Testimony to the House of Commons' Standing Committee on National Security
26 Nov 14
Christian Leuprecht, Associate Dean and Associate Professor, Royal Military College of Canada

M. le président, membres distingués du comité,

Peace, Order and Good Government: Parliamentary supremacy as the ultimate sovereign constitutional responsibility

There is a ubiquitous claim that Canada does not have a foreign intelligence service. This is a misunderstanding of Canada's security intelligence community. Given the legislated limitations on the Canadian Security Intelligence's Area Of Operations (AOR) beyond Canada, one might say that Canada does not have a *human* foreign intelligence service, certainly not one of the scope of the HUMINT services operated by some of our key allies, especially the Five Eyes' CIA, MI5, and ASIS (the Australian Secret Intelligence Service). However, Canada has a foreign *signals* intelligence service – the Communication Security Establishment (CSE) – and a very good and respected one at that.

Canada has compensated for AOR limitations on CSIS in several important ways. Two of the key mechanisms had hitherto been:

1. Under specific conditions, exchange of certain human intelligence information on certain Canadian citizens and residents and some other individuals with a direct bearing on Canada and Canadian interest, with allied foreign HUMINT services in general, and with the three aforementioned Five Eyes partners in particular (New Zealand's Security Intelligence Service, similar to CSIS, does not have a broad foreign human intelligence mandate akin to that of the US, UK, and Australia).
2. Under specific conditions, exchange of signals intelligence on certain Canadian citizens and residents and some other individuals with a direct bearing on Canada and Canadian interest with CSE.

As reported widely in the media, including *the Globe and Mail*, In November 2014, Justice Richard Mosley of the Superior Court of Canada found that CSIS had not been sufficiently open about all the surveillance alliances it planned to form. Five years ago, CSIS had persuaded him to sign off on a foundational eavesdropping warrant to extend its reach outside Canada. Judge Mosley learned the full extent of the information sharing between Canadian spy agencies and also foreign allies after reading the watchdogs' public reports. His ruling indicates he had never been told of this by Canada's intelligence agencies during five years of secret hearings. He took the extraordinary step of reopening a case he had settled in 2009. In the November ruling, he rebuked CSIS and CSEC for breaching their "duty of candour" to his court. And a statement released by the Court added that, despite perceptions to the contrary, "the Court considers it necessary to state that the use of 'the assets of the

Five Eyes community' is not authorized under any warrant issued." The case appears to be related to concerns about one particular instance where CSIS failed to disclose to the court one specific piece of information about a certain individual. In effect, the result of Justice Mosley's decision has been to blind CSIS once Canadians or non-Canadians with court-authorized surveillance leave the country.

The merits of the decision with respect to that particular instance of disclosure to the court aside, Justice Mosley's decision raises at least two fundamental issues:

1. In light of the at least 130 Canadian "extremist travelers" to have left the country as reported in testimony before this committee by the Director of CSIS, and another at least 80 returnees, this is problematic: CSIS now has trouble following extremist travelers and their activities outside of the country. This has second-order effects with respect to its ability to provide timely and accurate advice to the administrative branch of government and the political executive to which is reports, and the ability to liaise tactically with criminal intelligence and enforcement agencies, notably the Royal Canadian Mounted Police (RCMP) and the Canada Border Service Agency (CBSA).
2. What is – and should be – the purview of judicial supremacy with respect to matters of national security?

The committee will already have heard plenty of testimony with respect to the former. I shall not belabor the proximate implications of this point, other than to reinforce the point and concerns raised by others about the deleterious tactical, operational and strategic consequences of this decision for CSIS, national security policy and enforcement, and Canada's political executive ability to make informed decisions with respect to public safety and Canada's national interest.

The second point, by contrast, has more distal implications. Canada is a democracy; its ideological foundations are premised on those of small-l liberalism. That is, limited state intervention in people's lives, with a core value of freedom and subsidiary values of equality and justice. One of the hallmarks of this type of democracy is the rule of law, including an independent and impartial judiciary. By virtue of being in this room, we are all agreed on these basic principles that underlie Canada's Westminster constitutional monarchical system of government.

Constitutionally, however, Canada balances the premise of limited state intervention with a small-c conservative ideological premise about the role of the state in general, and about the role of the federal government in particular. Quoting from the preamble of section 91 of the British North America Act (1867): "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." For our purposes, at least two observations follow:

1. Insofar as a matter of security is demonstrably of *national* concern, it falls within the purview of the federal government. Such the case in terms of national security intelligence, and its interactions with foreign security intelligence entities.
2. The federal government has an overarching duty to ensure "the *Peace, Order and good Government* of Canada". That is, the federal government has inherent obligations for the collective security of Canadian society.

What exactly POGG denotes has been defined and circumscribed by both, the Judicial Committee of the Privy Council and, subsequently, the Supreme Court of Canada. Suffice it to say that Canada's Constitution imposes limits on judicial supremacy.

Unlike Americans, Canadians are not inherently skeptical and mistrusting of their government. This is readily demonstrable empirically. For instance, polling reported last weekend in the *National Post* showed a vast degree of confidence in the federal government's handling of matters of national security. By contrast, the poll clearly showed that voices concerned about potential violations of privacy and civil rights were in the minority. Canada has some of the most professional security institutions in the world. People travel to Canada from across the world to learn about our security institutions. People may have concerns about particular issues with respect to the RCMP and CSIS – and the poll reflected that – but, by and large, confidence in our security institutions appears to be very high.

The security sector is, of course, one form of government intervention. One might argue that it is actually the ultimate form of government intervention, precisely because it is empowered to curtail our freedoms in pretty dramatic ways. Critics like to cite the case of Mahar Arar. As tragic as that case may be, a single case does not make a pattern. To the contrary, it demonstrates the learning effects in our security sector, by virtue of the fact that a cases like Arar's would be highly unlikely to recur, given the changes in procedure and policy that have since been put in place. Moreover, it is public knowledge that the intelligence in the Arar case came from the RCMP, not from CSIS. And, to be sure, there are other cases where judges have called into question the evidence on which national security subjects were being held. But the professionalism and lawful conduct of the organization was never called into question. Similarly, CSE's watchdog office, directed by Quebec judge Jean-Pierre Plouffe, has repeatedly affirmed the lawful and professional conduct of its activities.

Whence, then, arises the skepticism? It appears to be driven by a curiously denatured interpretation of the Canadian Constitutions since the introduction of the Canadian Charter of Rights and Freedoms that the sole and primary purpose of the Constitution is somehow to limit government intervention in the lives of citizens. The result of this interpretation is that it would have privacy, civil liberties, and due process – and judicial supremacy -- trump any and all other considerations. As

someone who has published on Canadian constitutional politics, the conventional view is that of a Constitution that enables government to do "good" in people's lives, at least when it comes to fundamental obligations, such as "peace, order, and good government".

At times, that means having to balance considerations of due process with those of public safety and national interest. Confidential informants may be anathema to lawyers, but certain dimensions of security intelligence would be difficult to carry out without such confidentiality. Confidentiality may be indispensable to safeguard intelligence collection, methods, and analysis the disclosure of which would compromise the mandate and activity of security intelligence. The analogous problem arises for collaboration with the allied security intelligence community that is likely to shy away from collaboration with Canada that risks inadvertent disclosure of collection, methods, and/or analysis. Ergo, the effective work of security intelligence in Canada and security intelligence collaboration with allies necessitates a certain assurance of confidentiality under specific circumstances. The benefits such confidentiality affords in my view outweigh the risks to due process.

Allies such as the UK, France, Germany, and Spain have had to learn to live with terrorism, some for decades. As a result, their courts and their societies have developed greater sensitivity towards the protection of public safety. "He who sacrifices freedom for security deserves neither," Benjamin Franklin famously said. But what about he who sacrifices security for freedom? Freedom and security are not a zero-sum dichotomy; to the contrary, they are complementary: you cannot enjoy one without the other. However, you also cannot enjoy your freedoms if you are dead.

CSIS exists at the fulcrum of public security. Critics concerned about changes to Bill C-44 are also the one who will be the first to complain why CSIS did not do more should an extremist traveler return to Canada and commit mischief here. Moreover, they fail to account for the possibility of keeping keep safe in spite of themselves: that sharing intelligence may allow for intervention abroad to prevent individuals from harming themselves, Canada, Canadians, or Canadian interests. I value my freedoms; but I value my life and the lives of my compatriots even more.

By the same token, with respect to changes proposed to the *Strengthening Canadian Citizenship Act,* I believe that the potential for revocation of citizenship imposes an important deterrent against bringing one's citizenship into disrepute. After all, those who hold dual citizenship have made a conscious choice to divide their loyalty: As a naturalized dual citizen myself, I should know! Those who wish to protect themselves against the eventuality introduced by this amendment have the option to renounce their second citizenship. Some countries make it impossible to renounce citizenship: the onus is on such citizens to conduct themselves in a manner so as not to run afoul of the amendment being proposed, and Canada's administrative and judicial system would necessarily be sensitive to the revocation of Canadian citizenship in circumstances where that imposes demonstrable risks for

an individual's life. Ergo, revocation is judiciable and thus has a built-in review mechanism.

The current equilibrium needs rebalancing: Justice Mosley deemed it within his purview to constrain certain types of intelligence-sharing activity. But he did so in a somewhat unusual fashion: Often judges will give parliament time to remedy these types of deficits. Justice Mosley afforded no such opportunity to parliament. This, in my view, is disconcerting: While Justice Mosley may have been within his right to render the decision he did, the far-reaching implications of his decision could have let past practice prevail for a limited amount of time to allow for a legislative remedy to be introduced. Justice Mosley effectively left parliament with little option but to act swiftly, not merely on purely tactical grounds, but for reasons of ensuring that the federal government lives up to its constitutional obligations with respect to national security.

I value limited state intervention; but I also value peace, order and good government. So, when confronted with the rare and hard choice between individual freedoms, civil liberties, and privacy on the one hand, and public safety and collective security, it is within the federal government's constitutional purview and obligation to err on the side of the latter. The Canadian public gives parliament and the security agencies that report to Canada's political executive the benefit of the doubt. So do I. In fact, I would go so far as saying that given the current global security environment, the federal government has an obligation to Canadians to Canadians to pass precisely the sort of amendments that Bill C-44 proposes, and that these are in the vital interest of Canada and Canadians. Tactically, operationally, strategically and fiscally, this is a responsible way to compensate for the limits on CSIS to engage in foreign human intelligence gathering.

However, Bill C-44 does, in my view, commit one sin of omission. More expansive powers for security intelligence should be balanced with robust parliamentary accountability (not to be confused with oversight!). My preferred model is Belgium's where two permanent agencies headed by judges – the Comité R (renseignement) and the Comité P (police) -- are empowered to audit not only past but also ongoing investigations in real time and report their findings directly to a select group of security-cleared members of parliament.