

Bill C-59 - An Act Respecting National Security Matters

a brief by

Canadian Unitarians for Social Justice (CUSJ)¹

to the

Commons Standing Committee on Public Safety and National Security (SECU)

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Overview

This brief first considers the ethical and democratic issues that are raised by security legislation in general, argues that the Commons Standing Committee on Public Safety and National Security (SECU) must take an active role in reviewing and amending such legislation and provides supporting references². It then touches on three areas of particular concern to Canadian Unitarians For Social Justice (CUSJ) and recommends specific changes.

CUSJ is a national organization representing its members and pursuing goals of peace and security; environmental protection; the relief of poverty and economic injustice; discrimination based on religious, racial or other grounds; abuses of human rights whether of individuals or peoples; and abuses of democratic process.

Witnesses to the Commons Standing Committee on Public Safety and National Security (SECU) have ably analyzed many provisions of C-59. CUSJ asks that SECU carefully consider all recommendations, taking into account the ethical and democratic issues that are raised in this brief.

The democratic vision

In a democracy, power is vested in the people. People are treated as equals of each other, and they interact with government authorities as equals: the authorities are required to obey the law just as individuals must, and individuals are able to challenge the actions of the authorities.

These features of democracy are the reason that Canada has a peaceful and safe society. Evidence from the social sciences shows that people comply with the law not so much because they fear punishment as because they feel that legal authorities are legitimate and that their actions are generally fair. This perception of legitimacy depends in part on whether law enforcement agencies treat people with proper respect as human beings, each with his or her own needs for dignity,

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2 In the PDF version of this document the footnotes contain links to the referenced documents, which can be accessed in most browsers using <Ctrl>Click<Ctrl>Click.

privacy, and so on. CUSJ's submission to the Public Safety Canada Consultation on National Security presents this analysis in more detail.³

The democratic vision is rooted in the Golden Rule, the ethical principle that appears in many religions and traditions.⁴ Yet it is not only an ethical imperative. It is a practical way to foster a peaceful society in which people can fulfill their greatest potential. Conversely, when Canada's law or its government institutions fail to treat all people with respect and dignity, or when government secrecy prevents the people from exercising democratic control, the result is reduced respect for the law that damages the security of all Canadians.

Tension between the democratic vision and security agency demands

There is tension between the democratic vision and security agency demands. A reasonable person would agree that secrecy about some security activities is necessary and that security agencies may sometimes need special powers. Yet, based on the limited information available to the public, it appears that the level of secrecy and discretionary power demanded by security agencies goes beyond what is effective and fails to properly balance security against the principles of democracy. Security agency people have good intentions, but because of their position, they give disproportionate weight to the need to maximize their own effectiveness. In their minds, the immediate possibility of a real security failure outweighs the long term possibility of damage to the intangible democratic spirit of our country. In the USA, Michael Hayden, former director of both the CIA and the NSA, had a policy of “playing to the edge” of legality⁵. The same behaviour can be expected from Canadian security agencies.

It appears that security agencies will not release any information about their actions to the public unless the law explicitly compels it; even then, there are examples of the law being bent to avoid the release of information. There are examples of information being withheld when there is no risk that security will be compromised by its release; and examples where secrecy is damaging to individuals, yet security agencies make no apparent effort to find alternative methods.

Secrecy conflicts with democracy in two ways.

First, it prevents individuals from knowing when they have been wrongfully

3 Canadian Unitarians for Social Justice. 2016-12-14. Submission to the Public Safety Canada Consultation on National Security. <https://cyberspirit.dyndns.org/CUSJ/NationalSecurityConsultation2016-12-14Submitted.pdf> accessed 2017-03-07.

4 Wikipedia, Golden Rule. https://en.wikipedia.org/wiki/Golden_Rule accessed 2016-12-02.

5 Michael Hayden. 2016. Playing to the Edge: American Intelligence in the Age of Terror. Penguin Press. New York.

targeted by security agencies and need to seek recourse through the courts.

Second, it prevents the publication of general or statistical information about security agency actions. If citizens do not know what security agencies are doing, they cannot exercise democratic control over them.

The problem is real and substantial

Unfortunately, apologists for our security agencies fail to understand that violating the democratic vision damages Canadian society and its security. Testimony on C-59 before SECU included this statement:

... We are not here because there's in any way some large-scale violation of the professionalism or the capabilities in which the community does its job. We have the *odd issue* that comes up. Usually *those issues are first identified by the community* itself and then brought to the appropriate offices. We have a *professional* community, but we have the public that is skeptical, so I think the primary purpose of review here is to reassure the public that in a rule-of-law society and in a constitutional society everything is indeed on the up and up.⁶ [our italics.]

This viewpoint fails to address published evidence about the “odd issues” cited, the security agencies' record of self-regulation and their “professionalism”. To give one example of each:

- The provision of false information to foreign agencies which led to the wrongful incarceration and torture of law-abiding Canadian citizen Maher Arar⁷ cannot be dismissed as an “odd issue”.
- The ruling that the Federal Court was deliberately misled by CSIS for more than 10 years⁸ refutes the claim of self-regulation.
- Documented workplace harassment of Muslim employees by their supervisors at CSIS⁹ is egregiously unprofessional.

6 Christian Leuprecht. 2017-12-07 Standing Committee on Public Safety and National Security - House of Commons Canada (09:55). <http://www.ourcommons.ca/DocumentViewer/en/42-1/SECU/meeting-90/evidence#T0955> accessed 2018-01-05.

7 Dennis O'Connor. Report of the Events Relating to Maher Arar. http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/AR_English.pdf accessed 2018-01-05

8 Jim Bronskill. 2016-11-03. CSIS broke law by keeping sensitive metadata, Federal Court rules. CBC News. <http://www.cbc.ca/news/politics/csis-metadata-ruling-1.3835472> accessed 2018-01-05.

9 Michelle Shepard. 2017-12-14. CSIS settles multimillion-dollar lawsuit with employees who claimed workplace Islamophobia, racism and homophobia. Toronto Star. <https://www.thestar.com/news/canada/2017/12/14/csis-settles-multimillion-dollar-lawsuit-with-employees-who-claimed-workplace-islamophobia-racism-and-homophobia.html> accesses 2018-01-

These and other stories are substantive reasons for a lack of public confidence in security agencies. They are exacerbated by a culture of impunity: these errors and unlawful actions have not resulted in any sanctions against the security agency employees who perpetrated them.

Parliament must set clear limits on security agency actions

Uncritical acquiescence to security agency demands will mean that some people are treated unfairly and will have no recourse. This will damage the legitimacy of government and respect for the law, which in the long term will reduce the security of all Canadians. It is Parliament's role to set clear limits to security agency actions in order to properly balance short-term effectiveness against the long term health of Canadian society and to enact mechanisms to ensure that those limits are respected.

Parliamentarians must recognize that legislation drafted in government ministries will inevitably emphasize security agency concerns. The ministries rely on the agencies to be their in-house “experts”. There is no countervailing influence within the ministries to ensure balance in draft legislation. For this reason, parliamentary committee input is of particular importance in the case of security legislation. The government may reverse amendments made in committee, as in the case of SECU's amendments¹⁰ to C-22 - the National Security and Intelligence Committee of Parliamentarians Act, sections 13, 14 and 16. Even then, the forum provided by committee hearings and the independent recommendations of the committee members promote public debate that will produce better legislation in the longer term.

Undermining the sovereignty and security of Canada

C-59's vague concept “undermining the sovereignty and security of Canada or the lives or security of the people of Canada” is so broad that it includes lawful political activities. It has no place in the law of a democratic state.

Even if the low threshold of “undermining” is used only to authorize sharing of existing information between government departments, it has a chilling effect on the democratic process. The technological developments of the last 50 years make it possible to quickly assemble data from multiple government departments into a detailed dossier on any individual. Compiling dossiers on law-abiding citizens is not an acceptable activity of a democratic government.

Sincere and law-abiding people who advocate for social justice and environmental protection have good reason to mistrust the “undermining” provision . Given their

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10 Jack Dodds. 2017-04-14. <https://cyberspirit.dyndns.org/CUSJ/C22Versions.pdf>

tradition of social justice advocacy, we know that some of these people are members of CUSJ and of Unitarian-Universalist congregations.

Their fears are entirely realistic, given the documented record of security agency activities. For example, in 2015 some environmental activists discovered that undercover security agency employees were attending their meetings¹¹. A leaked RCMP report attempted to justify such surveillance: “There is a growing, highly organized and well-financed anti-Canadian petroleum movement, that consists of peaceful activists, militants and violent extremists, who are opposed to society's reliance on fossil fuels.”¹² By lumping together “peaceful activists” with “violent extremists”, the security agencies gave themselves permission to conduct surveillance against any organization advocating for reduced dependence on fossil fuels. A complaint to the Security Intelligence Review Committee (SIRC) resulted in a hearing that was held in secret. SIRC then dismissed the complaint and issued a gag order so that the complainants could not reveal anything heard at the hearing.¹³ The case has been appealed to the Federal Court. Whether SIRC is upheld or not, the chilling effect on citizen activism is real.

Such tactics harm the democratic process by intimidating citizens who take unpopular positions. Positive social change happens, in part, because some people are willing to advocate for causes that are initially unpopular, such as climate change and indigenous rights. Yet in Canada today, activists fear that they are being spied on and “disrupted”. The fear itself causes those people to question the legitimacy of government and undermines democracy.

False positives on the Canadian No-Fly list

The deceptively named “Passenger Protect” program and its Specified Persons (“no-fly”) list has arguably done more damage than any other program to the perception of the legitimacy of security agency actions, with good reason.

Innocent people, together with their accompanying family members, have experienced difficulties in boarding airline flights because their name is the same as a name on the list. Even though the list is mandated to include a birth date, which would appear to preclude the targeting of young children, there have been widely publicized cases of families being singled out for a humiliating “secondary

11 Alexandra Swann. 2015-08-06. I was spied on. British Columbia Civil Liberties Association. <https://bccla.org/2015/08/i-was-spied-on/> accessed 2018-01-05.

12 RCMP. 2014-01-24. Critical Infrastructure Intelligence Assessment. Criminal Threats to the Canadian Petroleum Industry. <https://www.desmogblog.com/sites/beta.desmogblog.com/files/RCMP%20-%20Criminal%20Threats%20to%20Canadian%20Petroleum%20Industry.pdf> accessed 2018-01-05.

13 Amanda Connolly. 2017-12-06. Early win for B.C. civil rights group in pipeline protest spying case heading to Federal Court. <https://globalnews.ca/news/3899870/csis-pipeline-protest-spying-illegal-federal-court> accessed 2018-01-05.

inspection” because the name of an infant or young child is on the list. Even more upsetting, the people on the list are not informed of their status until they try to board. Once a person finds out that their name is on the list, and even if they succeed in boarding their flight, there appears to be no effective procedure to prevent repeated false positive incidents on subsequent trips. Furthermore, because of Canadian security agencies' record in other cases, the “false positives” are justifiably concerned that their status will become known to foreign security agencies with consequences ranging from minor inconvenience to incarceration and torture should they travel abroad.

The program discriminates in that it disproportionately affects people with Islamic and Middle Eastern backgrounds. This discrimination damages the legitimacy of government. It is a concern for members of CUSJ and their fellow Unitarian-Universalists, who support religious freedom and who have sponsored hundreds of Syrian refugees.

Further damage results because the government does not appear to care about the effect on innocent people. Publicity about the farcical labelling of young children as threats, the refusal to inform passengers that their name is on the no-fly list before arrival at the airport, and the Kafkaesque treatment of those who become aware that they are “false positives” yet receive no government assistance to deal with the problem on future trips, all paint a picture of a government that does not care how many people's lives are disrupted as long as the goal of keeping “specified persons” off the aircraft is achieved. This causes double damage to democracy: government indifference alienates groups that are disproportionately affected; and the government's poor example legitimizes bigotry against them.

The “Passenger Protect” program is shrouded in secrecy, but we feel that its problems result from the inability of security agencies to balance their short-term effectiveness against the long term health of Canadian society. The clearest example is the 2010 Freedom of Information request for the number of persons on the Canadian no-fly list, which was refused.¹⁴ No one has been able to explain how an organization plotting violence could use this information, and SECU itself has recommended that the number be published annually¹⁵. Security agencies' policy of withholding information undermines the public's right to question the effect of the no-fly list on innocent travellers.

14 Federal Court. 2016-04-20. Canada (Information Commissioner) v. Canada (Transport) Federal Court Decisions. 2016 FC 448.
<http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/144140/index.do> accessed 2016-12-06.

15 SECU - Standing Committee on Public Safety and National Security. 2017-05. Protecting Canadians and Their Rights: A New Road Map For Canada's National Security.
[http://www.ourcommons.ca/Content/Committee/421/SECU/Reports/RP8874869/securp09/securp09-e.pdf](http://www.ourcommons.ca/Content/Committee/421/SECU/Reports/RP8874869/ securp09/securp09-e.pdf) accessed 2018-01-09. p. 42 - Recommendation 33.

Similarly, security agencies will not countenance the simple step of informing passengers who are purchasing tickets that they are on the no-fly list. Do they think that this change in procedure would make the list less effective? If so, it seems reasonable to ask that they explore other procedures to offset that result. The refusal to consider alternative measures creates the appearance that the government does not value the civil liberties of the false positives whose lives are affected. Since the security agencies will not do it, Parliament must legislate measures to solve the problems.

Mass surveillance and the rule of law

Of the principles of the democratic vision, the oldest is likely the requirement that the government obey the law. It was articulated 803 years ago in the Magna Carta.

It is clear that some Canadian security agency activities have bent and broken existing laws, especially when it comes to mass surveillance. This became public knowledge in 2014 as a result of the Snowden revelations. One of the Snowden documents showed that CSEC had tested mass surveillance techniques on innocent travellers in Canadian airports¹⁶, an activity that independent experts assessed to be illegal under Canadian law. Two years later, the Federal Court ruled that CSIS had illegally retained data collected using mass surveillance techniques for 10 years and had deliberately misled the courts about that activity.¹⁷

In 2014, the Canadian Unitarian Council¹⁸ adopted a resolution asking the government for “ ... legislation that would make it unlawful for the government to engage in pervasive surveillance, including the routine mass collection or storage of its citizens’ communications, movements, or metadata; ... ” It was joining many voices in civil society who saw government mass surveillance as contrary to the democratic vision and harmful to Canadian society.

Not only is mass surveillance widely seen as harmful in itself, there is no credible evidence that it is effective. In the USA, a member of a review committee appointed by President Obama stated that the NSA's mass metadata surveillance program “has not played a significant role in preventing any terrorist attacks to this point”¹⁹.

16 Greg Watson. 2014-01-30. CSEC used airport Wi-Fi to track Canadian travellers: Edward Snowden documents. <http://www.cbc.ca/news/politics/csec-used-airport-wi-fi-to-track-canadian-travellers-edward-snowden-documents-1.2517881> accessed 2018-01-05.

17 Jim Bronskill. op.cit.

18 Canadian Unitarian Council. 2014-05-16. Resolution on Pervasive Surveillance. http://cuc.ca/wp-content/uploads/2014/05/CUC_Urgent_PervasiveSurveillance_Approved.May2014.pdf accessed 2018-01-09.

19 Spencer Ackerman. 2014-01-14. NSA review panel casts doubt on bulk data collection claims. The Guardian. <https://www.theguardian.com/world/2014/jan/14/nsa-review-panel-senate-phone-data-terrorism> accessed 2018-01-10.

One would expect that these serious violations of the law would result in actions to sanction those responsible, to more clearly identify illegal actions and to prevent recurrence. Instead, C-59 seeks to enshrine mass surveillance in law. A detailed analysis by the International Civil Liberties Monitoring Group (ICLMG)²⁰ concludes that “C-59 legalizes unnecessary data collection and retention” Among other provisions, C-59 allows the collection of “‘publicly available information’, which, in today's connected society, means the digital trails we all leave in the course of our everyday activities. Comprehensive data about individuals can be stockpiled quickly and inexpensively. This is one reason why privacy legislation like PIPEDA has become necessary.

If we authorize security agencies to acquire publicly available information, we give them the power to create dossiers on law abiding citizens. Once mass surveillance data is acquired, even if dossiers are not immediately created, the technology exists to create them almost instantly on request. Mass data retention is surveillance. If data about a person is acquired for the sole purpose of facilitating possible future access to it by security agencies, that person is under surveillance. The fact that the data is not immediately organized into a dossier does not change that reality.

Who promoted this new power for security agencies? Instead of clearly limiting mass surveillance in response to illegal security agency activities, C-59 legitimizes that illegal activity. Given that the legislation was drafted in government departments, it appears that the agencies themselves requested the new powers and that they were not required to prove necessity or balance the new powers against democratic norms. By accepting and legalizing the formerly illegal activity, the proposed legislation would weaken the rule of law and the legitimacy of government.

20 International Civil Liberties Monitoring Group. 2018. Bill C-59: Mass Surveillance and Cyber Powers. <http://iclmg.ca/issues/bill-c-59-the-national-security-act-of-2017/bill-c-59s-mass-surveillance-and-cyber-powers/> accessed 2018-01-09.

Recommendations

These recommendations pertain to the issues that have been raised in this brief. Other witnesses and briefs have raised additional issues that should be carefully considered by SECU.

- In reviewing each provision of C-59 and its predecessor C-51, carefully consider whether the resulting law will unduly extend security agency effectiveness to the detriment of the legitimacy of government and fundamental democratic principles.
- Remove references in C-59 to the category of “undermining the sovereignty and security of Canada or the lives or security of the people of Canada”. Replace it with the category “threats to the security of Canada” defined in the CSIS Act, as recommended in other testimony and briefs²¹ and previously by SECU itself²².
- Amend the Secure Air Travel Act to require annual publication of statistical information on its operation, including the number of names on the Specified Persons list, as previously recommended by SECU²³.
- Amend the Secure Air Travel Act to require that names on the no-fly list be identified at the time of ticket purchase and that the government immediately investigate to determine if the passenger is a false positive or a genuine threat so that innocent passengers will not be inconvenienced. This would partially implement a previous SECU recommendation²⁴.
- Limit CSE's collection of “publicly available information” to cases that are “necessary” and pre-authorized with a warrant, consistent with SECU's previous position on the Spencer case²⁵.
- Define metadata and require the same authorizations for the collection of metadata as are required for the content of communications.²⁶
- Mandate a review of the new CSE powers in three years.

21 Kent Roach. 2017-11-28. Brief to the Standing Committee on Public Safety and National Security on Bill C-59. <http://www.ourcommons.ca/Content/Committee/421/SECU/Brief/BR9326885/external/RoachKent-e.pdf> accessed 2018-01-10.

22 SECU. op. cit. p. 41. Recommendation 23.

23 SECU. op. cit. p. 42. Recommendation 33.

24 SECU. op. cit. p. 42. Recommendation 35.

25 SECU. op. cit. p. 43. Recommendation 39.

26 Craig Forcese. 2017-12-05. Putting the Law to Work for CSE. Brief to SECU. <http://www.ourcommons.ca/Content/Committee/421/SECU/Brief/BR9326418/external/ForceseCraig-e.pdf> accessed 2018-01-10.

Canadian Unitarians for Social Justice

Canadian Unitarians for Social Justice (CUSJ) is a federally incorporated national non-profit organization. Among its purposes are to provide opportunities for Unitarian-Universalists and others to apply their religious, humanistic, and spiritual values to social action. CUSJ is not a registered charity and is able to speak freely on legislative issues.

Present day Unitarian-Universalism has its historic roots in the Christian churches of the Protestant reformation in 16th century Europe and of 18th century America. In the present day, it is a non-creedal faith which embraces a wide range of beliefs; significant numbers of members espouse humanist, Christian, agnostic, atheist and other beliefs. With no prescribed doctrine, members are bound together by a number of principles, including one that each person will engage in a “free and responsible search for truth and meaning”. Unitarian-Universalists generally agree spiritual values are relevant to the everyday world; that spiritual values of their faiths and others demand that each person should promote the well-being of other people; and that a free society is necessary in order for full spiritual development to occur. Unitarian-Universalists generally agree to “affirm and promote the right of conscience and the use of the democratic process within our congregations and in society at large.”

Unitarian-Universalist congregations have a history of involvement with human rights and social justice issues. This includes diverse actions, from performing the first same-sex marriages in several Canadian provinces²⁷, to sponsoring 172 Syrian refugees (as of 2017-02) with 176 more in progress²⁸

27 Wikipedia. 2017. Unitarian Universalism and LGBT people.
https://en.wikipedia.org/wiki/Unitarian_Universalism_and_LGBT_people accessed 2017-03-07.

28 Canadian Unitarian Council. 2017-03. How CUC Was of Value To the World in 2016.
<http://us2.campaign-archive1.com/?u=14cdbcb20d193a5636bf18bdd&id=8ad2817b45> accessed 2017-03-07.