-51, through its amendments to the *CSIS Act*, gave CSIS the power to act disruptively for the very first time. CSIS has historically been a "watcher," with the added dimension that, as the watcher, it is also in a unique position to analyze what it is watching and distribute its analysis to other departments or agencies who might then make policy decisions (the government), make arrests (the RCMP), or alter their approach to a foreign interlocutor (Global Affairs Canada). Post Bill C-51, CSIS's role was then expanded to include the explicit power to take wide-ranging actions during the watching phase: CSIS could act to disrupt a threat that it was watching. For example, CSIS might see a website with bomb-making instructions, analyze the possible authors, send a warning to the RCMP, but

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13 Clause 99(1) of Bill C-59 proposes to add three new limits to CSIS's kinetic powers, which will be set out at sections 12.2(1)(d) – 12.1(2)(f) of the *CSIS Act*. These new limits prohibit CSIS from torturing an individual (s 12.2(1)(d)), detaining an individual (s 12.2(1)(e)), or causing damage to property that would endanger the safety of an individual (s 12.2(1)(f)) (Bill C-59, *supra* note 2, cl 99(1)).

14 The provision that attempts to *Charter*-proof these powers is section 12.1(3) of the *CSIS Act*, *supra* note 4, which provides that CSIS "shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1." Section 12.1(3) of the *CSIS Act* was added under clause 42 of Bill C-51, *supra* note 1.

then — and this is the new part — also act "kinetically" to disrupt the activity, in this case perhaps by altering the website.

CSIS was created with the very idea that an intelligence agency *not* have such powers.[15] It was not the case that CSIS's absence of such powers was a mere oversight, no matter how necessary they might look today. Indeed, prior to Bill C-51, it was an explicit and very much intentional divide of powers between CSIS and the RCMP, whereby all disruptive powers — like the power to detain, arrest, take action against individuals, enter a dwelling house to collect bomb-making materials, and so on — resided in the RCMP's jurisdiction.[16] There was good reason for this: the RCMP was responsible for a series of remarkably widespread illegalities in the 1970s, leading most notably to its burning of a barn to prevent FLQ members from holding a meeting.[17] The RCMP was also found to have broken into the offices of a left-wing newspaper.[18] Revelation of these and other criminal acts led to the McDonald Commission in 1981, which, as Craig Forcese has succinctly stated, "not[ed] the incompatibility of security intelligence with traditional policing."[19] Additionally, the Commission found that the "noble cause" of protecting national security incentivized the Security Service to disrupt national security threats using illegal acts;[20] of course, in so doing the more effective powers of arrest were put on the backburner.

In light of these findings, the Commission recommended spinning off the RCMP's security intelligence function into a new intelligence agency whose role would be strictly limited to pure intelligence gathering. The agency would lack any authority to disrupt threats and it would be subject to special civilian oversight (now the Security and Intelligence

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15 See Forcese & Roach, *False Security*, *supra* note 3 at 38–40, ch 8.

16 This practice followed from the McDonald Commission's finding that the functions of collecting, analyzing, and reporting intelligence should be separated from the power to "enforce security measures" and, specifically, the power of "deterring, preventing and countering" national security threats. See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, *Freedom and Security under the Law*, second report, vol 1 (Ottawa: Minister of Supply and Services Canada, 1981) at 613–14 [McDonald Commission, vol 1].

17 The McDonald Commission heard evidence on several of these incidents: burning a barn, removing dynamite, removing and copying tapes at the Parti Québecois offices, opening mail and breaking into the offices of the APLQ (a news agency) (see Forcese & Roach, *False Security*, *supra* note 3; McDonald Commission, vol 1, *ibid* at 24; Jean-Paul Brodeur, "Legitimizing Police Deviance" in Clifford D Shearing, *Organizational Police Deviance: Its Structure and Control* (Toronto: Butterworths, 1981) 127 at 157).

18 See Forcese & Roach, *False Security*, *ibid* at 38–40, ch 8. For a brief overview of these events, see Justin Ling, "Barn Burner: The Story of the RCMP's Dirty Tricks Department, and How They Burned Down a Barn, Explains a Lot about Canada's Modern National Security System," *Vice News* (30 June 2017), online: <news.vice. com/en_ca/article/eva8da/story-of-how-canadian-police-committed-arson-to-stop-a-black-panther-meeting>.

19 Craig Forcese, "Canada's Security and Intelligence Community after 9/11: Key Challenges and Conundrums" in Ian Leigh & Njord Wegge, eds, *Intelligence Oversight in the Twenty-First Century: Accountability in a Changing World* (London: Routledge, 2019) 152 at 155, referring to *Report of the Royal Commission on Security* (Ottawa: Minister of Supply and Services Canada, 1969), online: <publications.gc.ca/collections/collection_2014/bcp-pco/Z1-1966-5-eng.pdf> [Mackenzie Commission]; McDonald Commission, vol 1, *supra* note 16 at 613.

20 The McDonald Commission observed the RCMP justified its illegal surveillance and break-ins on the grounds of its "noble purposes" (McDonald Commission, vol 1, *ibid* at 127, 292; Forcese & Roach, *False Security*, *supra* note 3 at 38).

Review Committee (SIRC)).[21] In response to the McDonald Commission's recommendations, the Canadian government created CSIS in 1984.

Today, the argument seems to be that times have changed since 1984; technology and the modern threat of terrorism require security services to act quickly and nimbly. The restrictions of the past mean a disaster in the future. Unfortunately, while there is potentially much to commend to this line of thinking, it has never been tested by robust discussion during debates in the House of Commons[22] and, publicly at least, CSIS has offered a less-than-full-throated explanation for why it now so desperately needs these powers that were once thought anathema to the Service as an independent agency.[23]

In part due to a lack of evidence and argument upon which to draw, this article will likewise not engage in policy arguments about whether it is best to endow CSIS with kinetic powers or not; that is a topic worthy of its own (long) study and, moreover, at least for the time being, that ship would seem to have sailed as the debate has largely been muted in public and academic circles. Significantly, that debate should have begun in the House where

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21 SIRC was initially left out of Bill C-157, the bill that created CSIS (Security Intelligence Review Committee, *Reflections: Twenty Years of Independent External Review of Security Intelligence in Canada* (Ottawa: Security Intelligence Review Committee, 2005) at 11, online: <sirc-csars.gc.ca/pdfs/rfcrfx_2005-eng.pdf> [SIRC, *Reflections*]). SIRC was added to Bill C-157 after the Senate determined additional civilian review of the proposed intelligence service was needed (SIRC, *Reflections*, *ibid* at 11). After this amendment, Bill C-157 enacted both CSIS and SIRC, respectively, under sections 3 and 34 of the *CSIS Act*, *supra* note 4. Since its inception, SIRC's responsibilities include investigating "the performance by [CSIS] of its duties and functions" and complaints against the Service (*CSIS Act*, *ibid*, s 38). In accordance with section 53 of the *CSIS Act*, SIRC also prepares an annual report on its investigations, which is tabled in Parliament (for the latest report, visit SIRC's website: <sirc-csars.gc.ca/index-eng.html>). As Craig Forcese and Kent Roach have observed, SIRC can retrospectively investigate CSIS's activities with a view to making recommendations, but it does not exercise real-time command and control over the agency's actions (Forcese & Roach, *False Security*, *supra* note 3 at 396). In other words, the body's powers are limited to review, not oversight. Moreover, SIRC's mandate is limited to investigating CSIS's conduct, so it cannot review the parallel activities of CSIS's partner agencies, like the RCMP or the Communications Security Establishment (CSE), although the latter agencies are subject to their own review bodies (Forcese & Roach, *False Security*, *supra* note 3 at 72). Bill C-59 will replace SIRC with the National Security and Intelligence Review Agency (NSIRA), which will consolidate Canada's national security review agencies into a single body (*supra* note 2, cl 8).

22 For a discussion of the very limited debate in the House during the passage of Bill C-51, see Forcese & Roach, *False Security*, *supra* note 3 at 245–46. A service of the transcripts from the Bill C-59 debates in the House, including during Standing Committee on Public Safety and National Security hearings, similarly provides for limited justifications of the necessity of such new powers. For the transcripts from debates in the House and the Standing Committee on Public Safety and National Security, see "Bill C-59, An Act respecting national security matters," *House of Commons Debates*, 42-1 (11 June 2019) [Bill C-59 Debates]; "Bill C-59, An Act respecting national security matters," House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 28 (6 October 2016).

23 Public Safety Canada released a Green Paper explaining that CSIS required the powers due to a changing threat environment. The report noted a trend "towards loosely organized small-scale attacks, the growing use of the Internet and mobile communications, and the ease with which people can move about the globe" and cited several scenarios where the powers might be used, including "[d]isrupting financial transactions" and "[i]nterfering with terrorist communications" (Government of Canada, *Our Security, Our Rights: National Security Green Paper, 2016: Background Document* (Ottawa: Her Majesty the Queen in Right of Canada, 2016) at 21, 23, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ntnl-scrt-grn-ppr-2016/ntnl-scrt-grn-ppr-2016-en.pdf> [*Green Paper*]). In testimony before the Standing Committee on Public Safety and National Security in October 2016, Michel Coulombe, CSIS director at the time, stated the powers were needed to confront rapidly evolving terrorist threats (House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 28 (6 October 2016) (Michel Coulombe) [Coulombe Testimony]). He explained that the time between a person's radicalization and commission of acts of violence can be very short, which necessitates quick action. He noted the powers allow CSIS to take such quick action. Coulombe cited scenarios where the powers might be used including "asking somebody to intervene because a young person is on the path to radicalization and mobilizing to violence" or "advising social media that a user is breaching their rules" (*ibid* at 17:00).

CSIS should have been asked more particular and probing questions about what specifically has changed, why that change in circumstances necessitates such a broad rethink of the agency and its grant of powers, what precisely CSIS needs in terms of powers (which would help limit the scope of the granted powers), and why specifically it needed the new powers rather than just enhanced capacity to cooperate with the RCMP, who could continue to perform the disruptive function. To be clear: the point is not to say that CSIS should not have such powers, but merely to demonstrate that we are continuing to operate in an absence of some information and quite a bit of justification that would help make this policy debate easier to navigate.

With that in mind, while this article will not make and rebut the argument for CSIS, the question of what powers CSIS needs, their scope, and how they might be used is nevertheless central in many ways to the ultimate constitutionality of CSIS's new kinetic powers regime. That is, under section 1 of the *Charter,* any *Charter*-limiting state activity must be "demonstrably justified," meaning that it must, *inter alia*, be minimally impairing and proportional to the identified threat.[24] One cannot coherently engage with what is "minimally impairing" if one does not understand the scope of the purpose for the power or the extent to which that power is likely to be used. Likewise, what is "proportional" as between the state's kinetic activity and the threat is impossible to determine without knowing the details of the justifications for the grant of state authority to act in violation of a *Charter* right in the first place.[25]

In any event, in the context of Bill C-51, that link never much mattered because the legislative scheme was otherwise so clearly unconstitutional that the Government promised not to act under section 12.1 of the *CSIS Act* until it had been amended.[26] The central (legal) problems, in addition to the above, were as follows.

Bill C-51 added to the *CSIS Act* sections 12.1, 12.2, and 21.1. Overall, the scheme gave CSIS very broad authority to act with very few legislated limits. The then-new section 12.1(1) stated: "If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat."[27] It is with this addition that CSIS formally gained the power to disrupt "threats to the security of Canada," which is defined in section 2 of the *CSIS Act* to include

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24 *Charter*, *supra* note 5, s 1. The balance of the analysis under section 1 assesses the proportionality of the limit imposed by a law or government action on a *Charter* right or freedom. The *Oakes* test is the analytical framework used under section 1 to assess a law's proportionality (*R v Oakes,* [1986] 1 SCR 103 at 138–40 [*Oakes*]). The third prong of the *Oakes* test, the minimal impairment arm, represents the core of proportionality assessment. To be minimally impairing, a limit on a *Charter* right must impair the right or freedom "as little as possible" (*ibid* at 139), but there is no standard of perfection so long as the measure is within a reasonable range of options (Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 76).

25 Identifying the objective or purpose underlying a law is key to assessing whether the law is minimally impairing. The minimal impairment stage of the *Charter's* section 1 analysis asks whether there is a reasonable, less rights-infringing way to accomplish the objective of the law in question (Sharpe & Roach, *ibid* at 76–77). Without knowing the law's objective in a specific sense, it is impossible to meaningfully determine whether alternatives to the law would reasonably accomplish the government's objective in enacting the law. Hence, the government's failure to clearly articulate its objective or purpose in granting CSIS kinetic powers hampers a review of the proportionality of CSIS's kinetic powers.

26 Boutilier & MacCharles, *supra* note 8; SIRC, *2017-2018 Annual Report, supra* note 8.

27 *CSIS Act*, *supra* note 4, s 12.1.

sabotage, espionage, and "foreign influenced activities … detrimental to the interests of Canada" or that might undermine Canada's constitutional system of government.[28]

The limitations on this broad new power, such as they were, attracted much criticism for not being sufficiently robust. First, section 12.1(2) required that the "measures … be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures and the reasonable availability of other means to reduce the threat."[29] Second, then-new section 12.1(3) added: "The Service shall not take measures to reduce a threat to the security of Canada if those measures will contravene a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* or will be contrary to other Canadian law, unless the Service is authorized to take them by a warrant issued under section 21.1."[30] In taking such measures, section 12.2 then clarified that CSIS may not "cause, intentionally or by criminal negligence, death or bodily harm"; "willfully attempt in any manner to obstruct, pervert or defeat the course of justice"; or "violate the sexual integrity of an individual."[31] Taking sections 12.1(1) and (3) together, CSIS was endowed with the power to break any Canadian law or contravene any right in the *Charter*. The sole limitations on the exercise of these unprecedented powers were that CSIS satisfied itself — and presumably the warrant-authorizing judge — that such an exercise of powers was proportional to the threat and that CSIS does not kill, sexually assault, or cause anyone bodily harm, or "willfully" obstruct justice (which allows for the accidental obstruction of justice).

The central legal controversy then flowed as follows. As we have just seen, 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.[32] 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; that is the stuff of first-year constitutional law, not serious academic debate. Put another way, we have the Constitution's "notwithstanding clause," section 33 of the *Charter*, for a reason.[33] 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*.

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28 *Ibid*, s 2.

29 *Ibid*, s 12.1(2).

30 *Ibid*, s 12.1(3).

31 *Ibid*, ss 12.2(1)(a)-(c).

32 One of Craig Forcese and Kent Roach's principal criticisms of Bill C-51 was the unbridled powers it conferred to CSIS under section 12.1 of the *CSIS Act*. The authors noted section 12.1, as set out in Bill C-51, was overbroad in two ways. First, it authorized targeting non-violent actors, including environmental and Indigenous activists, and non-violent activities, like lawful protests (Forcese & Roach, *False Security*, *supra* note 3 at 11–12). Second, it also authorized a range of constitutionally suspect "disruptive" activities including speech-suppression, detentions, and renditions (Forcese & Roach, *False Security*, *ibid* at 247–57). See also Forcese & Roach, "Roses and Thorns," *supra* note 2; Nesbitt, "Grey Holes," *supra* note 3 at 89–90.

33 The notwithstanding clause is set out in section 33 of the *Charter*. The section allows Parliament or a provincial legislature to temporarily suspend the *Charter*'s application to a piece of legislation. Section 33(1) reads: "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or *a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15*" (*Charter*, *supra* note 5 [emphasis added]). Per section 33(3), a declaration that an Act or provision operates notwithstanding the *Charter* lasts for, at most, 5 years (*Charter*, *ibid*).

In the absence of an appeal to the notwithstanding clause, in Canadian law, if the government wants to breach a specific constitutional right (or rights), the government 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.[34] The old rule of law requirements of "clarity" and "transparency" in legislation are built right into our constitutional tests.[35] 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* 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.[36] So, broadly speaking, the government can indeed infringe a *Charter* right, but the proposed limit 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.[37] In this way, a judge can determine whether the government's proposed limit is "reasonable" and "demonstrably justified in a free and democratic society."[38]

Moreover, in order to exempt itself from the application of the *Charter* in the exercise of a governmental power, surely the exercise of that power must be properly constrained (going back to minimal impairment and proportionality) but also overseen such that the courts and the public can adequately ensure that the actual exercise of the governmental power is consistent with — and limited to — the statutory authorization. Yet as we have seen, the limits on CSIS activities that did exist were primarily internal constraints overseen by the agency (the measures had to be reasonable and proportional) and included absolute limits only on the most egregious conduct that surely CSIS had no interest in engaging in the first place (murder, sexual assault, perhaps rendition to torture).

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34 The *Charter* authorizes the government to breach a *Charter* right but only if the breach is justified under section 1 of the *Charter*. This section provides that the rights set out in the *Charter* are subject only to those "reasonable limits" that "can be demonstrably justified in a free and democratic society" (*Charter*, *ibid*, s 1). Thus, if the government wishes to breach a *Charter* right without invoking the notwithstanding clause, it must show that the limit is "prescribed by law" and "demonstrably justified in a free and democratic society." The consideration of whether a limit is "prescribed by law" is a preliminary step, arising before considering whether the limit is "demonstrably justified." In order to be "prescribed by law," the limit must arise expressly or impliedly from a statute or regulation, and pass the vagueness test from section 7 of the *Charter* (Sharpe & Roach, *supra* note 24 at 67–69). To pass the vagueness test from section 7 of the *Charter*, the limit must be "precise and ascertainable; there must be standards and criteria by which it may be determined" ("Charterpedia: Section 1 — Reasonable Limits," online: *Department of Justice* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html> ["Charterpedia"]; *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 77–79). *Irwin Toy* and *Nova Scotia Pharmaceutical* set out the test for vagueness. In these cases, the Supreme Court held the limit will fail to be prescribed by law if it "is so vague that it fails to provide an intelligible legal standard" ("Charterpedia," *ibid*, citing *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 at 622-23 [*Nova Scotia Pharmaceutical*]; *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 983). Since the Supreme Court of Canada's decision in *Oakes*, determining whether a law is "demonstrably justified" involves a two-step process (*Oakes*, *supra* note 24 at 138–40). The *Oakes* test, as it is now known, requires the government to show, on a balance of probabilities, that the law has a "pressing and substantial" objective and that the law is proportional (*Oakes*, *ibid* at 138–39). For the law to be proportional, it must be rationally connected to its objective, minimally impairing, and there must be proportionality between the infringement and the objective (*Oakes*, *ibid* at 139). To pass the *Oakes* test, the government cannot merely invoke section 1; instead, they must adduce "cogent and persuasive" evidence (*Oakes*, *ibid* at 138).

35 For a more in-depth discussion of the requirements of clarity and transparency in our constitutional tests, see Nesbitt, "Grey Holes," *supra* note 3 at 89–94.

36 *Oakes*, *supra* note 24 at 138–40.

37 *Ibid*.

38 *Ibid*.

In order to meet the needs of the demanding section 1 regime, Bill C-51 failed miserably, though it 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.[39]

But this judicial warrant process should not have been seen as a limit on *Charter* rights that was prescribed by law. Rather, it was 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, and so on. 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 *ex parte* and in camera, that is, in secret, without opposition, outside of the eyes of the public, and without the foreseeability of subsequent review).[40] 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."[41]

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 parallels were poorly drawn. The rights as found in section 8 of the *Charter* against state-conducted searches and seizures are qualified by the term "unreasonable": one has only a more limited right against "unreasonable" search and seizure.[42] Similarly, section 9 *Charter* rights are constrained by the qualifier "arbitrary" — protecting not against all detention (jail is thus permissible), but only against arbitrary detention (jail without due process of law is impermissible, for example).[43] So in the context of these police warrants, which are authorized many times over every day in Canada, 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."[44] As a matter of procedure, this is why the judge does not "give a warrant" as is often mistakenly said, but rather "authorizes" a warrant, which is in actuality prepared by the police — usually alongside prosecutors — explaining for the judge the proposed action and why it is purportedly 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 XV.[45] In other words, the regular (police) warrant process is highly prescribed by statute (and case law), and the

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39 *CSIS Act*, *supra* note 4.
40 Nesbitt, "Grey Holes," *supra* note 3 at 90–93.
41 *Ibid* at 90.
42 *Charter*, *supra* note 5.
43 *Ibid*.
44 Nesbitt, "Grey Holes," *supra* note 3 at 93–94.
45 *Criminal Code*, *supra* note 11, s 487. See also *Controlled Drugs and Substances Act*, SC 1996, c 19, s 11.

judges never pre-emptively authorize future *Charter* breaches. On close legal inspection, the criminal warrant process looks nothing like Bill C-51's 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 XV 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 on 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.[46]

The practice in the context of secretive CSIS disruptive actions has two practical implications as related to legal oversight. First, the usual process by which courts can confirm the propriety of a warrant was almost completely absent in the context of section 12.1 *CSIS Act* warrants under Bill C-51, for there will never be a court challenge or judicial review. Second, at least based on the legal processes authorized by Bill C-51, the usual process by which, in a criminal trial, the judge would review the subsequent actions of the police to determine if they actually acted in compliance with the warrant was also absent.

In the context of CSIS, once the warrant was (theoretically) issued, there was no provision for continued judicial oversight. There might be practice to compensate for this lack of continued oversight, but it is reliant on judicial actors instituting continued oversight where the law fails to do so, which is not a recipe for certainty or transparency in the law; on a reading of the law on the book (as found in the *CSIS Act* post-Bill C-51), a warrant-authorizing judge just had to assume that the agency carried out the warrant in the manner originally authorized. If the criminal-police context is any indication, no such assumption should ever be justified.[47] Mistakes happen: a judge can make a mistake authorizing a warrant, the scope of the authorization can be misconstrued, or the actions of the enforcing

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46 For more detail on this point, see Nesbitt, "Grey Holes," *supra* note 3 at 91–92; Forcese & Roach, *False Security*, *supra* note 3 at 248.

47 Indeed, the so-called "ODAC Decision" relating to CSIS's unauthorized collection of metadata is a prime example (*X (Re)*, 2016 FC 1105 [ODAC Decision]). In that case, SIRC issued an annual report stating that CSIS's collection and storage of metadata (its ODAC system) was operating in a way that might be different from what CSIS had earlier disclosed to the Federal Court, and that CSIS should inform the Court of such (Security Intelligence Review Committee, *Annual Report 2014–2015: Broader Horizons: Preparing the Groundwork for Change in Security Intelligence Review* (Ottawa: Public Works and Government Services Canada, 2015) at 25, online: <www.sirc-csars.gc.ca/pdfs/ar_2014-2015-eng.pdf>). CSIS decided not to follow the "recommendation," and, eventually, Justice Noël took CSIS to task for its failure to disclose the particulars of what it was doing to the court overseeing the process (ODAC Decision, *ibid* at para 108).

official can be (accidentally or even intentionally) offside the authorization. Subsequent review 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 — and certainly the *CSIS Act* did not offer a solution.

For this reason, the process of transposing the well-understood warrant process from the *Criminal Code* to the CSIS context was said to be tantamount to creating a "legal grey hole."[48] A legal grey hole exists "where the executive power purports to rely on pre-existing 'legal' norms or standards, but ultimately legislates or acts in a manner that leaves the state largely unconstrained by those norms or standards."[49] The grey hole is governed then not by the absence of legal rules (what David Dyzenhaus has called the more transparent legal black holes),[50] or clear legal rules (the *Criminal Code*'s warrant regime, for example), but by the "façade of legality."[51] Accordingly, we have a rather serious rule of law problem: a situation (warrant regime process) that is purportedly covered by robust legal protections and understandings but "that is, in practice, largely unconstrained by law."[52]

The end result was we were indeed left with a power that was in fact largely unconstrained by law: CSIS could theoretically do who knows precisely what, when, or how, none of it limited robustly or transparently by law on the books, and all of it justified by a vague allusion to a warrant process that works well in the criminal context but is emptied of its substantive value when transported to the CSIS disruption regime. The SIRC — which Bill C-59 replaced with the NSIRA[53] — might have offered one glimmer of hope to the old CSIS regime in that it can review CSIS's actions; but it could never review all of them, and surely the same will be (more so?) true with respect to NSIRA and its much broader mandate to review all national security agencies, as opposed to just CSIS. The best SIRC or NSIRA 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.

Ultimately, there existed a regime that was almost certainly unconstitutional, that flouted basic standards of criminal and constitutional law, and that applied a warrant-authorizing process from one system (police) to another (CSIS intelligence investigations) that, when transported, was emptied of its most important legal protections. Recognizing the fatal flaws of Bill C-51, the Liberal government made it a plank of their 2015 election campaign to revisit and fix (legally) Bill C-51, starting presumably with the *CSIS Act* and the then-new kinetic powers. The Liberal government did so with Bill C-59, *An Act respecting national security*. The questions then become: What specifically did Bill C-59 offer by way of amendment to the controversial Bill C-51 powers of disruption? And, are these legal fixes

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48 Nesbitt, "Grey Holes," *supra* note 3 at 87.

49 *Ibid* at 90 [footnotes omitted].

50 David Dyzenhaus, "*Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?" (2006) 27:5 Cardozo L Rev 2005 at 2006.

51 *Ibid* at 2038.

52 Nesbitt, "Grey Holes," *supra* note 3 at 90.

53 Bill C-59 enacts the *National Security and Intelligence Review Agency Act* [*NSIRA Act*], which creates NSIRA (Bill C-59, *supra* note 2, cl 2). As set out at sections 8(a)–(c) of the proposed *National Security Review Agency Act*, the new body will have a mandate to "review any activity carried out by [CSIS] or [CSE]," "any activity carried out by a department that relates to national security or intelligence," and "any matter that relates to national security or intelligence that a minister of the Crown refers" to NSIRA. Bill C-59 also transfers all of SIRC's rights and obligations to NSIRA under the transitional provisions of the *NSIRA Act* (Bill C-59, *ibid*).

enough, or do they perhaps amount simply to a grey hole of a slightly different shade? It is to these questions that we now turn.

III. THE LIBERAL GOVERNMENT'S RESPONSE: AN INTRODUCTION TO BILL C-59, CSIS'S STILL-NEW DISRUPTIVE POWERS, AND THE LANGUAGE OF *CHARTER* COMPLIANCE

A. THE BILL C-59 AMENDMENTS TO THE *CSIS ACT*

Bill C-59 was introduced in the House of Commons on 20 June 2017. The bill passed its third and final reading in the House almost one year later, on 19 June 2018, after it was referred to the Committee on Public Safety and National Security on 27 November 2017;[54] it received Royal Assent, passing it into law on 21 June 2019.[55]

Before getting into the specific amendments offered by Bill C-59, it is worth canvassing what Bill C-59 does *not* do with regard to CSIS's kinetic powers — for there was a great deal of controversy and confusion in this regard when Bill C-59 was introduced on first reading in the House of Commons. First, Bill C-59 does not repeal section 12.1(1) of the *CSIS Act*.[56] Significantly, under the new scheme, CSIS retains the ability to "limit" *Charter* rights with warrant authorization. Newly-proposed section 12.1(3.2) states:

> The Service may take measures under subsection (1) [the right to "limit" the law or *Charter*, which was not amended] that would limit a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* only if a judge, on an application made under section 21.1, issues a warrant authorizing the taking of those measures.[57]

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*-"limiting" authority under Bill C-59 as existed under Bill C-51. Those general kinetic powers remain — though, to be fair, their scope has been clarified, as we shall see.

Second, no new independent checks on the warrant process were added to the scheme that did not already exist. The warrant process would continue to take place *ex parte*, in camera, without ultimate oversight or any foreseeable method of judicial review. To be very clear, contrary to several newspaper reports that coincided with the release of Bill C-59,[58] the Bill does not "introduce" independent judicial oversight to the scheme. As we have seen, that (limited) oversight already existed under Bill C-51 in much the same form as it now exists.

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54 "House Government Bill C-59," online: *Parliament of Canada* <parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=9057418>.

55 *Senate Debates*, 42-1, vol 150 No 308 (21 June 2019) at 1430. Not all of Bill C-59 immediately became law as of Royal Assent; some amendments require a further Order-in-Council, basically to ensure that that which needs to be in place after Royal Assent is actually in place before the next (dependent) steps are taken. For more details, see Craig Forcese, "Chain Reaction: Bill C-59's Complicated Coming Into Force Rules" (6 June 2019), online (blog): <intrepidpodcast.com/blog/2019/6/6/chain-reaction-bill-c-59s-complicated-coming-into-force-rules>.

56 *CSIS Act*, *supra* note 4.

57 Bill C-59, *supra* note 2, cl 98.

58 See e.g. Amy Minsky, "Liberal Anti-Terror Bill Could Make It Harder for Spies to Do Their Job: Former CSIS Director," *Global News* (20 June 2017), online: <globalnews.ca/news/3543018/anti-terror-law-national-security-csis-liberals>.

So, with that out of the way, how does Bill C-59's amended regime differ from the previous iteration?

First, to respond to a matter of practical concern that CSIS's disruptive actions would not lead to criminal prosecutions, that they would replace RCMP actions rather than complement them where necessary, Bill C-59 added to section 12.1 of the *CSIS Act* the requirement that, "[b]efore 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."[59] But from a policing perspective — and arguably from a national security perspective writ large — the problem here is that there is no requirement for deference to other options or agencies, even if those alternatives could be proven to be "better" — for example, more likely to lead to criminal prosecutions. In other words, while the idea seems to be that CSIS disruptive activities would be a sort of last resort, whereby RCMP arrest activities would take priority, the language says that CSIS must only "consult," not "defer." 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 have already made the decision to act," or something in between? That will be up to CSIS to decide — hopefully in consultation with other agencies such as the RCMP. 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.[60] The result is continued legal and procedural uncertainty — and likely little in the way of transparency into how the Canadian public is being protected by agencies (CSIS and the RCMP here) that until recently were separated as between the watchers (CSIS) and the actors (police).

Second, Bill C-59 added a new section (3.1) to section 12.1 of the *CSIS Act*, which states: "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."[61] This language

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59 Bill C-59, *supra* note 2, cl 98.

60 CSIS has faced criticism since the Air India Inquiry for failing to share sufficient information with the RCMP (Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *Air India Flight 182: A Canadian Tragedy*, vol 1 (Ottawa: Minister of Public Works and Government Services, 2010) at 136–37 [Air India Inquiry]; Forcese & Roach, *False Security*, *supra* note 3 at 291). The Inquiry took issue with CSIS's failure to support the RCMP's evidence gathering. For instance, before the bombing, the RCMP sought a wiretap authorization on one of the bombing's plotters, using summaries of CSIS's raw intelligence to support the warrant application. The RCMP's warrant application, however, was hampered by CSIS's refusal to share the raw intelligence underlying its summaries (Air India Inquiry, *ibid* at 136 –37). A more recent example arises in the case of the Toronto 18 (*R v Ahmad*, 2009 CanLII 84776 (Ont Sup Ct) [*Ahmad*]). In that case, CSIS located the terrorist training camp used by the Toronto 18 (*Ahmad*, *ibid* at para 43; Forcese & Roach, *False Security*, *supra* note 3 at 293). CSIS, however, did not convey this information to the RCMP, although the police eventually discovered it. CSIS also failed to inform the RCMP when the Service learned that the RCMP was following the wrong suspect or surveilling a house when a suspect had already left (*Ahmad*, *ibid* at para 43). As Forcese and Roach note, CSIS's reluctance to share information stems from the broad disclosure rules in criminal prosecutions after the Supreme Court of Canada's decision in *Stinchcombe* (Forcese & Roach, *False Security*, *ibid* at 291–93; *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*]). Under *Stinchcombe,* the Crown is obligated to disclose "all relevant information" to the accused in a criminal investigation (*Stinchcombe*, *ibid* at 340). Thus, CSIS's secretive sources and methods may be revealed in a criminal prosecution to the extent that the RCMP's investigation relied upon information gathered using CSIS's sources and methods. As a result, CSIS pre-emptively limits the amount of information it shares with the RCMP if the Service is investigating something that may be a crime (Forcese & Roach, *False Security*, *ibid* at 293). Forcese and Roach criticized Bills C-51 and C-59 for failing to improve information sharing between CSIS and the RCMP (Forcese & Roach, *False Security*, *ibid* at 291).

61 Bill C-59, *supra* note 2, cl 98 (adding section 12.1(3.1) to the *CSIS Act*).

is laudatory as a general sentiment. Unfortunately, it seems to provide little substance. Of course the *Charter* is part of the Constitution, the supreme law; and of course all government agencies must comply with it; saying so is merely reiterating the most fundamental law operating at all times in Canada. In the result, the new section (3.1) should be read 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 generally work.

Third, we find some meaningful differences between the two regimes. New section 12.1(3.3) states that the judge may authorize the warrant only if "satisfied that the measures … comply with the *Canadian Charter*."[62] 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). On this understanding, section 12.1(3.3) merely repeats a pre-existing obligation. On the other hand, perhaps section 12.1(3.3) 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 (tautological) 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 legislative provision is tautological in that the proposed action does not become *Charter* compliant until the judicial "authorization," but the judicial authorization cannot take place — as per section 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 section 12.1(3.2) is thereby rendered moot by the terms of its own statute — to say nothing, of course, of the fact that this is not how warrants work, as we saw with respect to the criticism of Bill C-51's "warrant" regime.

There is an alternative interpretation, though it is really just an extension of what would happen if you took seriously the "first hand" proposition, above, that section 12.1(3.3) is a largely redundant marketing tool, which unfortunately looks to be the case. That is, section 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 already reasonable by virtue of a continuing section 1 analysis. But such an interpretation would have its own set of flaws; let us thus examine the argument and its flaws.

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62 *Ibid*.

The aforementioned interpretation of section 12.1(3.3) admits that there is a proposed *Charter* infringement and that it would have to be made *Charter* compliant by a judicial save. CSIS in this case only goes to the judge for judicial authorization of a warrant 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 section 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 of the *Charter*.[63] 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 that have not yet taken place 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. Seen in this light, Bill C-59 simply imports the confused understanding of warrant authorizations and the *Charter* from Bill C-51, though it does so with more circuitous language (and reasoning).

Even if this is incorrect and prospective authorizations are legal, albeit a dubious proposition, there remains a serious problem with the Bill C-59 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? Who would appeal the judicial decision saving the CSIS rights-limiting action? 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, which is to say that section 9 is not at play.[64] So under this interpretation of the legislation, at best we are really only talking about wiretaps or searches and seizures under section 8 of the *Charter*. The section 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, which to be very clear *already* existed

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63 Section 1 of the *Charter* states that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*supra* note 5, s 1).

64 Bill C-59, *supra* note 2, cl 99 (adding section 12.2(1)(3) to the *CSIS Act*).

under the *CSIS Act* prior to either Bills C-51 or C-59.[65] Of course, this interpretation also begs the question why the legislative scheme was explicitly enacted to allow the limitation of any *Charter* right, at least on the ordinary meaning of the Bill C-59 text, but in practice only applies to section 8 of the *Charter* — which, again, is a solution without a problem because such a process already existed under the *CSIS Act*.

There is one further interpretative avenue whereby the government might resolve the above conundrums, though in the circumstances it likely imports its own set of related problems. In any event, the following is probably the government's best bet for upholding the constitutionality of the Bill C-59 CSIS kinetic powers regime. 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's discretion exercised during the warrant authorization process, not specifically prescribed by law. The warrant-authorizing judge did the prescriptive work while, in contrast, 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 in Bill C-59 is to "prescribe" the law to a much greater degree. Amended section 12.2(1) of Bill C-59 thus clarifies with greater certainty and specificity the scope of the proposed disruptive activities: in addition to Bill C-51's original limitations on death or bodily harm, violation of the "sexual integrity of an individual," or obstruction of justice, Bill C-59's new sections 12.2(1)(d)–(f) now also prohibit torture or "cruel, inhuman or degrading treatment or punishment" (d), detention and presumably then rendition (e), and serious property damage "if doing so would endanger the safety of an individual" (f).[66] On the one hand it is very good to make each of these limitations explicit. On the other hand, these additional restrictions remain very broad and surely touch on only the most extreme actions that one might conceive of a state agency undertaking.

But for Bill C-59, extending the explicit scope of the limitations on CSIS's disruptive activities is only one-half of the equation. More importantly, Bill C-59 clarifies, through a closed enumerated list, the types of situations in which CSIS might act, including: altering or disrupting a communication (for example, preventing an email from being sent or changing the content of a website that teaches how to make bombs); altering or destroying equipment (for example, replacing the shipment of bomb-making material with innocuous material); fabricating information; making a financial transaction (so, for example, presumably allowing an undercover CSIS agent to "finance" terrorism in contravention of the *Criminal Code*); interrupting a financial transaction (preventing or interrupting terrorist financing); interfering with a person's movement short of detention (for example, by preventing someone from boarding an airplane); or, finally, impersonating someone (going undercover as a business person for example) to perform any of the above-mentioned

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[65] CSIS may apply for a warrant under the existing *CSIS Act* where, "required to enable the Service to investigate, within or outside Canada, a threat to the security of Canada" or where "required to enable the Service to take measures, within or outside Canada, to reduce a threat to the security of Canada" (see *CSIS Act*, *supra* note 4, ss 21(1), 21.1(1)).

[66] Bill C-59, *supra* note 2, cl 99.

disruptive measures.[67] These amendments speak directly to one of the most important critiques of Bill C-51 levelled by Craig Forcese and Kent Roach, that the new disruptive powers were not sufficiently prescribed by law.[68]

Indeed, taken together, the actions that CSIS can and cannot take in "limitation" of *Charter* rights (or other laws) are thereby tightly prescribed by law in a way that Bill C-51 failed to do. We now have a broader, more explicit list of limitations, coupled with a closed list of types of activities that CSIS might undertake. In other words, we now have a much better sense of what CSIS may and may not do to disrupt activity in limitation of a *Charter* right. Surely, in the result, we also now have a much better — though still general — sense of why CSIS needs the new Bill C-51/59 powers: so that they can cut off terrorist financing, swap out explosive material for innocuous alternatives, or intercept a suicide bomber on the way to his target, and so on. As a corollary, we now also understand why CSIS would need the power to breach the law or limit a *Charter* right to undertake just about any of the tasks, for each one of the enumerated disruptive measures could easily run afoul of Canadian law, including the *Criminal Code* in some situations, and might well limit a *Charter* right, for example by "limiting" free speech, freedom of movement, and so on. Combined then with the expanded list of limitations, we have a much better legal "prescription" and are better able to debate the proportionality and minimal impairment of any action with specific understandings of what CSIS might do and when it might act (including after "consultation" with the RCMP).

Unfortunately, as we work through how these new prescriptions might uphold the Bill C-59 disruptive scheme, we must come back to this rabbit hole of prospective (judicial warrant) authorizations of *Charter* breaches. Bill C-59 offers a list of general types of situations where CSIS can and cannot act. But the scheme still seems to contemplate case-by-case determinations by a judge about whether specific CSIS disruptive activities that fit within the general types are constitutional. In other words, the judge is still making a constitutional determination that otherwise *Charter*-infringing behavior is reasonable — that is, saved under section 1 — in the circumstances.

There is (at least) one response available for the government as I see it. 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 (disrupting finances, and so on). Put another way, the government argument must be that the scheme as a whole has sufficiently prescribed

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[67] Clause 103(1) of Bill C-59 adds section 21(1.1) to the *CSIS Act*, which enumerates seven potential situations when CSIS may receive a warrant to act. These situations include "altering, … disrupting or degrading a communication or means of communication" (section 21(1.1)(a)), "altering, … or interfering with the use or delivery of — any thing" (section 21(1.1)(b)), "fabricating … any information, record or document" (section 21(1.1)(c)), "making … any transaction that involves … currency" (section 21(1.1)(d)), "interrupting … any financial transaction" (section 21(1.1)(e)), "interfering with the movement of any person, excluding the detention of an individual" (section 21(1.1)(f)), and "personating a person, other than a police officer" to carry out one of the enumerated activities (section 21(1.1)(g)) (Bill C-59, *supra* note 2, cl 103).

[68] Forcese & Roach, "Roses and Thorns," *supra* note 2; Forcese & Roach, *False Security*, *supra* note 3 at 262–63.

government action such that all CSIS actions that fall within those prescribed types are *Charter* compliant (saved under section 1). 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 Bill C-59. Presumably the judge would also be reviewing whether the disruptive activities are "reasonable and proportional in the circumstances," requirements laid down by Bill C-59 for a warrant to be authorized.[69]

This is surely the strongest argument for the government, though it will not be uncontentious; at least three very broad 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 on a case-by-case basis. 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; but, the plain wording of the text indicates that such a case-by-case evaluation is indeed needed. Second, the government will 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 (that is, the enumerated measures in section 21.1(1.1)). Once again, the fact that these decisions as they pertain to CSIS activities are generally made behind closed doors without challenge or the likelihood of judicial review will play against the government. Moreover, here we will surely need more information on what precisely CSIS wishes to do — for example to intercept financial transactions — and how its proposed scheme is minimally impairing and proportional to the threat that, as yet, has not been fully articulated before Parliament. Third, the government will need to convince a court to take the next step and issue a broad ruling that *any* action purportedly pursuant to the scheme is *Charter* compliant. That would mean convincing a court that, for example, any CSIS interference with the movement of a person that is short of a detention, and otherwise reasonable and proportional to a perceived threat, is presumptively *Charter* compliant. The alternative is that, even with a ruling that the scheme is generally *Charter* compliant, a case-by-case analysis of *Charter* compliance must nevertheless take place; and, here we again return to the rabbit hole of how such an analysis can take place *ex parte*, in camera, without judicial follow-up, and all pertaining to any *Charter* right (as contrasted with just section 8 protections, for example). One would imagine that any court would be reluctant to issue such a broad ruling given *Charter* rights are at stake.

So the question then becomes whether the government can properly answer the above questions or, in the alternative, whether further amendments might be available to save such a scheme. It is here that this article now turns.

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[69] Bill C-59, *supra* note 2, cl 98.

IV. DID THE GOVERNMENT FILL THE CONSTITUTIONAL (GREY) HOLES?

In contemplating the above assertions that the government will have to put forward to uphold its new Bill C-59 regime, at least three interrelated obstacles carry over from the Bill C-51 scheme, though they admittedly present in a slightly modified manner. These three obstacles are discussed below, along with possible amendments, where relevant, that could have and should have been made to put the legislation on firmer constitutional footing.

A. WHEREFORE ART THOU GOVERNMENT JUSTIFICATIONS?

The first legal problem that any constitutional save of the Bill C-59 disruptive activity regime will have to confront is the continuing absence of proactive government justification for the kinetic activities scheme as a whole. If the above analysis is correct and the best argument — perhaps the only argument — that the government has is that the *CSIS Act*, section 12.1 scheme can be saved as a whole under section 1 of the *Charter*, then the court will have to undertake that *Oakes* analysis that requires it to look at minimal impairment, proportionality, and the reasonableness of the scheme, all of which is difficult to measure without knowing fairly *precisely* why the kinetic powers — and the scope of those powers — are required in the first place.

As already noted, the Bill C-59 scheme is an improvement on its precursor because, at least, it offers a closed, enumerated list of activities that might be undertaken by CSIS in limitation of *Charter* rights. Of course, the Bill C-59 scheme also goes further in explicitly limiting the types of disruptive activities that CSIS might undertake. As we have seen, these two additions are clearly intended to speak directly to concerns expressed over Bill C-51's failure to properly "prescribe" the disruptive authorities regime, and in particular its failure to properly (legally) circumscribe the disruptive activities such that they would pass the proportionality and minimal impairment tests under the *Oakes* analysis of section 1. (In an explicit nod to this intention, it is thus no surprise to see the word "proportionality" inserted into the legislation throughout the new Bill C-59 amendments.)[70]

But in order to get to the analysis of whether the government's goals are necessary, reasonable, minimally impairing, and proportional to the potential *Charter* limitations, surely the government will have to justify the need for the new kinetic powers in the first place. While the C-59 limitations and closed list of "measures" that it might take surely put the scheme on firmer constitutional footing than the Bill C-51 authorities, it is no sure thing. Indeed, when such a broad and in this case unprecedented *Charter*-limiting power is given to a clandestine agency to breach all Canadian laws, including its most fundamental laws, one would hope for, at minimum, a more rigorous debate about the need for the scheme and scope thereof in Parliament.[71] Yet much as with Bill C-51, that debate never much took place

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[70] See, for example, the new sections of the *CSIS Act* that Bill C-59 proposes: sections 12.1(2), 21.1(2)(c), 22.1(1)(b), 22.2, 24.1(1) and of course, as discussed, sections 12.1(3.1) and 12.1(3.2), which explicitly invoke the *Charter* as well (Bill C-59, *supra* note 2, cls 98, 103–106).

[71] As noted above, CSIS officials and the Minister of Public Safety have offered several justifications for introducing the Bill C-51 powers in Parliament (for justifications provided in Parliament and recorded in the Hansard, see Bill C-59 Debates, *supra* note 22; Coulombe Testimony, *supra* note 23). First, the powers were needed to permit the Service to intervene in the "upstream … radicalization process," for

publicly or within the House or Senate.[72] Now this is on Parliament, but the reality is that the failure of Parliament to properly interrogate the broad new powers could ultimately affect CSIS's capacity to act — even if CSIS has justified its need to act off the record (to Parliamentarians).

But let us be more specific as to what precisely the problem is, for the limited debate and public justification is only relevant legally if there remain unanswered questions pertaining to the *Charter*-limiting power. Unfortunately, numerous fundamental questions do remain unanswered about the scheme and what it hopes to accomplish, questions that pertain directly to minimal impairment, overbreadth, and other constitutional hurdles that the government will have to overcome. For example, we are left to wonder why precisely does CSIS, as opposed to the RCMP, need these powers? Even if we can justify these new authorities to limit *Charter* rights, why must these authorities be exercised by CSIS? If disruption was so crucial, why not leave it to the RCMP? There are surely answers to these questions, but it should not have been left to academics to ponder plausible "theoreticals" when Parliament could have asked for specific details over the course of the almost two years (or arguably longer) when Bill C-59 was conceived and debated.[73] In addition, we still do not know specifically why the new CSIS powers must be so extraordinary as to go beyond any such power given to the primary kinetic security agency, the RCMP. Should the RCMP also have these powers? Why must its powers remain more limited? (There is no such scheme to allow for proactive *Charter*-limiting conduct for the police; and, again, the section 8 warrant and wiretap schemes found in the *Criminal Code* are a different animal entirely in that section

example, by informing parents that their children were turning to terrorism (Senate, Standing Senate Committee on National Security and Defence, *Evidence*, 41-2, No 15 (30 March 2015) (Hon Steven Blaney) [Senate Evidence No 15]). Second, the disruptive powers were needed to enable CSIS to respond to rapidly emerging threats (presumably when there was not enough time to call the RCMP) (Senate Evidence No 15, *ibid*). Lastly, more recently the Service has stated that it needed the powers because other intelligence agencies in democratic countries also had similar authority (*Green Paper*, *supra* note 23). Blaney, speaking as the Minister of Public Safety at the time Bill C-51 was introduced, explained that CSIS's new threat disruption powers also needed to be paired with an authority to break the law in the same way that section 25(1) of the *Criminal Code* authorizes peace officers to commit some unlawful acts in carrying out their duties (Senate Evidence No 15, *ibid*). The Department of Justice also issued a statement, which was tabled in Parliament at the time of Bill C-59's first reading, addressing the question of whether CSIS's threat disruption powers were *Charter* compliant (Department of Justice, "Charter Statement - Bill C-59: *An Act respecting national security matters*" (Ottawa: DOJ, 2017), online: <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/ns-sn.html>). In the statement, the Department of Justice did not state the rationale for CSIS having the threat disruptions powers, although it did state that the law-breaking authority that came with these powers was justifiable under section 1 of the *Charter* as this authority was analogous to section 25(1) of the *Criminal Code*, which only authorizes the breach of laws, not the *Charter*, and in any event presupposes that the execution of the laws as between the RCMP, whose activities will be tested before court, and CSIS, whose activities will not, are the same (which they are not, as already discussed). Representatives of CSIS appeared at both the 13 February and 23 April 2018 meetings of the House of Commons' Standing Committee on Public Safety and National Security (SECU), though in both cases were asked very general questions that demanded little more than short, general responses. See House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 97 (13 February 2018) at 12:15 (Merydee Duthie, Special Advisor, CSIS, and Tricia Geddes, Assistant Director, Policy and Strategic Partnerships, CSIS). See also House of Commons, Standing Committee on Public Safety and National Security, *Evidence*, 42-1, No 106 (23 April 2018) at 17:25 (Cherie Henderson, Director General, Policy and Foreign Relations, CSIS).

72 *Ibid*.

73 Even the CCLA has acquiesced to the possibility that the government might indeed need such kinetic powers; again, that does not seem to be the central question. Rather, the question is why the public debate has been so muted and the public (governmental) justifications so few and far between (and limited in detail). See "Ten Things You Need to Know About Bill C-59" (12 September 2017), online (blog): *Canadian Civil Liberties Association* <ccla.org/ten-things-need-know-bill-c-59>.

8, as already discussed, operates only to protect against "unreasonable" search and seizures.)[74]

Further, as already noted, the Bill C-59 scheme authorizes the limitation of seemingly any *Charter* right. Why then would CSIS need the power to limit the right to vote, as expressed under section 3 of the *Charter*? Why would it need the right to limit "life, liberty and the security of the person" as interpreted by section 7 *Charter* jurisprudence,[75] particularly given the explicit limitations on not causing bodily harm? Surely a breach of the criminal-procedural rights found in sections 10 and 11 of the *Charter* would be incompatible with CSIS activities. For example, it cannot be the case that CSIS has the right to limit the right to be informed of the reasons for your arrest (section 10(a)), your right to counsel (section 10(b)), and then limit one's ability to be tried within a reasonable time (section 11(b)).[76] Yet the Bill C-59 scheme as worded would seem to contemplate just such authorities — it offers the authority to limit *any Charter* right, or breach *any* law, subject only to limitations pertaining to the *reasons* behind when and why CSIS might act to limit such rights. If the intention is to grant CSIS such wide-ranging authority, then there is absolutely a need for extensive public debate on these powers — and there should be a good deal of concern about these new powers.

If on the other hand, as I suspect, CSIS has no intention of limiting these aforementioned rights and the government has no intention to grant such a power, then how can the grant of power be minimally impairing or avoid a challenge for overbreadth?[77] The test for minimal impairment asks whether among the reasonable alternatives available, there is no less rights-impairing means of achieving a law's objective in a real and substantial manner.[78] If CSIS never wanted to rely on these powers to limit the aforementioned rights, then there is a less rights-impairing means available — the scheme could have been drafted to exclude those *Charter* rights that CSIS never sought to breach. Surely, this is a reasonable and less rights-impairing alternative. The Supreme Court has further characterized minimally impairing laws as "carefully tailored" to their objective, keeping in mind practical difficulties.[79] But it is difficult to conceive how the Bill is carefully tailored when it grants authority well beyond what CSIS desires or intends to do. By definition, it is also overbroad, since the grant of authority to breach *Charter* rights goes well beyond what is justifiable, and surely theoretically interferes with conduct that CSIS believes is unconnected to its objective. Indeed, that the scheme theoretically allowed for activity far beyond what even CSIS might be interested in doing was the primary concern of Roach and Forcese with regard to the

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74 For a robust discussion of this difference between section 8 of the *Charter* and its usual operation before courts and with respect to the police, and the *CSIS Act* pre-authorization regime in section 12.1, see Nesbitt, "Grey Holes," *supra* note 3 at 88–94.

75 *Charter*, *supra* note 5, s 7.

76 *Charter*, *ibid*, ss 10–11.

77 The Supreme Court held in *Canada (Attorney General) v Bedford* that a law is overbroad if the law "interferes with some conduct that bears no connection to its objective" (2013 SCC 72 at para 101). See also *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at para 135; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 129–30, 232. A law that is overbroad may also fail to be justified under section 1 of the *Charter*, the reason being that the same aspect of the law making it overbroad also makes it impermissibly vague and therefore, it does not impose a limit prescribed by law, which is a prerequisite for justification under section 1 of the *Charter* (*Nova Scotia Pharmaceutical*, *supra* note 34 at 626–27).

78 The Supreme Court affirmed this test for minimal impairment in *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 102, citing *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 53, 55.

79 *R v Sharpe*, 2001 SCC 2 at paras 95–96.

original Bill C-51; the current scheme, while surely better, would nevertheless still seem to suffer from the same sort of flaws, and must be called to account in the same manner.

Indeed, the best bet is that more information to answer the above questions will have to be provided by the government in court during a constitutional challenge to properly save the regime. That is not to say that the scheme cannot be saved, simply that it is impossible to do a proper section 1 analysis as it stands — thus explaining the resort, herein, to speculation about what questions will need firm answers to ensure the scheme is minimally impairing, proportional to its objective, not overbroad, and so on.

But even assuming that the government can effectively answer the above questions, it appears that if the scheme is to be saved by the courts, then the legislation will also almost certainly have to be interpreted — indeed read down — such as to seriously constrain CSIS's grant of authority much beyond what is currently on the books. At a most basic level, any such judicial reading-down will have to address the fact that the Bill C-59 *CSIS Act* amendments maintain that any *Charter* right might be limited, while in practice, as we have seen, surely not any *Charter* right should be limited (for example, the right to vote). Now, Canadian courts have a history of reading-down or reading-in requirements in the area of national security law so as to save sloppy drafting from pernicious overbreadth,[80] so one should not bet against such an outcome, though it is also true that Bill C-59 would seem to require a fairly hefty rereading of the plain language of the Bill.

Nevertheless, in the end, the government may well have the arguments available to save the kinetic powers scheme under section 1 scrutiny, particularly if the courts take the view — as happened in Canada's first terrorism prosecution, *R. v. Khawaja*[81] — that it is better to "read down" and reinterpret wording to make a needed scheme constitutional than to render it unconstitutional and subject, once more, to the vicissitudes of the Parliamentary process. But the least that can be said is that the process, while also an improvement from the rushed tabling of Bill C-51, has thus far remained far from ideal — as evidenced by the fact that a proper or even speculative section 1 legal analysis is nearly impossible to conduct at this time. Requiring the government to robustly articulate the *reasons* for new governmental powers and to properly and publicly then debate them is the gold standard for what courts and the general public should expect from our Parliamentary hearings. It is an

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[80] For a review of several examples of this practice, see Michael Nesbitt, "An Empirical Study of Terrorism Prosecutions in Canada: Elucidating the Elements of the Offences" 57:3 Alta L Rev [forthcoming in 2020] [Nesbitt, "Terrorism Prosecutions"]. As noted there, the Supreme Court in *R v Khawaja* narrowed the scope of section 83.18(1) of the *Criminal Code*, *supra* note 11, which states, "Every one who knowingly participates in or contributes to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity" is guilty of an offence (2012 SCC 19 [*Khawaja* SCC]). Read literally, section 83.18(1) captures persons providing nominal help to a terrorist group (say, for example, someone who attends a public event organized by the charitable arm of a terrorist group) (Nesbitt, "Terrorism Prosecutions," *ibid*; *Khawaja* SCC, *ibid* at para 42). To avoid potential overbreadth and a breach of section 7 of the *Charter*, the Supreme Court in *Khawaja* read into section 83.18(1) a *de minimis* requirement, which required that the accused's acts were "capable of materially enhancing the abilities" of a terrorist group to commit terrorist activity (Nesbitt, "Terrorism Prosecutions, *ibid*; *Khawaja* SCC, *ibid* at para 51). A similar example is the definition of "terrorist activity" at section 83.01 of the *Criminal Code*. In *Khawaja* SCC, the Supreme Court interpreted the definition to encompass (mostly) violent activity, which meant the definition would almost always capture activity outside the protection of section 2(b) of the *Charter* (Nesbitt, "Terrorism Prosecutions," *ibid*; *Khawaja* SCC, *ibid* at para 71).

[81] *Khawaja* SCC, *ibid*.

unfortunate reality that we must count on court challenges to know the details of the government's justification for important new legislative amendments that have serious implications on civil liberties, and it is a shame that courts are called upon either to tacitly support the process by allowing it to continue, or are put in the unenviable position of overturning legislation that might well be justified as a reasonable limit in a free and democratic society, if only the government had offered its justifications publicly, while debating the Bill, rather than waiting for civil liberty court challenges.

In any event, before even getting to how and whether the government might save the new scheme under section 1 of the *Charter,* one might ask how such a challenge would ever arrive before the courts? Put another way, even a section 1 court challenge would seem speculative at this point — let alone the outcome or what the arguments might be — because it is very hard to see how the legislation, as drafted, would be properly challenged. It is to this question that this article now turns.

B. HOW DOES ONE CHALLENGE THE CONSTITUTIONALITY OF THE SCHEME UNDER SECTION 1 OF THE *CHARTER?*

The Bill C-59 disruptive scheme is prima facie unconstitutional in that it contemplates the explicit power to limit *Charter* rights in violation of the Constitution; as such, it will have to be judicially saved under section 1, as has just been discussed. But the government can only argue that the scheme can be saved if the disruptive scheme is first somehow properly challenged. But how would the scheme as constructed ever be properly challenged and subsequently upheld (or overturned)?

As the legislation stands, both judicial review and an adversarial process are non-existent in the scheme, the warrant authorization process takes place in secret, and the process is unlikely to lead to an arrest and corresponding challenge — a dynamic also seen in the Bill C-51 context. As a result, the best that can be hoped for is a judge, with only CSIS agents and government lawyers present, determining that the new scheme is either constitutional or not without ever having that scheme challenged in regular courts, without ever undergoing an adversarial challenge, and without ever being ruled upon by a higher court — indeed, by a court at all (recall that the warrant is authorized by a judge in his or her judicial capacity, but this is not a court case per se). As any law student is aware, this is not how constitutional challenges function: the process of challenging legislation that purports to offer government actors authority to breach any law or limit any *Charter* right must at least be adversarial, one would think. So the first problem with the Bill C-59 disruptive activities regime is really that a proper constitutional challenge to its novel structure can never take place, or so it seems.

Fortunately, there are three potential solutions; unfortunately, none of them are ideal, and the first two, as we shall see, are somewhat less than that. The first two fixes — each suffering from the same or similar flaws — are as follows. First, the government may send the legislation to the Supreme Court on a "reference" for an "advisory opinion," that being a governmental request for the Supreme Court to opine on the legality of the scheme before

it is ever used.[82] Second, the government may be counting on a public interest challenge to the legislation.[83] In both cases, the reality of the challenge function, such as it exists in these contexts, would mean that the appellate courts — and those tasked with the challenge function at the court hearings — would be operating in the absence of a real-life factual matrix associated with a warrant authorization. In the case of an advisory opinion, this result flows naturally from the government sending the scheme, without a case, to the Supreme Court for its opinion — a situation Carissima Mathen has called "[c]ourts without cases."[84] In the case of a public interest challenge, the result would flow from the fact that the challenge would either be to the scheme without a warranted activity case — for it is hard to see how a public interest challenger would become aware of such a case and challenge it specifically — or, if the challenge arose out of an actual warrant proceeding, because neither the appellate courts nor the public interest challenger would likely have security clearance to see much of the warranted information. Moreover, given the lack of access that appellate courts and public interest litigants generally have to the very type of secret material likely implicated in CSIS warrants — information generally protected by section 38 of the *Canada Evidence Act*[85] — a public interest challenge would also likely result in a disclosure quagmire whereby the challenging party would not have been privy to virtually any of the details upon which the warrant was authorized.[86]

In the result, the judicial save of the disruptive regime would be adjudicated by way of generalities and hypotheticals rather than specific facts and activities. If the answer to the question, *how does one ever challenge unprecedented legislation that gives a secretive government agency authority to limit any Charter rights?* is that the government hopes a public interest group or the Supreme Court steps in to help without the relevant facts, and in a context where limited justification has been offered for the scheme at any stage, then this is a poor answer indeed. Hoping that someone else (a public interest organization or the Supreme Court) will save a scheme that does not have an explicit avenue for challenge is not the way to operate in a free and democratic society. Nor is it consistent with the spirit of the rule of law, which depends on constitutional review of rights-limiting government actions. Particularly given the broad (and unprecedented) scope of the *Charter*-limiting powers conferred upon CSIS, it is better for the issue to be decided in light of some real-life factual matrix, which would help the court hearing the challenge develop a more nuanced view of the issues at stake. In particular, it would help ensure that judges are interpreting the disruptive authorities in a nuanced way that is sensitive to both the *Charter* and national security issues at play.

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82 For the most comprehensive review of reference or advisory opinions, see Carissima Mathen, *Courts without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019).

83 For a very interesting collection of essays on public interest litigation, including standing and practice before the Supreme Court of Canada, see Cheryl Milne & Kent Roach, eds, *Public Interest Litigation in Canada* (Toronto: LexisNexis Canada, 2019).

84 Mathen, *supra* note 82.

85 RSC 1985, c C-5.

86 See West, *supra* note 11; Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182, *The Unique Challenges of Terrorism Prosecutions: Towards a Workable Relation between Intelligence and Evidence*, by Kent Roach, vol 4 (Ottawa: Minister of Public Works and Government Services, 2010); Craig Forcese, "Threading the Needle: Structural Reform & Canada's Intelligence-to-Evidence Dilemma" (2018) University of Ottawa Faculty of Law Working Paper No 2018–19, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id= 3214750>.

Even if this analysis is incorrect and either a public interest challenge or advisory opinion is deemed the appropriate route to saving the Bill C-59 disruptive activities scheme, this is only a partial answer at best. Either of these solutions only speaks to the constitutionality of the scheme as a whole, not to the legality of any specific disruptive activity, and in the context, this too creates a controversy. To see why, return for a moment to the government's necessary argument at this stage, that once the scheme is saved under section 1 — however that is achieved — the process begins to look much more like the police warrant context, whereby the government activity is simply authorized by a judge and there is no need for a further challenge or oversight function. As such, once the scheme as a whole is saved, there is no need for a system more robust than that proffered by Bill C-59.

But recall also that the analogy to the police warrant context has never been a good one, and neither is it fair at this stage of the analysis. The police context does not contemplate the authority to limit any *Charter* right, it only offers protections that proposed searches and seizures are reasonable, or that proposed detentions (arrests) are not arbitrary. Sections 8 and 9 of the *Charter* are fundamentally different than the other *Charter* sections implicated in the Bill C-59 regime in that the former were always qualified (reasonable, non-arbitrary) rights. So unlike the Bill C-59 scheme, the police context is not authorizing activities that might be saved by section 1, it is authorizing activities only where the judge concurs with the police that there are no *Charter* infringements (because the proposed activities are reasonable or non-arbitrary). If that is wrong, that is, if the police conduct does amount to a *Charter* infringement, then that decision can be challenged upon arrest and the warrant thrown out. Moreover, as compared to the police context, the Bill C-59 scheme contemplates the authorization of a much broader range of *Charter*-limiting activities with a much broader range of *Charter* rights implicated, meaning regardless of how one conceives of these rights relative to one another, the Bill C-59 scheme offers a greater danger in government overstep vis-à-vis the *Charter*. Finally, the regular police warrant context provides greater certainty with respect to the types of activities that might be authorized by a warrant-issuing judge: searches and seizures, for example, are understood to be executed in a variety of ways that police might search or seize something; by contrast, the Bill C-59 scheme authorizes broad types of varied *Charter*-limiting "measures" — interrupting a financial transaction, for example — but does little to speak, even by implication, to how those activities are carried out. The contrast is slight, but non-negligible: we know that an authorized search will, in general, be executed by way of a search by the RCMP (or even CSIS), so we can also understand the attendant risks; but we have no idea how CSIS proposes to interfere with the movement of a person, or to destroy records, meaning that the proposed activities and their civil liberties implications is far greater in the Bill C-59 scheme.

The clear implication is that even if the Bill C-59 scheme is saved after a public interest challenge under section 1 of the *Charter*, this should not mean that any proposed disruptive activity will necessarily be saved; in the context of the Bill C-59 scheme, that is self-evidently a determination to be made on a case-by-case basis. This conclusion follows from the fact that, as compared to the police context, the types of activities contemplated by Bill C-59's scheme are more varied and less certain, the *Charter* rights implicated are much broader, and each proposed activity in the disruption context would amount to a *Charter* limitation in a way that is not true in the police search and seizure context. So, it follows that

each proposed "*Charter* breach" should be subject to its own rigorous case-by-case *Charter* challenge function. Put simply, with great(er) power comes great(er) responsibility.

Yet, as we have returned to time and again, the opposite still holds true under Bill C-59: in the context of the CSIS disruptive activities scheme, the opportunity to challenge the warrant authorization, to review the actual activities of the Service to ensure compliance with the warrant, or even to appeal a warrant authorization are actually greatly diminished as compared to the police warrant context. So we are left with a situation that demands heightened challenge and oversight and that provides, relatively speaking, very little. At the same time, we must acknowledge that CSIS cannot operate in a system that requires both complete covert activity to ensure the effectiveness of its operations and simultaneously the alerting of a defence lawyer of each disruptive warrant application. As such, it is hard to see how the scheme could function if the whole thing was opened to adversarial challenge by a defence lawyer, or conducted in open court.

Fortunately, there is one remaining solution that resolves both of the aforementioned concerns regarding the lack of challenge functions in the disruptive regime; that is, there is a solution that would both allow for a proper adversarial challenge to the Bill C-59 scheme as a whole *and* an assurance that case-by-case authorizations can be challenged in a contextually appropriate adversarial proceeding. This solution would also address, at least in part, CSIS's presumed concern with disclosure of warrant applications to defence counsel (and thus to the targets). That is, the court will have to appoint an amicus curiae to perform that challenge function to the scheme and the individual authorizations. Better yet, the Bill C-59 scheme should have provided for special advocate intervention in lieu of the robust challenge function that exists in open-court proceedings.

In Canada, amici and their cousin "special advocates," are already used in several types of hearings involving sensitive intelligence. Amici are security-cleared legal counsel, usually working in private practice, who advance the interests of unrepresented parties at closed Federal Court hearings (that is, hearings where the party's attendance is forbidden and where the Federal Court judge is also specially cleared to hear the sensitive information — just like a warrant-authorizing judge under the Bill C-59 scheme). They are appointed by the court, and their task is to help the court — the name amici refers to "friend of the court." Special advocates are similar, but tend to be inserted through legislation into the court process and tasked specifically with assisting the non-government party; as a result, their connection to the defendant, for example, and duty to represent his or her interest is arguably greater. In either case, counsel would both have the clearance to see protected materials (and thus overcome the "disclosure quagmire," discussed above) and the experience needed to challenge CSIS in a fair and informed way.

Special advocates were first added to national security proceedings in Canada via the closed security certificate hearings under the *Immigration and Refugee Protection Act*[87] — an addition to the legislation that was made after the Supreme Court in *Charkaoui v. Canada (Citizenship and Immigration)* ruled the amici-less process at the time was unconstitutional,

[87] SC 2001, c 27 [*IRPA*].

as judges were unable to ensure the fairness of the *ex parte* and in camera hearings.[88] In security certificate hearings, these special advocates challenge both the government's decision to withhold secret evidence from the person named in the certificate, and any secret evidence presented to the reviewing judge.[89]

Similarly, to ensure the right to a fair hearing, though not in the legislation, amici are regularly appointed by judges to assist the court in the *ex parte* and in camera proceedings under secret disclosure proceedings at the Federal Court, as conducted under section 38 of the *Canada Evidence Act*.[90] Like security certificate hearings, these hearings involve secret information the government wishes to withhold from a party whose rights and interests are the subject of a judicial proceeding. In 2007, Justice Lutfy of the Federal Court observed that while section 38 does not mandate the use of amici, they could help ensure the hearings comply with constitutional requirements of fairness.[91] Amici are now routinely appointed during section 38 hearings and tasked with challenging the government's application to withhold the secret information, though the legislation has not been updated to reflect practice.[92]

Lastly, in 2017, the Liberal government passed the *Journalistic Sources Protection Act* — around the same time that Bill C-59 was introduced.[93] The *JSPA* requires that a judge appoint a special advocate whenever police seek a warrant authorization to access information obtained from a journalistic source. The special advocate must speak to the interests of the freedom of the press, whether the police have demonstrated that there is no reasonable alternative to obtain the source information, and whether the public interest outweighs a journalist's right to privacy.[94] Put another way, the special advocate scheme was offered under the *JSPA* to address, in general, the very sorts of questions and concerns that would seem to present themselves in the context of CSIS disruptive activity warrant proceedings.

In each of the three preceding examples, amici or special advocates offer a mechanism to reconcile the competing interests in the secret hearings, balancing the government's need to protect sensitive information against the need to protect the rights and interests of unrepresented parties. In other words, they are a tested and well-worn method of responding to many of the concerns that we are seeing with respect to the Bill C-59 scheme. The failure

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88 2007 SCC 9. Security certificates authorize the government to detain and deport foreign nationals and non-citizens residing in Canada who pose a threat to national security. Security certificates are issued following a hearing before the Federal Court; the person named in the certificate is not privy to the secret evidence on which the certificate issued, nor given an opportunity to directly challenge the secret evidence. See *IRPA*, *ibid*, ss 77–80; "Security Certificates," online: <www.public safety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx>.

89 Kent Roach, "*Charkaoui* and Bill C-3: Some Implications for Anti-Terrorism Policy and Dialogue between Courts and Legislatures" (2008) 42 SCLR 281 at 314–15.

90 Section 38 of the *Canada Evidence Act* enables CSIS to bring an application in the Federal Court to limit disclosure of sensitive information during any criminal proceeding before a superior court (*supra* note 85). Since the outcome of a section 38 hearing may prevent an accused in a criminal trial from hearing some of the evidence relevant to his case, the scheme was subject to and upheld after a *Charter* challenge under section 7 in *Canada (Attorney General) v Khawaja (FC)*, 2007 FC 463 [*Khawaja* FC].

91 Chief Justice Lutfy stated the amicus curiae process, provided under section 38, "further assures adherence to the principles of fundamental justice" as required under section 7 of the *Charter* (*Khawaja* FC, *ibid* at para 57).

92 West, *supra* note 11 at 95, citing *Huang v Canada (AG)*, 2017 FC 662 at para 48.

93 SC 2017, c 22 [*JSPA*].

94 *Ibid*, s 3.

to provide for special advocates in the secret hearings authorizing CSIS to breach the *Charter* is thus puzzling, since those proceedings share features with the three types noted here. Like security certificate and section 38 hearings, they are *ex parte* and in camera hearings, where a government agency is intent on maintaining both the secrecy of the proceedings and the information relied on in the proceedings. Moreover, the outcome of all of these hearings threatens the rights and interests of unrepresented parties.

The flawed analogy to the *Criminal Code*'s general warrant application scheme best explains the failure to include special advocates in CSIS's applications to breach the *Charter*. In attempting to replicate the features of a typical warrant authorization in Bill C-51's scheme, the Liberal government overlooked the secrecy that cloaks all aspects of the scheme; the omission was repeated in Bill C-59 when that scheme attempted to renovate the Bill C-51 scheme, rather than build anew from the ground up. As in the contexts noted above, ensuring the fairness of such a secretive process will require a departure from the typical procedures governing a warrant application. Unfortunately, the government has not yet seen fit to so add special advocates. This is a significant oversight, because it is difficult to determine how the disruptive scheme and the isolated CSIS activities can be properly challenged, and thus properly upheld, without such assistance. Once again, the court will likely have to "read in" the requirement of amici, even as it apparently reads down the scope of the Bill C-59 scheme. This is less than ideal, first, because it requires the judiciary to essentially legislate where Parliament should have done so and, second, because statutorily mandated special advocates provide assistance to those with a case to meet, while amici are "friends of the court" and thus have a theoretically more tenuous connection to the individual whose rights have been limited. Put another way, an amicus acts to help the court, which often but not always means advocating on behalf of the individual implicated in the process, whereas a special advocates program could have ensured an individual was there to perform a proper and more full-throated adversarial role. In the result, at minimum Bill C-59 should now be amended to include a special advocate scheme; but given that such an amendment is unlikely, as it was not included in the recently passed *National Security Act, 2017*,[95] the Federal Court must surely have to resort to its practice of appointing amici to compensate for incomplete legislation.

But even with the introduction of amici to the process, we still have a subsequent problem that results from a major difference between the CSIS context and the police context. That is, we have already noted that what is warranted and what actually takes place often diverges in police practice; what then is in place to ensure that the actual practice of CSIS resembles the proposed (warranted) disruptive activity? It is to this final question that we now turn.

C. HOW DOES ONE REVIEW ACTUAL CSIS ACTIVITY AND ITS CONSISTENCY WITH THE WARRANTED ACTIVITY?

Police generally seek warrant authorizations such that they can investigate and make arrests for criminal activity. The basis of those warrants will then be challenged by defence counsel, where necessary, in open court before a judge. The CSIS warrant process found in Bill C-59 diverges significantly from that process in ways that matter a great deal in law.

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[95] SC 2019, c 13.

Let us examine that claim, and how it might affect the opportunity to review CSIS disruption warrants, by way of example. In the police warrant context, the well-known *R. v. Collins* test sets out the standard by which police warrants will be reviewed (in the much more limited search and seizure context).[96] It asks the following: (1) is the search authorized by law?; (2) is the law reasonable? (this is where the general save of the scheme would be relevant in the context of Bill C-59); and (3) is the authorized search *carried out in a reasonable fashion*?[97] Now, the *Collins* test does not necessarily apply to CSIS warrants, but that is not the point. Rather, the point is that the final step of the *Collins* test plays an important role in justifying the warrant authorization process that otherwise takes place in secret and outside the adversarial process. Fundamentally, the police context is upheld, in part, because in that context a judge will eventually review the authorization of the warrant and whether it was valid, as well as the subsequent activities of the police and whether they corresponded to the authorized activity. Under the Bill C-59 disruptive activities scheme there is no concomitant to step three of the *Collins* test; there is no way to ever determine, or even examine, how the *Charter*-limiting activity was actually carried out. Once the warrant is authorized under the Bill C-59 scheme, there is no necessary return to the judge to review the activities of CSIS, the fit with the warrant as authorized, and so on.

The concern here is not merely theoretical. For example, there is a fairly regular divergence in criminal law between the specific terms of a warrant and precisely how the warrant is carried out. Likewise, there have certainly been examples in the past where CSIS too has had problems as between what was authorized by the court and what was actually done.[98]

Now, part of the solution here is an amicus or special advocate that would help hold CSIS to account and perform a challenge function. But also required is review of CSIS activity subsequent to the warrant authorization — in order to confirm consistency between that authorization and actual activities. One possible solution already exists to fill this latter void: it appears to be the consistent practice of CSIS to now bring questions regarding warrants or follow-up to the Federal court. Or perhaps another solution would be for the Federal Court justices to request that CSIS return after a warrant has been executed.[99] But this practice has not always been followed.[100] More to the point, goodwill as generally, though not always, evidenced through practice is no substitute for a legal requirement that CSIS return to the

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96 [1987] 1 SCR 265 [*Collins*].

97 *Ibid* at 278.

98 See e.g. ODAC Decision, *supra* note 47. As Craig Forcese has said:

> And now we get to the fireworks in this case: the duty of candour issue … among the other astonishing issues: the government lawyers apparently took the view that they did not need to tell the court how data collected under court warrant was being used, because the court did not have supervisory authority. This is a gobsmacking position, which basically confirms experience with other cases … once the warrant walks out the door, the government does as it wills with it.

(Craig Forcese, "CSIS and the Metadata Muddle Pt 2: On Secret Law, Courts and the Rule of Law" (7 November 2016), online (blog): *National Security Law* <craigforcese.squarespace.com/national-security-law-blog/2016/11/7/csis-and-the-metadata-muddle-pt-2-on-secret-law-courts-and-t.html>).

99 See e.g. *X (Re)*, 2017 FC 1047. In this case, the question to be decided was "whether the activity in which CSIS engaged to obtain such information from the mobile devices of a known subject of investigation…was in fact unlawful" (*ibid* at para 2). There is no way to explain, in this instance, how this case ever came back to the Federal Court unless by request for follow-up from the court or CSIS taking initiative to make the court aware of its subsequent activities — and striving to ensure that they were lawful.

100 See generally *X (Re)*, 2013 FC 1275 [*X (Re)* 2013]; *X (Re)*, 2014 FCA 249.

warrant-authorizing Federal Court judge and disclose precisely what it did, why, and how it complied with the warrant. And there is no such legal requirement in the Bill C-59 regime. As such, whether or not a disruptive activities warrant is ever reviewed remains at the discretion of the agency whose conduct is the source of the dilemma in the first place. This is no way to form a legal regime: laws, perhaps none more so than in the area of national security, should not presume the best instincts of government actors, but rather protect against their theoretical worst impulses.[101] As the old adage goes, "trust, but double check." We can trust that CSIS will volunteer updated information about the execution of its judicially authorized warrants. But the Federal Court must act as the system of "double checking." And just as with the appointment of special advocates, it is better that the law itself is explicit and clear in this regard rather than reliant on the court to invent a procedure to compensate for a fairly clear legal void; put another way, the law must *mandate* the double check. The special advocate would then act, as is his or her adversarial duty, to ensure that the methods and rights "limited" as contemplated by the warrant were consistent with the actual activities of the Service.

CSIS does have a potential response to the above analysis. That is, Bill C-59 laudably provides for more extensive review of CSIS's warranted disruptive activities: 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.[102] In particular, the amended *CSIS Act* states that: "The Service shall, after taking measures under subsection (1), notify the Review Committee of the measures as soon as the circumstances permit."[103] Moreover, the Bill adds section 40.1 to the *CSIS Act*, which states:

> If the Review Committee is of the opinion that the Service may not be carrying out, or may not have carried out, its activities in accordance with this Act and the regulations, the Review Committee shall submit a written report to the Minister on those activities. The Review Committee shall provide the Director with a copy of its report.[104]

But three problems emerge from this response. First, it again trusts CSIS to bring the activities to the attention of the reviewer, which might function in practice, for now, but is not the way legal checks and balances should work, particularly when citizens' most fundamental rights are implicated. Second, there is no adversarial element to the review — NSIRA will act as judge and defence counsel and will have only the power to issue subsequent recommendations. Third, 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; given that NSIRA will have the capacity to review activities across government and within various different departments, there is serious concern as to whether it can keep pace with all of the dealings of CSIS. In the end, this reporting and NSIRA review is a big step in the right direction, though given the scope of the activities and rights implicated, it is no substitute for what

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101 As Justice Mosley said in *X (Re) 2013*, it was CSIS's "deliberate decision to keep the Court in the dark about the scope and extent of the … collection efforts that would flow from the Court's issuance of a warrant" (*ibid* at para 117).

102 Bill C-59, *supra* note 2, cl 98.

103 *Ibid* (adding section 12(3.5) to the *CSIS Act*).

104 *Ibid*, cl 109.

exists in the police warrant context — the very context to which CSIS and the government has analogized the disruptive regime in order to support its legality.[105]

V. CONCLUSIONS

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 "limitation" of the *Charter*. It would still require CSIS to obtain a judicial warrant before engaging in any kinetic activities that purport to limit *Charter* rights, though in this regard no changes to the Bill C-51 scheme are offered. Put another way, the scope of judicial oversight under Bill C-59 is as limited as it was under Bill C-51.

Assuming *ad arguendo* that CSIS does indeed need these new kinetic powers, the service 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, given that so many of the proposed "measures" to disrupt terrorism can also clearly be seen to touch on rights related to speech, mobility, and so on. On the other hand, finding a way to prospectively allow for *Charter* violations in the context of CSIS's needs is, as we have seen, difficult indeed.

There is thus a serious legal and policy dilemma here. Bill C-59 undoubtedly improves on the Bill C-51 regime in moving towards a solution that is workable from both a national security and constitutional perspective. But there was also a better way forward, a more robust legislative scheme available that, with relatively minor modifications, could put the CSIS threat reduction scheme on firmer constitutional footing.

At minimum, the following steps should be taken to further amend the Bill C-59 disruptive activities warrant regime. First, public justification for the special powers given to CSIS by this scheme, including a recognition of just how unique these authorities are and why they differ from those given to police, is desperately needed. This is on the government to offer, and at minimum will be on the government to provide during the inevitable constitutional challenge to the disruptive activities regime (however that challenge comes about). Of course, the lack of robust debate in Parliament, including during Committee hearings, is a pernicious commonality to national security debates; while the Bill C-59 process was an improvement of that under Bill C-51 by leaps and bounds, Canadians should still expect more in the future, even if that hope seems far-fetched at this point in time. (The process took long enough in any event, mostly with the legislation sitting idly in the House and Senate, that it is hard to argue that some well-placed interrogation of newly proposed powers would add unduly to any government's capacity to pass timely national security legislation; the problem, it would seem, resides elsewhere.) Second, special advocates should be inserted into the process in order to ensure that it is properly adversarial given the rights at stake. If CSIS is to violate non-section 8 *Charter* rights in particular, and if its actions are unlikely to be challenged during subsequent criminal proceedings, then the proper balancing

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[105] See note 71 above, which offers instances where the government has specifically used the police powers context (and section 25.1 of the *Criminal Code*) as the analog for *legally* justifying the Bill C-59 disruptive scheme.

cannot take place outside the adversarial process. Nor should it. The addition of special advocates would also help to ensure that the scheme, and the individual measures, are properly legally analyzed for *Charter* compliance, in a manner that is absolutely necessary given the prima facie *Charter* incompatibility of the scheme. Third and finally, 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. That is a requirement that Federal Court judges can, and have, instituted; but, again, it is better to have such requirements firmly placed in the legislation itself. As it stands, the complete lack of formal 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; whether legislative amendment (the ideal) corrects this oversight or the judiciary must again step in to cure the oversight, we should expect to see a legal procedure that looks not entirely like that contemplated by Bill C-59.

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