Brief to the Standing Committee on Public Safety and National Security on Bill C-59

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Process

Bill C-59 is part of a process that started with the government's Green Paper, includes Bill C-22 and now includes the government's consultation on intelligence to evidence issues. This process has strengthened rather than weakened Bill C-59. It allows for a deliberative and evidence debate.

In my view, the two pieces of counter-terrorism legislation enacted in 2015 suffered from an absence of deliberation and evidence-based reasoning. They were politicized responses to two traumatic terrorist acts, but frankly not always well justified or evidence-based.[1]

Review and careful deliberation is not the enemy of security. It does not make us weak. There are no simple solutions to the real security threats we face. We should be honest with Canadians about this stubborn reality. All of us should strive to avoid reducing complex laws and processes to simplistic slogans. These are difficult issues and they should be debated with care and respect to all sides.

Part Nine: Review

Bill C-22 for the first time gives Parliamentarians access to classified national security information. This is necessary catch-up to our Five Eyes Allies.

Part 9 contemplates a review of both C-59 and C-22 to be started during the 6th year of the Bill taking force and to be completed within a year. This strikes me as too long especially given the delays that similar reviews have encountered in the past and the massive nature of the changes contemplated in both bills**.**

I would propose that the review be commenced with the fourth year to be completed in the fifth year. I would also propose that the review be undertaken by a special Joint Committee of the Commons and the Senate that could include 1-2 members of the new National Security and Intelligence Committee of Parliamentarians. This would allow the review to benefit from the expertise of the new committee while not being dominated by those who will be

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[1] For a book length critique see Craig Forcese and Kent Roach *False Security* (Toronto: Irwin Law, 2015)

asked to sit (at least in part) in judgment of their own performance. I would also recommend a Joint Committee to minimize the danger that national security debates will become overly partisan. I agree that the review should include an examination of the effects of both Bills C-22 and C-59 and that it could also include an examination of the threat environment which if the past is any indication may be different five, six or seven years from the date of C-59 being enacted.

Part One: Review

I welcome the creation of the new National Security and Intelligence Review Agency with a mandate to review all national security and intelligence activities as well to hear various complaints. This new body has a vast mandate, but one that is necessary to match whole-of-government security efforts.

I worry that s.3 requires only a minimum of 3 members which might be manifestly inadequate. **I would prefer that the new "super SIRC" be somewhat "super-sized". In my view, it should contain a minimum of 5 members and up to 8 members**. **Another alternative is to allow the new Agency to delegate its investigatory powers to specified persons with appropriate security clearances. This would allow the Review Agency to take on additional resources to deal with unanticipated problems.**

Increasing the number of members would also create more possibility for increased diversity in appointments. To my mind it will be more important to ensure that its members represent communities most directly affected by national security activities. It will also be important that the membership include those with expertise in the complex national security area. Section 4 is unimaginative in retaining the basic approach to appointments and consultation with the leaders of political parties that we have used for SIRC since 1984. This process has produced some fine reviewers but also those who appear not to have had a robust impact and it places too more emphasis on candidates who are acceptable to the major political parties.**The appointment process for the members of the new review agency should make attempts to ensure that its members represent the diversity of Canada and that a majority of them have pre-existing experience or expertise in complex national security matters.**

It will be vitally important that the new Agency be adequately funded especially given statutory mandates and Ministerial references as well as fluctuating numbers of complaints- all of which may take up much of its limited time and resources.

Access to material covered by solicitor client privilege contemplated in s.9(2) is critical given that the practical ambit of the powers of security agencies often depend on the legal advice they receive. If enacted, this part of Bill C-59 will make Canada once again at the forefront of nations in terms of review. That said, there is still room for improvement of this important and praiseworthy part of Bill C-59.

Parts Two, Three and Four

My colleague Craig Forcese has addressed some of these issues in his submission to the committee and I would simply refer you to those submissions which I adopt.

I would note, however, that some of the concerns about CSE and CSIS access to information might be mitigated by Part Five Reforms to the *Security of Canada Information Sharing Act* to be discussed below

I would also add that the additional restraints and specification of CSIS disruption powers mitigates some of the concerns that Bill C-51 provided judges with an open-ended discretion to authorize CSIS illegality.

Bill C-59 provides a closed list of what those powers are: altering or disruption communications and goods, fabricating documents, disrupting financial transactions, impersonating persons, and interfering with persons' movements. It also expanded the list of non-authorized conduct to include detention, damage to property that endangers and torture, cruel, inhuman or degrading treatment. (s.99) This approach allows the government to argue that threat reduction powers are prescribed by law and are a reasonable and justified limit on Charter rights. It provides a clearer and more solid legislative basis for these news powers while still maintaining the virtues of judicial authorization as well as notification of the Review Agency. The relevant constitutional principle here, one that was ignored when Bill C-51 was enacted, is that Parliament that should take responsibility for limiting liberty and authorizing limits on Charter rights with judges retaining the power to determine whether those limits have been justified as proportionate.

Intelligence to Evidence

CSIS disruption powers should be viewed through the larger lens of how they will affect the relation between CSIS and the police and the relationship between intelligence and evidence.

One policy concern with CSIS disruption powers is that they could be used as a temporary band aid for Canada's longstanding intelligence to evidence problems. Specifically, they could allow CSIS to maintain its separate terrorism investigations and to engage in disruptions without facilitating possible terrorism prosecutions. There are concerns that Canada is risk adverse when it comes to terrorism prosecutions. These prosecutions apply to acts well in advance of any act of terrorism and that apply to terrorist travel and that could potentially be the subject of a CSIS disruption.

There are legitimate debates about when terrorism prosecutions are appropriate in every case, but CSIS should not de facto be able to determine whether a prosecution is undertaken by using disruptions as an alternative to evidence gathering and prosecutions. This is especially the case because CSIS has institutional incentives

(this is not a matter of good personal relationships with the RCMP) to keep its sources and methods secret even in cases where the public interest may be in prosecutions. Prosecutions remain the fairest and most transparent counter-terrorism instrument. If they result in convictions, they will generally result in significant sentences, deterrence, denunciation and incapacitation.

Even if justified as "a just in case" power, CSIS disruption powers should not be used systemically as an alternative to terrorism prosecutions. They remain secret and controversial powers. In this respect, it should be noted that the police also have crime prevention powers that can be used to disrupt terrorist plots but that they can be expected to be more aware of possible trade-offs between disruption/temporary prevention on the one hand and prosecution/longer term incapacitation on the other. In other words, even CSIS disruption powers as reformed by Bill C-59 must be carefully reviewed both to determine not only their propriety, proportionality and necessity but also their effects on terrorism prosecutions.

CSIS Human Source Privilege

The Air India Commission (I served as its director of research (legal studies)) raised many concerns about the conversion of intelligence to evidence and many of these (ie the need for specialized prosecutors, giving criminal trial judges jurisdiction under s.38 of the Canada Evidence Act) remain unaddressed. Some but not all of these are being addressed in the government's ongoing intelligence to evidence consultation which unfortunately also includes a controversial and possibly unconstitutional proposal for the use of closed material proceedings and secret evidence in civil proceedings.[2]

The Air India Commission specifically recommended against giving CSIS human sources a class privilege that was enacted as part of the Protection of Canada Against Terrorists S.C. 2015 c. 9. I **remain of the view that the case for such a class privilege has not been made out and that it could make terrorism prosecutions more difficult.** [3] **I would recommend repealing the CSIS informer privilege. In the alternative, I would recommend that privilege only be triggered when sources are promised anonymity as opposed to confidentiality as required under the 2015 legislation There is a danger that routine promises of confidentiality will trigger a strong privilege that can only be waived by both the Director and the Source. The limited innocence at stake exception should be expanded to include whenever disclosure is required under s.7 of the Charter. Moreover, the Federal Court should not have the exclusive jurisdiction to determine whether innocence is at stake so as not to**

[2] Kent Roach and Craig Forcese "Intelligence to Evidence in Civil and Criminal Proceedings: Response to August Consultation Paper" 12 Sept 2018

[3] See Kent Roach "The Problems with the New CSIS Human Source Privilege in Bill C-44" (2014) 61 Crim.L.Q. 451. For a more sanguine conclusion that the present system based on separate police and CSIS investigations can live with the CSIS source privilege which will mainly be applicable when reviewing warrants see John Norris "The New CSIS Human Source Privilege" (2017) 64 Criminal Law Quarterly 509.

bifurcate terrorism prosecutions conducted that are conducted in provincial superior court. I also support those proposals to given provincial superior criminal courts jurisdictions to make and revise non-disclosures under s.38 of the Canada Evidence Act. Finally. I also would recommend that CSIS's practices in promising anonymity to informers be the subject to a study by the new National Security Parliamentary committee.

Part Five: Security of Canada Information Sharing Act

The *Security of Canada Information Sharing Act* was one of the most controversial parts of Bill C-51. It galvanized civil society opposition – and that opposition carried over to the Green paper consultations conducted in the fall of 2016.

Bill C-59 is most disappointing in its very light-touch amendments to this controversial and poorly drafted part of Bill C-51.

The *Security of Canada Information Sharing Act* created by Bill C-51 created a provocatively broad and novel definition of "activities that undermine the security of Canada" justifying internal federal government information sharing. The information-sharing law definition still includes the vague concept of "undermining the sovereignty and security of Canada or the lives or security of the people of Canada," and even extends it to apply to those connected to, but outside Canada.

Bill C-59 leaves intact the quasi-sedition section that refers to "changing or unduly influencing a government in Canada by force or unlawful means." It only adds that interference with critical infrastructure must be "significant and widespread." It also retains reference to conduct in Canada that undermines the security of any other state raising concerns that activities in Canada that undermine the security of repressive regimes will be the subject to information sharing. **The controversial and overbroad concept of "activities that undermine the security of Canada" should be replaced with "threats to the security of Canada" as defined in the CSIS Act.**

The Bill clarifies the exemption for protest, dissent and artistic expression. But it does so by allowing such activities to be still subject to the disclosure provisions of the act if they are "carried out in conjunction with an activity that undermines the security of Canada." And so, the protest exemption is tied to a statutory term that (even after the minor amendments in Bill C-59) remains the broadest definition of a national security in the law books. This distinguishes this approach from the similar approach to protest taken in the CSIS Act which is indexed not to the overbroad and relatively novel concept of "activities that undermine the security of Canada" but the more limited and traditional definition of "threats to the security of Canada" in s.2 of the CSIS Act.

The operative section 5 of the Act is amended, but it would still allow broad sharing whenever the disclosure "will contribute to the exercise of the recipient institution's

jurisdiction" in relation to security. This is far short of requirements that disclosure be "necessary" to that jurisdiction, a reform urged by the Privacy Commissioner. **Section 118 amending s.5(1)(a) should be amended to require that "the disclosure is necessary (not simply will contribute) to the exercise of the recipient institution's jurisdiction…". In addition the recipient institution's jurisdiction should be indexed to the threats to the security of Canada as defined in s.2 of the CSIS Act and not the still overbroad definition of activities that undermine the security of Canada in the Security of Canada Information Act even as it would be amended by Bill C-59.**

Bill C-59 does, however, improve the information disclosure act with respect to several information-sharing practices raised by the commission of inquiry into the treatment of Maher Arar. Notably, agencies that disclose information must provide information about its accuracy and the reliability of the methods used to obtain it. There is also a more accountability-friendly requirement to keep detailed records on what information is disclosed under the act and to provide them on an annual basis to the new review agency discussed above.

Nevertheless, the breadth of security information disclosure and sharing under Bill C-59 remains almost as large as it is in Bill C-51. This will provide challenges both for the Privacy Commissioner and the new review agency asked to keep an eye on this system.

Part Six: Secure Air Travel Act

The Bill C-59 creates the legal infrastructure for a list managed in-house by the government and not outsourced to the airlines. This opens the door to more careful management of one especially controversial form of false positives -- people who share the name of a listed person whose travel is affected by that coincidence. But creating a true system of unique identifiers requires more than legal change – it will require administrative and financial action. It also requires a recognition that false positives unnecessarily alienates Canadians- and especially Canadians who are Muslims or have Arab origins- from Canadian counter-terrorism.

C-59 also makes a slight change: where there is a challenge to a no fly listing, a person will be delisted if the minister does not respond. But the Minister now would have 120 days as opposed to 90 to make a decision on whether to respond or not. This is a long time if you have been wrongly listed. Meanwhile, in the appeal itself, there are no special advocates empowered to challenge the government case in the secret appeal. This is an unfortunate omission, since special advocates exist and have done very valuable work in the immigration law's secretive "security certificate" regime. Special advocates should also be extended to security-related passport suspensions. Again the basic principle is that all reasonable efforts should be taken to avoid false positives that result in a misallocation of limited security resources and also can tarnish social acceptance and public confidence in Canadian counter-terrorism.

Bill C-59 is also disappointing in failing to undo the amendments that C-51 made to restrict the disclosure that security cleared special advocates receive in security certificate cases. This may require a return visit to the Supreme Court if the government ever resorts to its secret evidence powers in the immigration law. It also raises concerns that CSIS may continue to prioritize secrecy especially with respect to its sources, thus precluding adversarial challenge to their reliability.

Part Seven: Criminal Code

Terrorist group listing

Under the Criminal Code, the cabinet can list terrorist groups. People who have the wrong sorts of dealings with the listed group (for example, giving them money) can then be prosecuted. But terrorism listing has not been that important in Canadian criminal law – most of the prosecutions involving terror "groups" have not been with respect to listed entitled like Al- Qaida, but rather connected to "bunch of guys" conspiracies. The listing system requires a reconsideration of each listing every two years. Under C-59, that will now happen every five years. This may not be that important, since reviews do not amount to much.

But there has been at least one instance where an entity challenged its listing as a terror group. And it really was not able to do so because its assets were frozen. **It would be fairer to allow frozen assets to be tapped to cover the costs of an appeal. And it also might be wise to guarantee that those who work on the appeal as lawyers are not later accused of terrorism offences because of that work. Special advocates should also be available in these appeals to the extent that the preclude the appellant from having access to intelligence that the government offers in support of listings. The UK has these rules as part of s. 10 of its Terrorism Act, 2000 and so should we. Again the basic principle is that all reasonable effort should be taken to minimize false positives and that fairness and the appearance of fairness is important to Canadian counter-terrorism.**

Advocacy of Terrorism Offence

Bill C-59 will drop the problematic and vague crime "knowingly advocates or promotes the commission of terrorism offences in general." It will replace it in s.143 amending s.83.221(1) with the more familiar and clear criminal law concept of "counseling another person to commit a terrorism act." This conduct will still be punishable by five years in jail. Given this change it is probably no longer necessary to incorporate defence-like concepts such as those in ss.83.01(1.1) and 319(3) of the Criminal Code into the advocacy offence.

Counselling or inciting others to commit crimes has always been a crime. The Bill C-59 change is a big improvement on Bill C-51's provocatively broad speech crime which came perilously close to criminalizing political comments that glorified

terrorism. This new definition will also apply to warrants to seize terrorist propaganda.

I would have less of an objection to expanding terrorist propaganda to include speech that both counsels and instructs people to commit terrorist acts that could be deleted by judicial warrant. This system (especially if special advocates could play a role in it) is a more transparent and public system than delegating powers of censorship to social media companies. I am not aware of any such judicial orders of take downs and that is another subject that the new Parliamentary committee might want to examine. There is a danger that democracies will subcontract the take down of content to social media companies. There is a need for clear criteria and public standards in this important and challenging area.

Much has been made in the news of efforts to counter violent extremism. This is a legitimate part of a comprehensive counter-terrorism strategy and one concern with overbroad speech offences such as that that presently exist in s.83.221 created by Bill C-51 is that they complicate outreach to extremists designed to prevent them from resorting to violence. This should also be a matter for additional study and Parliament should remain open to repealing terrorist offences that are not necessary and that have unintended and unanticipated counter-productive effects.

Preventive Arrests

Bill C-51 made it easier to make preventive arrests and also to obtain regular peace bonds (it is important to realize these are two separate things and that they have been around since 2001). It did all of this in the absence of a public lessons learned evidence based about these instruments and why they apparently failed with respect to the terrorist attack of 20 October, 2014.

Preventive arrest permits warrantless detention without criminal charge. The system may then allow continued detention for up to seven days, under court supervision, pending the imposition of a peace bond. (Before C-51, the maximum detention period was 72 hours.)

The amendments in Bill C-59 would retain the existing test for preventive arrest, but change some of the thresholds in this test. The test has two stages. First, the arresting officer has reasonable grounds to believe that a terrorist activity may be carried out. The second stage requires that the peace officer "suspects on reasonable grounds" that the arrest or peace bond "is necessary." This "necessary" language replaces C-51's more permissive "is likely to prevent" the terrorist activity.

This is a minor change that is difficult to assess – these powers have never been used since they were first created in 2001. We think they would never in practice be used, anyway, except in true emergencies likely to meet the "necessary" threshold. That is because preventive arrest blows the cover off a covert investigation. And without that covert investigation, you may not be able to unravel a conspiracy. And

so, once you arrest someone and preventively detain them, it will likely be because there is an emergency that precludes more conventional police work.

Still, I worry that the seven-day maximum preventive arrest time remains in place. That is a long time to hold someone in prison because you merely suspect them without having the basis for criminal charges – regular criminal law would never allow them as represented by the continuation of a five year sunset for these provisions. And it is a long time to be questioned by police while detained.

There has been no effort in the statute to regulate the sort of questioning police may undertake during this time. This has been a recurrent criticism of the preventive arrest provisions since their enactment in 2001 and it **becomes even more important given that Bill C-59 would retain their increased possible length to 7 days. I recognize that the 7 day detention would be supervised periodically by a court, but having some rules limiting questioning time and ensuring access to lawyers would be a good amendment. Such an amendment could guard against the risk of false confessions produced by prolonged questioning and other forms of abuse. Although judges are aware of the dangers of false confessions, their attempts to regulate them have been criticized as episodic and sub-optimal. It should be remembered that if ever used, this section will likely be used in an emergency situation and that wrongful convictions in terrorism cases have been caused by false confessions. Again one of the animating principles is to take all reasonable steps to avoid false positives.**

Peace Bonds

A peace bond is basically a restraining order – it does not amount to imprisonment, but instead includes other strictures on liberty (for example, wearing an electronic bracelet). They generally last for a year with breach of these conditions being an offence that under C-51 for a maximum of 4 years.

The constitutionality of the peace bond changes to Bill C-51 was upheld in *AG Canada v. Driver* 2016 MBPC 3 with the exception of the reference of the conditions in s.810.011(6)(a) of requiring attendance in a treatment program as a condition of a peace bond. This issue is not addressed in Bill C-59.

With C-59, regular peace bonds remain largely untouched, with some new annual public reporting requirements which will assist in understanding the prevalence and effectiveness of these intermediate sanctions. Understanding how many peace bonds were allowed to lapse will also help in determining whether they, like no fly listing, have a false positive problem.

I welcome the extension of Youth Criminal Justice Act standards to preventive detention and regular peace bond proceedings involving youth and there may be more of a case for using peace bonds as a less drastic alternative to terrorism

prosecutions for young people who may be responding negatively to temporary situational and identity crises.

I do, however, have some concerns that s.810.011(4) may be used as a form of post release controls on convicted terrorists who have served their sentence. It provides that such persons could be subject to peace bonds for up to 5 years. That is a long time.

Peace bonds may have a place as an intermediate counter-terrorism instrument but they run the risk of imposing excessive restraints and false positives on those who are not going to act on extremist ideas or as in the Aaron Driver case being unable to stop determined terrorists.

Investigative hearings

Investigative hearings would be repealed by Bill C-59 and this is a good thing. These hearings were supposed to be about secretly compelling persons to provide information useful to terrorist investigations. The procedures were introduced after 9/11, but were never successful. They were tried with a reluctant witness in the Air India trial – a trial that resulted in two acquittals in 2005 and the Supreme Court greatly limited their utility by placing them subject to the open court presumption and the presumption that regular evidentiary rules would apply. There was also a strong dissent on the basis that judges should not be conscripted to preside at what are essentially police investigations augmented by judicial powers to penalize a failure to co-operate.

Repealing investigative hearings makes sense – they were always an unwieldy concept that also resulted in compelled material being inadmissible in subsequent prosecutions. They would force the police to abandon any hope of a covert investigation and they could hurt subsequent prosecutions through their long immunity trails. The government deserves credit for repealing a power that has not proven necessary and could contrary to its intent when enacted prove to be counter-productive to terrorism prosecutions. This is the sort of evidence-based and rational review and reconsideration of evolving counter-terrorism policy that should be encouraged.