

**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**

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This is the second of a series of independent "backgrounder" documents that we are authoring on Bill C-51, the Anti-terrorism Act 2015. Here, we focus on the new powers the bill proposes granting the Canadian Security Intelligence Service (CSIS).

**Summary of Key Concerns**

If bill C-51 passes, CSIS will be expressly authorized to "take measures, within or outside Canada, to reduce" very broadly defined "threats to the security of Canada". Where authorized by Federal Court warrant, these "measures" may "contravene a right or freedom guaranteed by the Canadian Charter of Rights and Freedoms" or may be "contrary to other Canadian law".

The CSIS changes are dramatic, even radical. In 1984, parliamentarians granted CSIS a very broad mandate – found in the definition of "threat to the security of Canada" in s.2 of its Act – but were careful to accord it very limited powers. It has been an intelligence service – it collects and analyzes information and supplies assessments to the government. When enacted, Parliament accepted CSIS's broad mandate because it lacked what we will call in this discussion "kinetic" or physical powers – the powers to do things to people in the physical world (except as necessary to, for example, install a wiretap or listening device).

That will change in Bill C-51. The government's examples of what the new powers will mean for CSIS are mild, even innocuous. But in fact the only outer legal limit is surprisingly sparse: no bodily harm, no obstruction of justice and no violation of sexual integrity.

The bill superimposes a special warrant system of CSIS's new powers. Where those activities would violate a law or the Charter, a Federal Court judge must approve them in advance by a warrant.

The obvious thinking is that such a system simply builds on the conventional role of judges in issuing search warrants. But the analogy is approximate. In the world of search and seizure, judicial warrants are designed to prevent - not authorize - Charter violations. That is because the Charter privacy protection is qualified – the Charter protects against "unreasonable" searches and seizures and a search under a warrant is prima facie proper. "Unreasonable" typically means without warrant.

Other Charter rights are dramatically different. For instance, there is no concept of

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“unreasonable” cruel and unusual punishment. It is an absolute right – not qualified. Some rights - such as the right to freedom of expression – may have some internal limitations in their content (e.g., free expression does not reach threats of violence), but this is usually a matter decided by a court closely scrutinizing the scope of legislation against the behaviour protected by the right. All rights, such as the right of citizens to leave or come back to Canada, can be subject to reasonable limits under “section 1” of the Charter, but the restraint on the right is usually spelled out in advance in legislation. To imagine that a court can pre-authorize a violation of a right in response to an open-textured invitation to do so is to misunderstand entirely the way our constitution works, on a fundamental level.

We could be wrong in our construal of the law – and when we are, it is because courts will correct us. But any deliberation on this question, and on whether CSIS can exceed the law, will be conducted in a warrant proceeding. In other words, all these weighty legal deliberations will be done in secret, with only the judge and the government side represented. The person affected by the illegal activity will not be there — in fact they will likely never know who visited the misfortune on them. They cannot defend their rights. No civil rights group will be able to weigh in.

At best, a “special advocate” will be invited to defend the public interest (because a court insists on having that person present). This is a person, able to act only by themselves, trying to balance their special advocate work with their busy private practice, paid a fraction of their regular wage, unable to consult often with other special advocates, and sworn to secrecy. There is no equality of arms between special advocates and government lawyers/CSIS.

And more than that, there are now numerous review body reports and Federal Court decisions complaining that CSIS has failed to meet its duty of candour in closed door proceedings. It is very difficult to know whether these reports represent the sum total of CSIS shortcomings – a failure to be candid is something that is, by definition, very difficult to detect.

The ultimate court decision will generally not be public because of concerns its disclosure will adversely reveal ongoing operations and disruption methods. There will be no natural party able to appeal it. In the worst instance, we risk a secret jurisprudence on when CSIS can act beyond the law.

Our expectation is that the Federal Court will do its best to issue redacted versions of its cases, but it will be inventing the process as it goes. So too, any appeal will depend on *ad hoc* arrangements, and presumably also require a very earnest special advocate with the time and inclination to press matters.

Meanwhile, the Federal Court will not automatically know what is done under its authorization. Past experience suggests that what is authorized by the Federal Court and what is done by CSIS may not line up.

Everything will then depend on SIRC, CSIS's review body. We have nothing but respect for those who work in SIRC, in very difficult circumstances. The fact is SIRC is an underfunded, understaffed review body. Its statutory powers have not kept pace with the reality of the security service it reviews. In 2006, the Arar Commission underscored the urgent necessity of new legislative tools allowing SIRC to coordinate with other review bodies and to expand its mandate. But still, even now, as the security services all collaborate, the review bodies are "stove-piped" and "siloes" by agency. Informal efforts by review bodies to coordinate are reportedly rebuffed by the government.

On top of these legal matters, we have administration of justice and "operational" concerns. These include the following:

- *Criminal trials*: CSIS's operation and new powers are often "pre-criminal" and may overlap, affect and perhaps taint a subsequent RCMP investigation and evidentiary record. A criminal trial may be mired in questions arising from the Federal Court authorizations, its holdings in a potentially secretive Charter jurisprudence, and doubts about whether the CSIS operation contributed too or otherwise was associated with the crime at issue.
- *Interaction with informer privilege*: Bill C-44, now in the senate, will give CSIS "human sources" broad privilege from being compelled to be a Crown witness or having identifying information disclosed in court proceedings. Crown prosecutors may find this complicates and, quite likely, frustrates their witness list. Good defence lawyers will fight this proviso, especially when the first thing they suspect is that a CSIS kinetic operation lies at the heart of a subsequent criminal case. Disclosure disputes may make terrorism trials - already long and complex - even more difficult.
- *Interaction with the RCMP*: As we understand it, thusfar, "disruption" has been a peace officer function, linked to police investigations. Peace officers in these situations likely remain preoccupied with the effect their conduct might have in any future criminal proceedings, and concerned with reducing the chances that their disruption activities will lead to acquittals or stays on the basis of abuse of process in criminal trials. For cultural and institutional reasons, CSIS may not have the same concerns. How will CSIS and RCMP arrange their affairs so that CSIS's kinetic activities do not undermine RCMP criminal investigations, either ongoing or prospective?
- *Institutional skills*: CSIS is a security intelligence organization. If it gears up kinetic activities, it will presumably require skills and aptitudes that presently are not part of its arsenal. What plans are in place to acquire and resource and train these new kinetic operatives and operations? How will CSIS guard against agents recruited for kinetic operations themselves proving problematic?
- *Institutional culture*: CSIS is a law-observant service, and adhering to legal expectations is an important part of its culture. Violations of the law are an aberration, not a pastime. As the Service begins operations that, but for a

- Federal Court warrant, would be illegal, how will it ensure that its “black” operations do not contaminate the overall culture of the organization?
- *Social licence*: The world is rife with misunderstandings and conspiracy theories about spy services, including CSIS. With the new measures, many conspiracy theories move from the “implausible because require compounded illegal steps” to “within CSIS’s powers in principle”. There will be a consequence in terms of social licence for a clandestine service empowered to act in violation of the law and the Charter, especially in communities that feel targeted. Since CSIS too depends on community cooperation to conduct many of its activities in security intelligence, there is a risk that its new powers may undermine its ability to exercise effectively its original mandate. In the final analysis, the increased scepticism and the new doubts about the Service stemming from the new powers may be the most dangerous aspect of this law proposal.

In sum, the government proposes radically restructuring CSIS and turning it in a “kinetic” service — one competent to act beyond the law. This is rupture from the entire philosophy that animated the CSIS Act when it was introduced 30 years ago. We await convincing argument that it is truly warranted. This bill reaches much further in authorizing problematic CSIS conduct than required in any scenario we have seen raised by the government in justification. It amounts to an open ended authorization whose proper and reasonable application will depend on perfect government judgment. It violates, therefore, a cardinal principle we believe should be embedded in national security law: any law that grants powers (especially secret, difficult to review power) should be designed to limit poor judgment, not be a law whose reasonable application depends on excellent judgment.

But whatever the truth as to whether these powers are necessary, their introduction is irresponsible without a redoubled investment in our tattered accountability system. Anyone who has worked on accountability in the security sector knows that there is another core maxim in this area, when dealing with powerful, covert state agencies: “trust but verify”. We do not believe that that standard can be met at present, even without the new powers.

### **About this project**

This is a working document. It is legal scholarship done in “real time” in a highly politicized environment, in which fundamental decisions about the shape of law are being made.

We shall continue to develop this paper and its counterparts on different aspects of Bill C-51, adding more discussion, references and footnoted sources. We also anticipate developing the ideas and conclusions we present. And there will be typos.

Accordingly, we welcome (and very much encourage and need) feedback, critiques, suggestions and observations from other lawyers, legal scholars, security experts and

other interested persons with expertise to contribute (whether practical, legal, scholarly). We are, in other words, calling for a “crowdsourced” response to Bill C-51, and in this paper, to its new proposed CSIS powers.

We add an additional word relevant to this, a document dealing with CSIS. We are legal academics who have been researching and writing on issues of national security law (Canadian, international and comparative) for a sum total of 26 person years (between the two of us). We have never worked in a security service. Instead, one or both of us has worked with (or been involved in) two commissions of inquiry examining the security services (the Arar and Air India inquiries), a number of national security cases in the courts and several other commissions of inquiry focusing on state wrongdoing, including in the criminal justice sector. We are, in other words, an occasional and minor part of the national security “accountability sector”, to the extent that such a thing exists in Canada.

Our legal expertise informs our legal conclusions. Our accountability perspective and experience informs our comments on operational issues.

There will be those who disagree with us, especially in relation to our operational concerns. We invite debate and discussion. That is the very reason we are conducting this project. These issues are too important to be swept up in partisan political positioning and infighting, and the debate should be informed and acute.

Please send feedback to: [cforcese@uottawa.ca](mailto:cforcese@uottawa.ca) and [kent.roach@utoronto.ca](mailto:kent.roach@utoronto.ca)

## Table of Contents

Introduction .....	7
Part 1: CSIS’s Mandate and Powers .....	8
1. Security Intelligence Function .....	8
a) Threat to the Security of Canada .....	8
b) Warrants and Security Intelligence.....	13
c) Foreign Spying.....	14
2. New “Kinetic” Security Function .....	14
a) Overview .....	14
i) Kinetic Measures Short of Violations of Statute Law or the Charter.....	16
ii) Kinetic Measures Violating Statute Law or the Charter.....	17
b) Kinetic Warrants.....	22
i) Substantive Concerns .....	23
ii) Procedural Concerns.....	26
c) SIRC Review .....	28
i) Current Shortcomings .....	29
ii) Implications of Bill C-51 .....	30
d) RCMP Powers as Precedent .....	31
Part II: “Second Order” Impacts.....	32
1. Concerns Relating to the Administration of Justice.....	33
2. Operational Concerns .....	35
Conclusion.....	36

## Introduction

We divide this paper into two primary sections. In part I, we lay the factual foundation, describing what Bill C-51 (and the earlier Bill C-44, now before the Senate) would do to CSIS's powers. We raise legal doubts about these new powers, focusing first on concerns about the scope of the new powers and second on the Federal Court warrant regime. We also briefly examine the question of CSIS accountability. Here, we raise (but do not address in full) broader questions of accountability that will figure prominently in a separate paper on this topic.

In part 2, we name and briefly discuss a number of administration of justice and operational quandaries we see as possibly arising in relation to the new power.

### *Preliminary Note about Terminology*

At the outset, we raise several terminological issues. First, we regularly refer to “security intelligence”. This is a term of art – it refers to the “threats to the security of Canada” concept found in s. 2 of the CSIS Act. CSIS has been tasked, principally, as a service focused on “security intelligence” and not “foreign intelligence”, a concept less closely moored to concerns about threats to Canadian security.

Second, we distinguish between CSIS's traditional focus on collecting, analyzing and retaining “information and intelligence” on threats to the security of Canada and the proposed new capacity of CSIS to act to “reduce” those threats. The latter, extraordinary power is described, innocuously, as “measures” in Bill C-51 and as a power to “disrupt” by the government backgrounders.<sup>1</sup> However, we find the latter expression underinclusive and prefer to describe CSIS's proposed new power as “kinetic” – that is, it involves action affecting behaviour.

Third, we underscore the important distinction in Canadian national security law between “oversight” or “review”. These terms are often misunderstood, and even knowledgeable commentators invoke “oversight” when discussing accountability of every sort. The distinction is, however, important in understanding what the issues are. Put simply, “oversight” is command/control over operations (what one might call *real time* governance). In Canadian practice, executive chains of command (up to and including the Minister of Public Safety) perform “oversight”, as does (in essence) the Federal Court in the form of search and surveillance warrants.

“Review” is after-the-fact auditing of operations, measured against some set of criteria (e.g., compliance with the law or policy) (what one might call *ex post facto* accountability). What most people mean when they invoke “oversight” in popular discussion is actually “review”. In relation to CSIS, the Security Intelligence Review

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<sup>1</sup> Government of Canada, Amending the Canadian Security Intelligence Service Act to give CSIS the mandate to intervene to disrupt terror plots while they are in the planning stages (2015-01-30), <http://news.gc.ca/web/article-en.do?nid=926869>

Committee (SIRC) performs review. Review bodies including SIRC make findings and recommendations: they do not have the power to require CSIS to change its behaviour.

In Canada, there is no parliamentary “oversight” in national security (as there is, to some important degree, by Congress in the republican US system of government). Surprisingly, given patterns in most other democracies, there is also no parliamentary “review”. We will address this larger question of review in a subsequent paper.

## **Part 1: CSIS’s Mandate and Powers**

### **1. Security Intelligence Function**

As presently constituted, the CSIS Act charges CSIS with several functions, the most important of which is listed in section 12: collecting, analyzing and retaining information and intelligence on “threats to the security of Canada.”<sup>2</sup>

CSIS is principally a security intelligence agency, in other words. It is tasked with security intelligence gathering and analysis. It is not a law enforcement body, performing peace officer functions. (We do not discuss here CSIS’s more attenuated role in foreign intelligence gathering and its security screening tasks. These are important undertakings, but are not immediately relevant to this paper.)

#### **a) Threat to the Security of Canada**

The scope of CSIS’s proper “security intelligence” function has always depended on the meaning of “threat to the security of Canada.”<sup>3</sup>

This expression “threat to the security of Canada” is defined in s. 2 of the CSIS Act, as set out in Table 1. Each of the categories of threat found in section 2 is broad and thus capable of expansive definition.

The formulation and inclusion of this definition was the subject of sustained discussion at the time Parliament enacted the CSIS Act in 1984. It has also drawn the attention of the review agency empowered to scrutinize CSIS activities, the Security Intelligence Review Committee (SIRC). In one of its early reports on CSIS, the SIRC questioned several aspects of the threat definition in the Act. These concerns are summarized in Table 1.

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<sup>2</sup> CSIS Act, s. 12. CSIS’s security intelligence function is limited by certain criteria imposed by section 12 of the Act. It may collect information only to the extent “that it is strictly necessary,” and it must have “reasonable grounds” to suspect the threat to the security of Canada.

<sup>3</sup> It should also be noted that this threat definition has implications that extend beyond CSIS’s activities. Several statutes cross-reference this definition for the purpose of describing the powers of other government bodies, including the RCMP under the *Security Offences Act*.



Table 1: Definition of “Threats to the Security of Canada”

Type of Threat	CSIS Act	Critique <sup>4</sup>	CSIS Interpretation <sup>5</sup>
Espionage and sabotage	(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage	<i>Detrimental to the Interests of Canada:</i> The phrase is “wholly subjective” as “no criteria are provided to offer any standard for determining what is ‘detrimental.’” It should, therefore, be defined in the <i>Act</i> .	<i>Espionage:</i> “Activities conducted for the purpose of acquiring by unlawful or unauthorized means information or assets relating to sensitive political, economic, scientific or military matters, or for the purpose of their unauthorized communication to a foreign state or foreign political organization.”  <i>Sabotage:</i> “Activities conducted for the purpose of endangering the safety, security or defence of vital public or private property, such as installations, structures, equipment or systems.”
Foreign-influenced activities	(b) foreign-influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or	<i>Foreign influenced:</i> The phrase “foreign influenced” is broad, covering “foreign interest groups, political organizations, individuals, associations and corporations,” while the concept of “influenced” is ambiguous and should be replaced with “directed.” <i>Within or Relating to Canada:</i> “There are no criteria set out in the <i>Act</i> to help determine how much any particular activity must ‘relate’ to Canada before CSIS can take jurisdiction,	“Activities detrimental to the interests of Canada, and which are directed, controlled, financed or otherwise significantly affected by a foreign state or organization, their agents or others working on their behalf.”

<sup>4</sup> Unless otherwise noted, critiques drawn from SIRC, *Annual Report 1988-89* at 55 *et seq.*, available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_1988-1989-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_1988-1989-eng.pdf).

<sup>5</sup> Extracts cited in this column drawn from CSIS, Backgrounder #1: *CSIS Mandate* (2005) [apparently no longer on-line].

	<p>involve a threat to any person</p>	<p>creating a requirement that may be too easily met.”  <i>Clandestine or Deceptive:</i> “The precise meaning of the term ‘clandestine’ is uncertain. It may connote an element of underhandedness or <i>male fides</i>, but some dictionary definitions would support an interpretation that merely ‘secret’ activities may be ‘clandestine.’ The term should be replaced with a word like ‘surreptitious,’ which more clearly connotes some element of underhanded behaviour.”  <i>Detrimental to the Interests of Canada:</i> The phrase is “wholly subjective” as “no criteria are provided to offer any standard for determining what is ‘detrimental.’” It should, therefore, be defined in the <i>Act</i>.  <i>Involve a Threat to Any Person:</i> The term “threat” should be modified by an adjective like “serious.”</p>	
<p>Political violence and terrorism</p>	<p>(c) activities within or relating to Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a</p>	<p><i>Political, Religious or Ideological Objectives:</i> The reference to “political, religious or ideological objective” was added to the CSIS Act by the 2001 <i>Anti-terrorism Act</i>.<sup>6</sup></p>	<p>“Threat or acts of serious violence may constitute attempts at compelling the Canadian government to respond in a certain way. Acts of serious violence cause grave bodily harm or death to persons, or serious damage to or the destruction of public or private property, and are contrary to Canadian law or would be if committed in Canada”</p>

<sup>6</sup> S.C. 2001, c. 41.

	political, religious or ideological objective within Canada or a foreign state		
Subversion	(d) activities directed towards undermining by covert unlawful acts, or directed towards or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada.	SIRC recommended repeal of this provision, urging that it presented the greatest risk in a democracy and that its core content – avoiding political violence – is already covered in the other paragraphs.	“Activities intended to undermine or overthrow Canada's constitutionally established system of government by violence. Subversive activities seek to interfere with or ultimately destroy the electoral, legislative, executive, administrative or judicial processes or institutions of Canada.”

The section 2 definition includes a caveat that expressly excludes “lawful advocacy, protest or dissent, *unless carried on in conjunction* with any of the activities referred to” in the table.<sup>7</sup> The obvious intent of this exclusion is to limit CSIS’s role in investigating actions viewed as legitimate in democracy. It is an effort, in other words, to distinguish dissent from subversion. It is not clear, however, whether this exemption has much significance.

First, “lawful” advocacy, protest or dissent may be a narrow term, excluding, for example a demonstration undertaken without proper permits.<sup>8</sup>

Second, the exemption only applies to the extent the lawful advocacy, protest or dissent activities are not “carried on in conjunction” with espionage, sabotage, foreign-influenced activities, political violence or terrorism or subversion. “Carried on in conjunction” is an ambiguous phrase. At some point, advocacy, protest or dissent could become so tied to security threats that it would amount to aiding, abetting or attempts and conspiracies in relation to actual crimes associated with those security threats. This sort of advocacy, protest or dissent would, in other words, be criminal, and no longer be lawful, and would be excluded from the exemption anyway. And so the reference to “in conjunction” must mean we discussing conduct that is non- or pre-criminal.

We conclude, therefore, that the exemption still allows CSIS to investigate many otherwise democratic activities with a loose and distant relationship to actual espionage, sabotage, foreign-influenced activities, political violence or terrorism or subversion.

Applying a concept of “lawfulness” that does not constrain greatly CSIS investigation into *bona fide* threats may be necessary and desirable; legitimate threats to the security of Canada should not be excluded from CSIS’s mandate simply because elements of those bodies (also) engage in lawful protests. At the same time, investigations of behaviours deemed acceptable, and even essential, in a democracy raise obvious concerns.

As we discuss below, these mild concerns in relation to intelligence gathering become acute concerns when the issue become CSIS kinetic operations tied to the intentionally broad definition of “threats to the security of Canada”, designed in 1984 to apply to an intelligence agency that deliberately *did not* have such physical powers.

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<sup>7</sup> CSIS Act, s. 2 (emphasis added).

<sup>8</sup> CSIS is apparently alive to these issues, reporting that it “is especially sensitive in distinguishing lawful protest and advocacy from potentially subversive actions. Even when an investigation is warranted, it is carried out with careful regard for the civil rights of those whose actions are being investigated.” CSIS, Background #1, *CSIS Mandate* [on-line].

## **b) Warrants and Security Intelligence**

Section 8 of the Charter prohibits “unreasonable” searches and seizures. The Supreme Court of Canada has been emphatic that electronic surveillance may constitute a search and seizure regulated by section 8 of the *Charter*.<sup>9</sup> For this reason, “the statutory provisions authorizing them [electronic surveillance] must conform to the minimum constitutional requirements demanded by s. 8.”<sup>10</sup>

In this last regard, protecting individuals from “unjustified state intrusions upon their privacy” requires “a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place.”<sup>11</sup> In *Hunter*, the Court suggested that this objective “can only be accomplished by a system of prior authorization, not one of subsequent validation.”<sup>12</sup>

For this reason, electronic surveillance is rendered constitutional by “subjecting the power of the state to record our private communications to external restraint and requiring it to be justified by application of an objective criterion.”<sup>13</sup> A “detached judicial officer” supplies this external restraint.<sup>14</sup>

In keeping with this expectation, the CSIS Act creates a judicial warrant system for intelligence collection. CSIS may apply for such a warrant if it “believes, on reasonable grounds, that a warrant ... is required to enable the Service to investigate a threat to the security of Canada” or to assist the minister of national defence in “the collection of information or intelligence relating to the capabilities, intentions or activities of ... any foreign state or group of foreign states.”<sup>15</sup>

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<sup>9</sup> *R. v. Duarte*, [1990] 1 S.C.R. 30 at paras. 18 & 19 (“as a general proposition, surreptitious electronic surveillance of the individual by an agency of the state constitutes an unreasonable search or seizure under s. 8 of the Charter ... [O]ne can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed”).

<sup>10</sup> *R. v. Pires*, 2005 SCC 66 at para. 8.

<sup>11</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 160.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Duarte*, [1990] 1 S.C.R. 30 at para. 25.

<sup>14</sup> *Ibid.* at para. 25 (noting that “[i]f privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself, a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a *detached judicial officer* that an offence has been or is being committed and that interception of private communications stands to afford evidence of the offence”) (emphasis added).

<sup>15</sup> CSIS Act, R.S.C. 1985, c. C-23, s. 21, cross-referenced to s. 16.

The minister of public safety must first approve the warrant request, thus adding some degree of ministerial oversight. It is then brought before a “designated judge” of the Federal Court, along with supporting information justifying its necessity.

This CSIS warrant provision is a mild variation on conventional surveillance warrants, and has withstood constitutional challenges for that reason.<sup>16</sup>

### **c) Foreign Spying**

Recently, there has been considerable doubt as to whether CSIS can perform its security intelligence collection activities overseas, in a manner that might violate the laws of the foreign state. A related issue is whether a Federal Court could authorize such conduct. A line of cases, now culminating in the *Re X* proceeding currently before the Supreme Court,<sup>17</sup> suggests that the answer to both questions may be “no”.

In response, the government tabled bill C-44, emphatically extending CSIS’s security intelligence mandate overseas, and empowering judges to issue warrants to cover these actions, even if they are done in violation of foreign (or international) law. We do not discuss this bill C-44 change further here,<sup>18</sup> other than to note that its pattern of authorizing overseas activities, perhaps in violation of foreign law, is now replicated in relation to the new “kinetic” warrants discussed next.<sup>19</sup>

## **2. New “Kinetic” Security Function**

We turn now to the implications of the new powers proposed in bill C-51.

### **a) Overview**

The new CSIS powers in bill C-51 represent a serious rupture with the past. The bill leaves untouched the broad and sweeping definition of “threats to the security of

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<sup>16</sup> See *Atwal*, [1988] 1 F.C. 107 at para. 36. Also, in *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, (1998) 40 O.R. (3d) 489 (Ont. C.A.), the Canadian Civil Liberties Association sought to challenge the CSIS Act provisions on s. 8 grounds. The Ontario Court of Appeal refused them public interest standing to do so, concluding, *inter alia*, that the arguments presented by the CCLA on the s. 8 violation were “weak.” *Ibid.* at para. 88.

<sup>17</sup> See Supreme Court summary: <http://www.scc-csc.gc.ca/case-dossier/info/sum-som-eng.aspx?cas=36107>. For a discussion of this case and its aftermath, see Craig Forcece, *The Judicialization of Extraterritorial Spying: Gaps and Gap-Fillers in the World of CSIS Foreign Operations* (January 6, 2015). (2014) 61 Criminal Law Quarterly 440. Available at SSRN: <http://ssrn.com/abstract=2545876>

<sup>18</sup> For further discussion of this issue, *ibid.*

<sup>19</sup> Such foreign adventures raise issues of political co-ordination, including possible knock on effects to Canadian foreign affairs and military officials operating outside Canada.

Canada” developed in support of CSIS’s information collection activities, and now uses it as the zone within which CSIS will be able to intervene physically with Canadians, persons within Canada and people and events outside of Canada. In the result, a threats definition that SIRC once considered concerning in relation to mere information collection will now also be the justification for “kinetic” activities.

In proposed s.12.1, where the Service has reasonable grounds to believe that activities constitute a threat to the security of Canada, it may take “measures” inside or outside Canada to “reduce the threat”. There is only one set of absolute limitations on what measures may be taken. The Service may not:

- (a) cause, intentionally or by criminal negligence, death or bodily harm to an individual; (b) wilfully attempt in any manner to obstruct, pervert or defeat the course of justice; or (c) violate the sexual integrity of an individual.

“Bodily harm” is defined consistently with s.2 of the Criminal Code and means “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”. This phrase probably reaches “psychological harm”.<sup>20</sup>

Within the vast universe of possible measures that might reduce threats to the security of Canada and fall short of these three restrictions, the other safeguards are these:

- The “measures” are to “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.”
- Where the measures violate the Charter or Canadian law, they must be authorized by a Federal Court warrant.

We return to the warrant issue below. Here, however, we note that the question of “reasonable and proportional” will be decided unilaterally within government (and CSIS) whenever a measure falls short of violating the law or the Charter. The government need only seek a warrant under new s.21.1 where it has “reasonable grounds” to believe it is required. Section 12.1(3) only requires such a warrant where “measures” “will” (not “may”) contravene a Charter right or Canadian law. Other measures that do not go this far presumptively do not require a judicial warrant, and the only oversight in this instance will be internal, executive branch controls.

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<sup>20</sup> In *R. v. McCraw*, [1991] 3 S.C.R. 72 at 81, albeit decided in a context in which the statutory provision read “serious” bodily harm. See also *R. v. Moquin* (2010) 253 C.C.C.(3d) 96 (Man.C.A.) holding that interference with comfort can constitute bodily harm so long as it is not trifling or transient.

*i) Kinetic Measures Short of Violations of Statute Law or the Charter*

What sort of measures might “reduce” “threats to the security of Canada” and not violate the law or the Charter. We propose examples in table 2:

*Table 2: Possible CSIS Kinetic Measures Short of Illegality*

<b>Threat to the security of Canada element</b>	<b>Example of possible “measure” that does not violate law or the Charter, applicable assuming that CSIS deems it “reasonable and proportional in the circumstances”</b>
(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage	Remotely wiping a data device stolen from a government facility and believed to be in the hands of a foreign intelligence service.
(b) foreign-influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person	Providing misinformation to an anonymous (that is, secret) foreign environmental funder in an effort to deter them from continuing to secretly fund a Canadian environmental group’s planned public protest (done without proper permits) in opposition to the Keystone Pipeline Project, a project that the government of Canada sees as a priority and strongly in “the interests of Canada”.
(c) activities within or relating to Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state	Notifying parents or other persons of influence when CSIS investigations reveal that an individual is radicalizing towards violence.
(d) activities directed towards undermining by covert unlawful acts, or directed towards or intended ultimately to lead to the destruction or overthrow by violence of	Advising a fertilizer dealer not to sell chemicals that may be precursors to a bomb built by a radical secessionist movement.



the constitutionally established system of government in Canada.	
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Setting aside the issue we address below of whether some of these functions might instead be undertaken by RCMP, most of these examples are modest. Indeed, they are largely consistent with the limited justifications for the new powers that the government has offered so far.

Note, however, that even in the area of measures that do not violate Canadian law or the Charter, the twinning of the broad “threat to the security of Canada” concept with the new powers may create unease. Observe how overbreadth in the definition of the “foreign influence activity” threat authorizes CSIS conduct in relation to an environmental campaign. Many would disagree that the matter we describe constitutes a national security issue, let alone one justifying a kinetic response. Nevertheless, it is easily encompassed by the definition of “threats to the security of Canada”. This is a direct and pernicious consequence of tying kinetic measures to the broad “threats” definition invented for information gathering powers and nothing more.

*ii) Kinetic Measures Violating Statute Law or the Charter*

We turn next to measures that would require CSIS to obtain a Federal Court warrant. Specifically, what sort of measures might “reduce” “threats to the security of Canada”, but violate the law or the Charter. These will obviously be more extreme measures than those examined above. We propose examples in table 3,

*Table 2: Possible CSIS Kinetic Measures that would be Illegal or Unconstitutional*

<b>Threat to the security of Canada element</b>	<b>Example of possible “measure” that violating statute law or the Charter, applicable assuming that CSIS deems it “reasonable and proportional in the circumstances” and the measure is authorized by Federal Court warrant</b>
(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage	<ul style="list-style-type: none"> <li>• Breaking into a private home in order to destroy equipment CSIS believes may be used to wreck pipelines (Absent Federal Court authorization, Criminal Code provisions would be engaged);</li> <li>• Calling on the services of CSE under that agency’s so-called “mandate C” (assistance to CSIS) in order to infect and destroy the computers of a radical environmental group believed responsible for “tree spiking”, but for whom there is insufficient evidence for criminal charges (Absent Federal Court authorization, Criminal Code provisions would be engaged)</li> </ul>

<p>(b) foreign-influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person</p>	<ul style="list-style-type: none"> <li>• Draining the bank account of an anonymously foreign-funded environmental group in an effort to impede planned public protest (done without proper permits) in opposition to the Keystone Pipeline Project, a project that the government of Canada sees as a priority and strongly in “the interests of Canada”. (Absent Federal Court authorization, Criminal Code provisions would be engaged)</li> <li>• Working with CBSA to prevent the travel to Canada of foreign anti-globalization protestors believed to be associated with a planned (and possibly violent) public protest at an international summit hosted in Toronto (Absent Federal Court authorization, most likely an irregular use of the immigration law).</li> </ul>
<p>(c) activities within or relating to Canada directed towards or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state</p>	<ul style="list-style-type: none"> <li>• Working with Foreign Affairs and CBSA to prevent the return to Canada of a citizen who is feared to pose a potential future risk in terms of political violence (Absent Federal Court authorization, a violation of the s. 6 Charter right to return)</li> <li>• Calling on the services of CSE under that agency’s so-called “mandate C” assistance to CSIS to bring down a website that CSIS believes may be about to begin recruiting to a group engaged in political violence (Absent Federal Court authorization, a violation of the Criminal Code)</li> <li>• Calling on the services of CSE under that agency’s so-called “mandate C” assistance to CSIS to bring down a website which CSIS believes may be about to encourage support for a foreign insurgency, one of whose activities includes political violence (Absent Federal Court authorization, a violation of the Criminal Code; possibly a violation of Charter free speech protections, see backgrounder #1 in our series)</li> <li>• Starting a cyber-whisper “smear” campaign in order to discredit among his peers an individual regarded as the nucleus of a group that CSIS fears may be radicalizing to political violence. (Absent Federal Court authorization, probably a violation of the Criminal Code and possibly a</li> </ul>

	form of cruel and unusual treatment.) <sup>21</sup>
(d) activities directed towards undermining by covert unlawful acts, or directed towards or intended ultimately to lead to the destruction or overthrow by violence of the constitutionally established system of government in Canada.	<ul style="list-style-type: none"> <li>• Breaking into a private residence to destroy chemicals that CSIS believes may be precursors to a bomb to be used by a radical secessionist movement (Absent Federal Court authorization, a violation of the Criminal Code).</li> </ul>

These examples include a mix of measures that most people of good faith would support and yet still others that seem more doubtful in a democracy. At the very least, the measures relate to state conduct we might usually expect to be authorized by statute, after democratic debate.

Whether CSIS would ever pursue them is not the question we address. It is not an acceptable argument, in our view, to simply claim “we would never do this”. If that is the case, then the law should make this prudence a firm rule, and not one that may change with time. Shifting norms and changes in “what we would do” have been a feature of security law and behaviour since 9/11, as the United States’ experience with extreme interrogation demonstrates.

At any rate, we also note that even at present, there have been documented instances of CSIS using (illegally) kinetic measures that are not much different from some of these examples:

- In a 2002 case investigated by SIRC and reported in its 2006-07 annual report,<sup>22</sup> CSIS facilitated the transfer of an admitted member of Al Qaeda and Canadian citizen from Oman to the United States, via Canada. SIRC concluded, that individual was "arbitrarily detained" by CSIS, in violation of section 9 of the Charter. Further, "[b]ecause he was detained, his right to silence as protected by Sections 7 and 11(c) was violated, as was his right to counsel under Section 10. Furthermore, his right to remain in Canada as protected by Section 6 of the Charter (mobility rights) was breached." CSIS, SIRC concluded, "strayed from its security intelligence mandate into the area of law enforcement."

<sup>21</sup> We note that such an undertaking may be entirely prohibited by the “bodily harm” concept limiting the range of permissible measures. In the caselaw, “bodily harm” reaches psychological injury. Cyberbullying may qualify. However, as noted below, these close questions of fact and law would be adjudicated in a secret, closed door proceeding where the target is not represented.

<sup>22</sup> SIRC, *Annual Report 2006-07* at 20 *et seq.*, available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_2006-2007-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2006-2007-eng.pdf)

- In 2010, the Ontario Superior Court of Justice threw out child pornography charges against a CSIS target stemming from photos extracted by CSIS from the target's computer. In *R. v. Mejid*,<sup>23</sup> the target was suspected of posting extremist Islamist literature on the internet with the intent of inciting violence. CSIS's investigation along these lines was apparently fruitless, but the target was (according to the Ontario court's finding of fact) coerced by CSIS agents (threats and intimidating conduct) into supplying his computer for searches on several occasions. At some juncture, CSIS began to suspect that the target had propensities in the area of child pornography. These suspicions were insufficient to attract a police investigation -- there was no reasonable and probable grounds. However, they did steer CSIS to search the photos on the computer coerced from the target, producing the evidence then used in the subsequent prosecution. Indeed, at a certain juncture in the supposed national security investigation, the central purpose of the CSIS agents' activities was to unearth evidence of child pornography. All this was done without warrant. The evidence was suppressed on Charter grounds, as a violation of the section 8 search and seizure protections. In the court's words: "This court cannot condone the activities of CSIS. The protection of Canada's national security is of utmost importance. However, CSIS cannot rely on its authority as a license to abrogate the Charter rights of individuals by conducting a criminal investigation based on suspicion. When conducting a criminal investigation, CSIS must adhere to the standards expected of the police and the application of the Charter."

The case also lent credence to longstanding complaints within the Muslim community that CSIS agents use strong-arm tactics to induce cooperation from potential witnesses. The Superior Court wrote: "I am troubled by the atmosphere of coercion and intimidation that the CSIS agents (and in particular Witness 'A') seem to have created and been eager to embrace. The very people that are tasked by the federal government to oversee and safeguard Canada's national security are themselves acting in a manner that suggests either a complete lack of comprehension of our Charter rights or else, they demonstrate a total willingness to abrogate and violate these same principles. Neither is acceptable and I find that the Charter breach in this case was serious."

Nor is it an answer to our hypotheticals that "the Federal Court would stop us from going too far". We would be more comforted by this prospect if at issue were deliberations in a fully adversarial process, in open court. As discussed below, this is not, however, what would happen.

Note another issue about these hypothetical measures: we have intentionally used "believed by CSIS" and "may" to characterize the threat at issue in the examples.

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<sup>23</sup> 2010 ONSC 5532

The standard CSIS would have to meet before acting is not proof beyond a reasonable doubt – simply “reasonable grounds to believe”. In other contexts, this phrase means a reasonable based probability.<sup>24</sup>

It is far from a standard of perfection,<sup>25</sup> and we should expect that there will be false positives – circumstances where CSIS has reasonable grounds to believe, but ultimately is incorrect in that belief.

In our examples, we have not included detention. The government has repeatedly indicated that the new powers will not reach detention by CSIS. We accept that the example cited above of illegal detention by CSIS was aberrational. We would not expect CSIS to stray beyond the law. The issue for us is whether detention is in fact prohibited under the new bill.

Detention is not listed among the outer limit of the CSIS powers in the bill. Detention does not (or at least need not) obstruct justice or violate sexual integrity. Nor (as best we can tell from a rapid and ongoing search of caselaw) does detention necessarily constitute bodily harm. The real limitation on detention would, therefore, be Charter protections against, most notably, arbitrary detention (s.9). Detention without trial and close judicial supervision managed by law would also probably constitute a violation of the s.7 liberty/security of the person guarantee, s.10 right to counsel and habeas corpus protections and s.12 cruel and unusual punishment protections.<sup>26</sup>

As best as we can determine, the government claim that CSIS would not be able to detain appears to be based on the assumption that CSIS would neither seek, nor a Federal Court authorize, detention by the Service because of these constitutional rights. This would be an entirely sensible development.

But of course, the bill purports to allow exactly this kind of Federal Court legal debate: it permits Charter breaches, so long as reasonable and proportional and authorized by the Federal Court. This is another way of saying that the limit on detention is only as robust as the checks and balances of the proposed warrant scheme. The very language of that scheme invites the Federal Court to authorize limits on Charter rights that protects people from detention.

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<sup>24</sup> Hunter v. Southam supra; R. v. Debot [1989] 2 S.C.R. 1140.

<sup>25</sup> *Canada (Minister of Citizenship and Immigration) v. Mugesera*, 2005 SCC 40 at para. 114 (“...[T]he reasonable grounds to believe” standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”).

<sup>26</sup> For a discussion of Charter standards for preventive detention, see Craig Forcese, *Catch and Release: A Role for Preventive Detention Without Charge in Canadian Anti-Terrorism Law* (July 28, 2010). Institute for Research on Public Policy Study, No. 7, July 2010. Available at SSRN: <http://ssrn.com/abstract=1650094>

If the government is convinced that warrants should never be used to detain people, it should simply add detention to the list of the three types of behaviour that can never be authorized.

We note that when Australia granted its intelligence agency limited powers of detention including denial of rights to counsel in 2003, the legislation was extremely controversial with concerns being raised it could allow even children to be detained incommunicado. The law was passed but with additional measures for review including provisions to ensure right to counsel and attendance by the Inspector General, who reviews intelligence functions in that country.<sup>27</sup>

We are concerned that bill C-51 could authorize similar powers but be less controversial because it does not spell out the full extent of CSIS's powers and simply allows judges to decide what is necessary to reduce security threats on a case-by-case basis in closed courts.

The same comment can be made about orders that prevent Canadians from returning to Canada. The United Kingdom is debating this very issue, but in the context of a bill before the UK Parliament that is much more transparent as to its scope in authorizing “temporary exclusion orders” to keep UK nationals involved in terrorism abroad from returning to the UK.<sup>28</sup> Bill C-51, in comparison, may be used in the future to authorize such exclusions, a violation of the rights of Canadian citizens to return to Canada.<sup>29</sup> But the merits of this idea will not be properly debated because they will be smuggled in through the opaque “Trojan Horse” law: a system of warrants that allow any and all violations and limits on Charter rights.

As noted, any check and balance will be the warrant process itself. We turn now to these checks and balances.

## **b) Kinetic Warrants**

The Federal Court warrant regime has, in our view, one chief virtue. No Federal Court judge will ever wish to be (directly or indirectly) implicated in a scandal, court case or commission of inquiry sparked by a judge-approved CSIS “kinetic” measures gone wrong. Both personal and institutional reputations will be in play, and will encourage judicial wariness. For this reason, if we must have a warrant regime, it is better to put it into the hands of a regular court, one not encapsulated by a secrecy culture, and instead concerned about its broader reputation. The alternative – a

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<sup>27</sup> Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011) at 330-332

<sup>28</sup> Counter-Terrorism and Security Bill HL 93 ch 2.

<sup>29</sup> For a finding that government actions in preventing Abousfian Abdelrazik from returning to Canada violated his rights as a citizen of Canada under s.6 of the Charter to return to Canada see *Abdelrazik v. Canada* [2009] F.C.

specialized and inherently secret and insulated US “FISA” style court – would be much worse.

That said, we have concerns tied to substantive legal preoccupations about the constitutionality of the new regime. Those concerns are then compounded by the procedural context in which warrants would be issued.

*i) Substantive Concerns*

At first blush, the new kinetic warrant regime is simply an extension of the traditional security intelligence warrant system. This would be an incorrect assumption.

*The Entire Charter at Risk*

First, the *only* right at issue with security intelligence warrants is the protection against unreasonable search and seizure. The only otherwise illegal conduct in play would be the Criminal Code Part VI prohibitions on unauthorized wiretaps and the various legal violations associated with taking the physical steps needed to install these listening devices and tools.

In comparison, and as the examples above suggest, the range of illegal and unconstitutional conduct in play with the new kinetic regime is close to unlimited. Whereas the s.8 Charter protections against unreasonable search and seizure have always incorporated a warrant regime into their very fabric, there has been no such warrant-based qualifier on, e.g., the right of a citizen to return to Canada (the right most in play in cases with Canadians who have left to fight in Syria and Iraq), free speech, free association, cruel and unusual treatment and other rights.

Put another way, in the world of search and seizure, judicial warrants are designed to prevent - not authorize - Charter violations. That is because the Charter privacy protection is qualified – the Charter protects against “unreasonable” searches and seizures and a search under a warrant is *prima facie* proper. Other Charter rights are dramatically different. There is (and never has been) a concept of “reasonable” cruel and unusual punishment, for instance.

In the result, the new provision places judges in a radical new universe. Their task is no longer to define the limit of privacy protections and to prevent the violation of reasonable expectations of privacy, but rather possibly to authorize violations of Charter rights. This is an astonishing rupture with foundational expectations about both the rule of law and the role of the judiciary. In our constitutional system, it is for Parliament to prescribe by law limits on Charter rights and for the courts to protect those rights and to determine if limits on those rights are reasonable. Parliament should not avoid democratic responsibility by writing anyone – even judges – a more or less blank cheque to authorize violations of Charter rights.

We are baffled why the government would construct a regime that even hints that the entire Charter may be set aside through judicial warrants. Indeed, when we first confronted the bill, we were reluctant to read it literally. However, the government's own backgrounder clearly anticipates that it means what the bill says: "CSIS would need a court warrant whenever proposed threat disruption measures contravene *Charter* rights or would otherwise be contrary to Canadian law."<sup>30</sup>

#### *A Novel Conception of the "Section 1" Process*

Second, the kinetic warrant regime may be designed to allow judges to adjudicate on an *ad hoc* basis a spontaneous s.1 "justification" for a rights breach. Section 1 of the Charter limits rights: rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Supreme Court has developed a sophisticated jurisprudence on section 1.

Under the *Oakes* test, section 1 may save a rights-impairing measure where the government proves that the measure has an important objective, that there is a rational connection between the objective and the means, that there is a minimal impairment of the right in question, and that there is proportionality between the impact on the right and the benefits of the measure in question.<sup>31</sup>

In cases involving discretion exercised by government officials that may violate the Charter, the Court has begun deploying a slightly different approach. In the wake of *Dore*,<sup>32</sup> the section 1 analysis in relation to discretionary executive action amounts to consideration of "reasonableness". In deciding that matter, everything would then turn on the facts – was the national security objective motivating the action so pressing as to be proportionate with the right violated?<sup>33</sup>

Probably with this jurisprudence in mind, the government has proposed that a court only issue a warrant for illegal or unconstitutional conduct where reasonable and proportionate. In other words, it is (in principle anyway) the judge's views on these matters that will matter, not CSIS's initial position. Where the judge authorizes the measure, this amounts to an implicit Charter section 1 finding.

But this approach ignores the unique legal and procedural context in which the proposed warrant decision would operate. For one thing, in every instance where the *Dore* approach to s.1 has been applied, the delegated power is much more closely

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<sup>30</sup> Canada, above note 1.

<sup>31</sup> *R v Oakes*, [1986] 1 SCR 103.

<sup>32</sup> *Dore v. Barreau du Québec*, 2012 SCC 12.

<sup>33</sup> *Ibid* at para. 57 ("On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play").



anchored to a limited and specific range of possible government conduct, and the Charter rights potentially at play are not “the entire Charter”.

Even more critically, we only reach s.1 in the first place where the rights limitation is “prescribed by law”.

“Prescribed by law” is rarely an issue in constitutional disputes, since the government action in question is either expressly authorized in a statute or is sufficiently linked to it to meet the “prescribed by law” standard. In challenges to legislative action, the Supreme Court takes a “flexible approach to the ‘prescribed by law’ requirement as regards both the form (e.g., statute, regulation, municipal by-law, rule of a regulatory body or collective agreement provision) and articulation of a limit on a Charter right (i.e., a standard intelligible to the public and to those who apply the law).”<sup>34</sup> In bill C-51, neither this form requirement nor the intelligible standard expectation is met. We cannot predict in advance which Charter right is violated, or the specific circumstances or nature of the breach. That is a matter that will be decided on a case-by-case basis.

In addition, all this will be done in the name of reducing “threats to the security of Canada”. As examined above, this is an extremely broad concepts that is closely intertwined with political freedoms and civil liberties. The CSIS Act is not your typical administrative regime; it is one that by design skates very close to the edge of what the state should be doing in a democratic society.

As a consequence, the bill constitutes an even more aggressive manifestation of the “prescribed by law” shortcomings identified by the Supreme Court in provisions that once governed court-authorized bail conditions.<sup>35</sup> It offers exactly the sort of vagueness and imprecision that disentitles the measure to a full s.1 inquiry.<sup>36</sup> In the proposed new CSIS powers, the *only* statutory framework translates into: “you can do anything to ‘reduce’ broadly defined threats to the security of Canada, including violating every right in the Charter, so long as it doesn’t do bodily harm, violate sexual integrity or obstruct justice”.

We stand to be corrected, but we are not aware of any circumstances in which the Supreme Court has concluded that such an open-textured invitation to violate the Charter is “prescribed by law”.<sup>37</sup> That is probably because we have never before seen

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<sup>34</sup> Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component, 2009 SCC 3, at para. 55.

<sup>35</sup> *R. v. Morales*, [1992] 3 SCR 711, at para. 28 (raising a question as whether a discretion tied to “public interest” was precise enough to meet the “prescribed by law” standard).

<sup>36</sup> *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 4189, at para. 87 et seq.

<sup>37</sup> See discussion in Sharpe and Roach *The Charter of Rights and Freedoms* 5<sup>th</sup> ed (Toronto: Irwin Law, 2013) at 66 (“There are important justifications for a rigorous approach to the ‘prescribed by law’ requirement...Government actions that infringe Charter rights should be accompanied by notice to

such an open-textured invitation. This result, when coupled with the extraordinary procedural context in which Charter rights will be decided in one sided and closed court proceedings, takes the proposed system out of the column of “novel” into the realm of “radical”.

### *Doubtful Conception of the Role of Courts*

Third, in making judges enablers of executive illegality, and not reviewers of compliance with the rule of law, the bill runs roughshod over common expectations about the separation of powers. We appreciate that in Canadian constitutional law, the separation of powers is not a robust limiter. It does, however, exist, and a judge dragooned into an executive function is no longer the independent and impartial adjudicator required by the constitution.

We believe that this system amounts to a drafting of judges into the legislative function of limiting Charter rights. It differs so significantly from the traditional search warrant process that we do not accept that approach as a plausible analogy. Moreover, the present system is dramatically different from the “investigative hearings” process upheld by the Supreme Court the last time judicial independence was a live issue in a national security context.<sup>38</sup> Most notably, a key ingredient saving the latter process from being unconstitutional was the fact that investigative hearings are held presumptively in open court.<sup>39</sup> As we discuss next, that safeguard does not exist in bill C-51. Moreover, a strong minority of the Court concluded that even the relatively banal investigative hearing system did violence to the role of judges. The dissent concluded that judges were in effect being made into police investigators, even though investigative hearings are adversarial hearings held in open court.

Bill C-51 concentrates the legislative power to authorize and limit Charter rights on “section 1 reasonableness grounds” into the hands of those Federal Court judges who have been specially designated to sit in security cases, in secret. This is dramatically different from (and much more concerning than) investigative hearings.

### *ii) Procedural Concerns*

We imagine that the Federal Court will correct these obvious deficiencies and decline to embark on a constitutional adventure.

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citizens of the conduct that is permitted and prohibited so that they can regulate their activities accordingly. Similarly, the law should set adequate limits on officials who exercise discretion....and limits on Charter rights should be clearly stated to encourage democratic debate and accountability about such limitations.”)

<sup>38</sup> Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42.

<sup>39</sup> *Ibid* at para. 91.

But we note that any deliberation on this constitutional question and the broader issue of when and how CSIS can exceed the law, will be conducted in a warrant proceeding. These are *ex parte* and *in camera* proceedings. That means they will be done in secret, with only the judge and the government side represented. The person affected by the illegal activity will not be represented — in fact they will often never know who visited the misfortune on them. They cannot defend their rights. No civil rights group will be able to weigh in.

At best, a special advocate may be invited by the court to defend the public interest and restore a pseudo-adversarial system. This prospect is not identified in the bill, but our assumption is that — like with conventional security intelligence warrants — courts have the inherit power to manage their affairs and seek counsel from an *amicus curiae*. They have done so in relation to the existing CSIS warrant powers, and we expect they would do so confronted with this new system.

In practice, however, special advocates operate in close to total isolation, trying to balance their special advocate work with their busy private practice, paid a fraction of their regular wage, unable to consult often with other special advocates, sworn to secrecy, and often engaged in protracted procedural disputes with the government side, including in an effort to ensure that the government meets its obligations of full candour in *ex parte* proceedings. In this pursuit, there is no equality of arms between special advocate and government.

Government candour is a preoccupying issue. There are now numerous review body reports and Federal Court decisions complaining that CSIS has failed to meet its duty of candour in closed door proceedings.<sup>40</sup> It is very difficult to know whether these reports represent the sum total of CSIS shortcomings — a failure to be candid is something that is, by definition, very difficult to detect.

The ultimate court decision will generally not be public because of concerns its disclosure will reveal and adversely affect ongoing operations and disruption methods. There will be no natural party able to appeal it. In the worst instance, we risk a secret jurisprudence on when CSIS can act beyond the law.

Based on emerging practice in security intelligence warrants, our expectation is that the Federal Court will do its best to issue redacted versions of its cases that raise legal issues of general import. This will, however, be an *ad hoc* process, and possibly associated with protracted delays. The specifics of the who, what, where of the warrant will never be revealed. Depending on a behind the scenes debate about what can be made public, it may be that no aspect of the decision (including important

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<sup>40</sup> See, e.g., *Re X*, 2014 FCA 249; SIRC, *Annual Report 2013-14*, available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_2013-2014-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2013-2014-eng.pdf). Candour issues also have characterized several of the immigration “security certificate” cases. See, e.g., *Almrei (Re)*, 2009 FC 1263.

Charter rulings) will be made publicly available while a warrant is operational and with extension the new CSIS warrants could last a year.<sup>41</sup>

So too, any appeal will depend on *ad hoc* arrangements, and presumably also require a very earnest special advocate with the time and inclination to press matters and involve themselves in endless novel disputes (including over whether they have actual standing to bring an appeal and, if so, whether they can actually receive remuneration for doing so).

Meanwhile, the Federal Court will not automatically know what is done under its authorization. What is authorized and what is done by CSIS may not always correspond, as a recent Federal Court decision suggests.<sup>42</sup> There, the Court only learned of the gap between a security intelligence warrant authorization and CSIS conduct through an accident. A particularly earnest judge reviewing a public SIRC report and the public report of the CSE commissioner noted inconsistency between the practice attributed to his warrant and the actual content of the warrant.

This should not be taken as good evidence that the accountability system “works”. It is, at best, a form of “fortuitous accountability”. The system “worked”, but by happenstance and not design. Indeed, the SIRC and CSE commissioner report betrayed a misunderstanding of what the judicial warrant actually prescribed. It would appear that no one had audited the actual content of the warrant against the CSIS conduct, and the judge who knew the content of the warrant only learned of the conduct because it happened to be reported (and incorrectly described) in the review body report.

The absence of formalized, standing “feedback” loops between authorizing judges and review bodies is one of the many striking omissions in the Canadian national security accountability system. It is one thing not to have feedback loops where all that is at issue is covert surveillance. It is quite another where the entire Charter is in play. But even a perfect feedback loop would have its disadvantages as it would slowly move judges in our adversarial system towards a model of investigating magistrates found on the European Continent. We acknowledge that some may prefer such a system, but it has not been our system, and our judges are not trained or equipped for this task.

We turn now to questions about the review process.

### **c) SIRC Review**

SIRC is CSIS’s independent review body. It is the SIRC reports, not court decisions, that will matter most in making sure CSIS does not exceed its already

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<sup>41</sup> Bill C-51 inserting s.22.1(2) into the CSIS Act

<sup>42</sup> *Re X*, 2013 FC 1275.

troubling judicially-authorized remit to break the law. Here, we ask about the capacity of SIRC.

*i) Current Shortcomings*

In a future paper on accountability, we will trace in detail our concerns about SIRC and other review bodies. Here we simply provide a brief outline.

A number of observers regard SIRC as an inherently flawed concept.<sup>43</sup> We do not feel the need to come to that conclusion. We have nothing but respect for those who work in SIRC, in very difficult circumstances.

However, the truth of the matter is that relative to CSIS and its scale, SIRC is an underfunded, understaffed review body.<sup>44</sup> Its statutory powers have not kept pace with the reality of the security service it reviews. In 2006, the Arar Commission underscored the urgent necessity of new legislative tools allowing SIRC to coordinate with other review bodies.

But still, even now, as the security services all collaborate, the review bodies are “stovepiped” by agency. Informal efforts to coordinate are rebuffed by the government — as we understand it, the government has even suggested that coordination would violate Canada’s criminal law on secrecy.<sup>45</sup>

We are happy to be corrected if we misstate the challenges. But in our view, even at present, SIRC is in evident need of more resources, more people, and a robust and credible process of appointing SIRC members. In its committee members, it has been both understrength and occasionally been problematically staffed for some time. It (or some similar body) also requires a renewed whole of government mandate, recrafted to reflect “stovepipe” problem recognized by the Arar Commission. We cannot accept at face value the government’s repeated assertions that all is well with review in national security.

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<sup>43</sup> For an overview of these views, see Craig Forcese, “The Social Cost of National Security Symposium: Accountability with a Pinch of Context and a Dash of Fire and Brimstone” (October 1, 2012). (2012) 91 Canadian Bar Review 1. Available at SSRN: <http://ssrn.com/abstract=2551295>

<sup>44</sup> See *ibid* for some data on this issue. For media coverage of SIRC’s resourcing and operational tempo issues, see CBC News, “Bill C-51: CSIS oversight body lacks resources, former member Bob Rae says” (Feb 7, 2015), available at <http://www.cbc.ca/news/politics/bill-c-51-csis-oversight-body-lacks-resources-former-member-bob-rae-says-1.2948639>; Ian MacLeod, “Depleted spy watchdog SIRC scrambles to keep up with CSIS,” *Ottawa Citizen* (Nov 14, 2014), available at <http://ottawacitizen.com/news/national/depleted-spy-watchdog-sirc-scrambles-to-keep-up-with-csis>.

<sup>45</sup> Colin Freeze, “Spy agencies try to curb watchdogs’ ties to each other,” *Globe and Mail* (May 29, 2014), available at <http://www.theglobeandmail.com/news/national/spy-agencies-try-to-curb-watchdogs-ties-to-each-other/article18919190/#dashboard/follows/>.

*ii) Implications of Bill C-51*

We now face the prospect of a review body increasingly ill-equipped to review a security intelligence organization being tasked with considering kinetic conduct.

We do not believe there is any serious prospect SIRC will be able to do so successfully, absent serious changes to its resourcing level and mandate. In some of the scenarios we paint above, we note that CSIS may work in association with other government agencies in exercising its kinetic measures. This is emphatically permitted by the proposed s.22.3, allowing other persons to provide assistance to CSIS authorized kinetic operations. We also note that since s.22.3(2) allows confidentiality, the public may never know who in addition to CSIS is assisting CSIS in carrying out its kinetic measures. These other persons could include policing, border services, customs, signals intelligence and consular access persons. This is a long list, and we are sure it is not complete.

Will SIRC be able to “follow the trail” and examine, for instance, what CBSA does under the banner of the CSIS warrant authorization? Will it be able to coordinate reviews with the CSE commissioner when CSE exercises its technological skills on the authority of a CSIS warrant?

Experience and legislative language in the CSIS Act suggests that SIRC review will continue to be confined to CSIS, raising the prospect that swathes of (other) state conduct conceivably authorized under assistance orders in the new warrants will be effectively unreviewable, or imperfectly reviewed. We ask whether this possibility has been fully considered.

We note that the only language on review included in C-51 says: “In reviewing the performance by the Service of its duties and functions the Review Committee shall, each fiscal year, review at least one aspect of the Service’s performance in taking measures to reduce threats to the security of Canada”. In other words, not every kinetic measure will be scrutinized – we are in the area of partial audits of potentially only one of many “aspects” of CSIS actions under the broad kinetic warrant system.

To summarize: the Federal Court may be issuing warrants so CSIS can engage in kinetic or physical activities to reduce threats to security threats that were broadly defined when CSIS was an intelligence agency without such powers. The only limits are no intentional or criminally negligent death or bodily harm, no violation of sexual integrity and no willful obstruction of justice. The Federal Court has no structural or formal way to monitor how its warrant powers are deployed in practice. SIRC is underfunded and underresourced. The proposed s.38(1.1) to be added to the CSIS Act in Bill C-51 only requires that SIRC examine annually one aspect of CSIS

“performance in taking measures to reduce threats to the security of Canada”.<sup>46</sup> On the face of it, SIRC does not necessarily have to review any warrants, though we are confident that they will. We are not confident that the under-funded SIRC will be able to do much more than a partial audit of how CSIS exercises its new powers. Even then, SIRC will have difficulty reviewing the activities of others ranging from CSE, to the police, to customs, immigration and consular access officials who may (under the new Act) assist CSIS in the execution of its new powers. The prospect of such assistance orders underscore the striking consequence of the government’s refusal to modernize review powers to reflect whole of government realities, even though they were put on notice of this issue by the Arar Commission in its 2006 report.

There are many accountability gaps. They should have been repaired long ago. They will only be aggravated by CSIS’s new powers.

#### **d) RCMP Powers as Precedent**

We wish to pause on the issue of RCMP and its own capacity to engage in “disruption”. Under s.25.1(8) of the Criminal Code, a peace officer may commit an act or omission that is a crime if (a) engaged in the investigation or enforcement of criminal law; (b) is an officer who has been properly designated through the internal approval process; and, (c) believes “on reasonable grounds that the commission of the act or omission, as compared to the nature of the offence or criminal activity being investigated, is reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the reasonable availability of other means for carrying out the public officer’s law enforcement duties.” The outer limit of this power is the obvious inspiration for the CSIS kinetic powers: no bodily harm, no obstruction of justice and no violation of sexual integrity.

For ease of reference we shall refer to this as an RCMP power, although recognizing that it also extends to other police services. The government will undoubtedly argue that this RCMP power (controversial when enacted) is precedent for the CSIS kinetic powers, and indeed the CSIS provision is more constrained because it requires judicial preauthorization by warrant. We recognize that authorization by independent judges is in principle better than executive authorization. That said, we underscore the reservations listed above concerning the closed nature of the judicial warrant process.

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<sup>46</sup> In addition the proposed s.6(5) of the CSIS Act would require CSIS to issue (presumptively confidential and secret) reports to the minister on the number of warrants and a “general description of the measures that were taken under the warrants during the period.” We understand the need for operational secrecy, but we note the vagueness of this requirement tied to an internal report to the minister (the supposed apex of accountability). We would prefer a more onerous reporting requirement than a “general description”.

In any event, reliance on RCMP law-breakings powers for the new CSIS powers is an imperfect analogy that disregards important differences between intelligence and policing agencies, for the following reasons:

- The RCMP power is limited to criminal law and investigation, a broad scope but not nearly as broad as the scope of “threat to the security of Canada” and one that is much better understood;
- The RCMP power is limited to violations of the criminal law, and does not authorize violations of all law and the Charter, as does the CSIS power. It cannot, for example, be used to deprive citizens of their Charter rights to leave or return to Canada;
- Use of the RCMP power is more transparent. First, there is a *public* report with data on its use each year and the nature of the RCMP’s actual illegal (but exonerated) conduct, something that does not exist for the CSIS power. Second, since the RCMP power is exercised in the course of criminal law duties, the RCMP conduct is much more likely to come to light in a subsequent criminal proceedings. In comparison, if the CSIS system operates as designed, the precise scope and contours of the CSIS measure will never be revealed publicly. Some reporting is done confidentially to the minister. But public disclosure is merely statistical: all that is required are details on the raw number of new warrants.<sup>47</sup> SIRC is only instructed, meanwhile, to review annually “one aspect of the Service’s performance in taking measures to reduce threats to the security of Canada.”<sup>48</sup> Third, the person affected by an RCMP activity that causes serious property loss or damage must be notified of the police conduct within one year, subject to reasonable exceptions enumerated in the Criminal Code. Nothing equivalent exists for the CSIS provisions. In our view, all these transparency measures serve as prudential check on police conduct that greatly exceeds the significance of a court-authorized warrant in the CSIS context, especially given the above-noted procedural concerns with such a warrant.

In short, the government has replicated CSIS’s new powers to act unlawfully but has omitted the key checks on that power employed in relation to law enforcement under the Criminal Code.

## **Part II: “Second Order” Impacts**

In this final section, we list a series of “second order” or indirect impacts these CSIS amendments may have on both the administration of justice and the effectiveness of existing anti-terrorism strategies.

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<sup>47</sup> Bill C-51 adding s.51(2) to the CSIS Act

<sup>48</sup> *ibid* adding s.38(1.1) to the CSIS Act



We do not predict that all of these eventualities will arise, but would be surprised if none do. At the very least, they constitute matters that should be addressed by the government in justifying its proposal before Parliament. Put another way, government officials should be asked on each of these matters “have you thought of this, and what is your plan to avoid this problem?”

## **I. Concerns Relating to the Administration of Justice**

We have already identified the problems associated with efforts to appeal the Federal Court’s warrant orders, given that they will be secret, redacted and without a natural party aware of (or with) standing to challenge the government’s position. There are several other issues:

- *Criminal trials*: The best approach to anti-terrorism, like any other crime, is probably a criminal trial. As we discuss further below, a CSIS kinetic operation that occurs in the “pre-criminal” phase may overlap, affect and perhaps taint a subsequent RCMP investigation and evidentiary record. A criminal trial may be mired in questions arising from the Federal Court authorizations, its holdings in a potentially secretive Charter jurisprudence, and doubts about whether the CSIS operation contributed too or otherwise was associated with the crime at issue. The Supreme Court has reminded trial judges that they must permanently halt terrorism trials if they have a doubt that a fair trial is possible.<sup>49</sup> In the result, CSIS kinetic operations could have the unintended impact of making prosecutions more difficult. *R. v. Mejid*,<sup>50</sup> discussed above, is an existing case in point. The Air India Commission in the third volume of its report warned about the dangers of criminal investigations and trials collapsing because of secrecy issues often related to CSIS.<sup>51</sup> It recommended abolishing the bifurcated approach used with different Crown lawyers claiming secrecy and conducting prosecutions and the Federal Court deciding secrecy issues and the criminal trial judge then deciding whether a stay was required.<sup>52</sup> The government rejected these key recommendations of the inquiry. It has now added CSIS disruption warrants to the already fragile state of terrorism prosecutions – cases that will often be brought after extensive CSIS involvement in an investigation.

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<sup>49</sup> *R. v. Ahmad*, [2011] 1 S.C.R. 110 in the context of statutory stay powers under s.38.13 of the Canada Evidence Act

<sup>50</sup> 2010 ONSC 5532

<sup>51</sup> Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 *Air India A Canada Tragedy Vol 3 The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions* (Ottawa: Public Works, 2010)

<sup>52</sup> The report also warned that “at present, there is no effective and independent decision maker, charged with ensuring responses to terrorism issues serve the broader public interest and not merely the sometimes narrower interests of individual agencies.” Ibid at 13

- *Interaction with informer privilege*: Bill C-44, a law project now in the senate, will give CSIS “human sources” broad privilege from being compelled to be a Crown witness or having identifying information disclosed in court proceedings. This, like CSIS disruption warrants, will be another burden that Crown prosecutors will likely have to face in terrorism prosecutions and it goes against a major recommendation of the Air India commission. That commission warned that “it is inappropriate to give CSIS the unilateral ability to disqualify persons from becoming witnesses by extending the police informer privilege to them.”<sup>53</sup> The use of a human source to assist with the execution of a new CSIS warrant will raise complex issues that may make terrorism prosecutions even longer. Good defence lawyers will fight the new CSIS human source privilege, especially when the first thing they suspect is a CSIS kinetic operation lying at the heart of a subsequent criminal case. They will argue that the jurisprudence on police informers suggesting that the privilege is lost if the informer becomes an active agent in the investigation should apply. If that fails, they will argue that the innocence at stake exception applies. They will also argue that any CSIS misconduct in the execution of a warrant counts against a state and that either that misconduct (or combined misconduct) may warrant a stay of proceedings on abuse of process grounds. We have concerns that the new privileges and powers for CSIS in both Bills C-44 and C-51 may have the unintentional effect in at least some cases of making terrorism prosecutions more difficult.
- *Interaction with disclosure disputes and secrecy claims*. As the Air India Commission discussed in its third volume, broad ranging disclosure obligations to the accused is a constitutional reality in Canada. CSIS can be subject to disclosure either directly as part of the Crown or as a third party. This remains a disputed issue, but the disclosure expectations may be expected to increase as CSIS exercises kinetic and law breaking powers previously only available to police forces. Claims by the accused for increased disclosure will be met by claims of both privilege and national security confidentiality by the Crown including the possibility of pre-trial appeals on some of these issues. The end result may make terrorism trials - already long and complex - even more difficult.
- *Judicial review*: In many instances, it seems likely the “target” of the kinetic activities will have no idea what has happened to him or her, or if they do, the source of their misfortune. In other instances – especially where CSIS warrants amount to an opt-out of standard and otherwise lawfully conducted government processes – they will. The individual may then ultimately challenge the outcome in court, albeit unaware that the state behaviour stemmed from a CSIS warrant. An example would be measures that impede a Canadian from re-entering the country. In these circumstances, the Federal Court may be asked to judicially review state conduct authorized by a secret Federal Court warrant.<sup>54</sup> Setting aside the impossible procedural nightmare

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<sup>53</sup> ibid at 15

<sup>54</sup> See *Abdelrazik v. Canada* 2009 FC 580 for such an application.

this would provoke, courts of concordant level would be in the disagreeable and impossibly suspect position of being asked to review, indirectly, each other's own conduct. That is, the court's role as facilitator of illegality is then retrospectively and indirectly reviewed by another court. Collateral review of this sort is usually anathema in our legal system.

- *Collateral constitutional challenge:* Similar issues might arise if at issue is not the issuance of a particular warrant, but a (likely) public interest challenge to the bill's provisions brought by a public interest group on constitutional grounds. If that challenge were brought in Federal Court, the court would be called upon to consider whether its own situation as warrant authorizer is constitutionally sound. While the situation is not unknown, it is awkward for a court to be asked to adjudicate the constitutional scope of its own powers.

## 2. Operational Concerns

We also have a number of "operational" questions about the new CSIS powers, as follows:

- *Interaction with the RCMP:* As we understand it "disruption" to date has been a peace officer function, linked to police investigations. Peace officers in these situations likely remain preoccupied with the effect their conduct might have in any future criminal proceedings, and wish to reduce the chances that their disruption activities will lead to acquittals in criminal trials. For cultural and institutional reasons and because of the broad terms of the broad new powers unlinked to crime investigations, CSIS will face no such concerns. How will CSIS and RCMP arrange their affairs so that CSIS's kinetic activities do not undermine RCMP criminal investigations, either ongoing or prospective? Will the RCMP, charged with investigating illegality, be properly apprised of unlawful CSIS conduct authorized by the Federal Court, to avoid the "keystone cop" problem of cops chasing spies? What protocols will be in place to ensure handover from CSIS to RCMP in the event that CSIS's kinetic activities in the "pre-criminal" phase are handed off to the RCMP if and when the target crosses a criminal line? Has anyone worked any of this out?
- *Institutional skills:* CSIS is a security intelligence organization. If it gears up kinetic activities, it will presumably require skills and aptitudes that presently are not part of its arsenal. What plans are in place to acquire and resource and train these new kinetic operatives and operations? Will these preoccupations detract from CSIS's security intelligence operations? In other words, will the same or only modestly increased resources be spread over a broader range of activities? How will CSIS guard against agents recruited for kinetic operations not themselves proving problematic? Recruiting *informants* with criminal and terrorist backgrounds in one thing. Employing these persons to *interfere* with the lives of other people is quite another.
- *Institutional culture:* CSIS is a law-observant service, and adhering to legal expectations is an important part of its culture. Violation of the law is an

aberration, not a pastime. As the Service begins operations that, but for a Federal Court warrant, would be illegal, how will it ensure that its “black” operations do not contaminate the overall culture of the organization? This is not an academic consideration – there is a reason why most democracies hive security intelligence and special operations/foreign intelligence services into two separate organizations.

- *Social licence:* The world is rife with misunderstandings and conspiracy theories about spy services, including CSIS. Because of our speciality, we regularly receive missives from Canadians complaining of alleged wrongdoing by the Service. We are in no position to evaluate these complaints, but are able to apply a form of “Occam’s Razor” – that is, we prefer the explanation that requires the fewest complicated presumptions. If CSIS did many of the things people fear they do, they would be operating far outside their remit as a security intelligence service. With the new measures, many conspiracy theories move from the “implausible because required compounded illegal steps” to “within CSIS’s powers in principle”. There will be a consequence in terms of social licence for a clandestine service empowered to act in violation of the law and the Charter, especially in communities that feel targeted. Since CSIS too depends on community cooperation to conduct many of its activities in security intelligence, there is a risk that its new powers may undermine its ability to exercise effectively its original mandate. In the final analysis, the increased scepticism and the new doubt about the Service stemming from the new powers may be the most dangerous aspect of this law proposal.

The above operational and administration of justice concerns suggests that Bills C-51 and C-44 could have major foreseeable and unforeseen implications.

In another example of the government’s aversion to review, however, there is no requirement in either bill that they be brought back to Parliament for review after 3 or 5 years. A mandatory review was, however, a feature of the original 2001 Anti-terrorism Act, as it was for the original CSIS Act passed in 1984. Such a mandatory parliamentary review feature is fairly common in contexts where statutes are controversial and can be expected to have complicated consequences.

## **Conclusion**

In sum, the government proposes radically restructuring CSIS and turning it in a “kinetic” service — one competent to act beyond the law. This is rupture from the entire philosophy that animated the CSIS Act when it was introduced 30 years ago. We personally have not been persuaded that it is truly warranted – it seems to us that such a radical change should be supported by cogent and persuasive evidence. No one has provided a clear explanation as to why the current process in which CSIS must call the police in if they wish to break the law is inadequate.

If the new warrants are being driven by CSIS's increasing foreign operations, they should be limited to off-shore operations, though that would still merit a thorough review. We do not accept that logistical difficulties associated with "CSIS spies needing to call in the Mounties" come close to justifying the radical new proposal in bill C-51. Nor have we seen anything that suggests a link between this proposal and the October events in Ottawa or Saint-Jean-sur-Richelieu.

We also wonder at many of the details of the proposed system – not least its breadth in twinning kinetic powers with a vast concept of "threats to the security of Canada". As we have underscored repeatedly, this broad concept was developed in light of the McDonald Commission to reflect CSIS's mandate as a *pure* intelligence gathering agency that would emphatically not have either law enforcement or law-breaking powers.

We also do not believe that the warrant system purporting to permit even unconstitutional state action is lawful or desirable. We have serious questions about "knock on" effects in terms of administration of justice and operational matters. We believe that Canadians deserve reassurance that the government has a clear and cogent plan to remedy these issues.

But whatever progress is made in relation to all these flaws, the new system is breathtakingly irresponsible without a redoubled investment in our tattered accountability system. Anyone who has worked on accountability in the security sector knows that the core maxim is "trust but verify". We believe that current legal and resource constraints on review bodies mean that that standard cannot be met at present, let alone in relation to the proposed new powers.