House of Commons
Standing Committee on Public Safety and National Security
Meeting No. 41,
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Notes for testimony of Professor Wesley Wark

Re: C-44,
"An Act to Amend the Canadian Security Intelligence Service Act and other Acts"

Since the 9/11 attacks, the role of intelligence in Canadian national security policy has been revolutionized. Canadian intelligence has become more significant, more powerful, better resourced, more closely aligned with allied partners, and more globalized in terms of its operations and capabilities. As an important constituent of what is called the Canadian 'Security and Intelligence Community,' The Canadian Security Intelligence Service (CSIS) has undergone its share of revolutionary change since 2001. CSIS has become, de facto, a hybrid service, required to deal with an ever-expanding range of threats to national security and to operate both at home and abroad.

The issues that arise with regard to Bill C-44 reflect the fact that CSIS's functions have changed enormously since the 9/11 attacks, both in terms of the kinds of threats that CSIS must operate against and in terms of its geopolitical scope. The changes proposed in C-44 respond, belatedly, to a concern that the original CSIS Act, now 30 years old (it had its anniversary this past summer), may no longer provide either sufficient clarity or sufficient legal authorization for the operations that CSIS now finds itself engaged in, in particular its overseas operations. Bill C-44 is by nature a legal bandaid, a form of house-keeping, or modernization, but it also points to a larger issue of whether or not the CSIS Act requires a more fundamental overhaul than that proposed in C-44. My view is that it does require a more fundamental overhaul—a matter to which I will return later in my statement.

In my specific remarks on C-44 I intend to focus on what I think are its key provisions regarding CSIS overseas operations, including those targeting Canadians. C-44 would add clarifying language to Section 12 of the Act indicating that in the performance of its security intelligence function it can operate both within and outside Canada. It further adds that Federal Court judges may issue warrants to allow CSIS to collect threat-related intelligence on Canadians abroad under its Section 12 powers. C-44 also stipulates, in amendments to Section 21 of the CSIS Act, that CSIS may apply for warrants to conduct Section 16 operations—that is the authorized collection of foreign intelligence within Canada.

To understand the key elements of Bill C-44 we need to put these in the context of a series of judgments made by the Federal Court with regard to CSIS extraterritorial

warrant applications. The history is a bit complex but I will do my best to provide a succinct summary and to draw out the relevant findings.

The question of providing an extraterritorial warrant for CSIS investigations was raised for the first time in an application before Justice Noel of the Federal Court in June 2005 (CSIS 18-05). The effort by CSIS to obtain extraterritorial warrants was renewed in April 2007 in an application heard by Justice Blanchard of the Federal Court. Justice Blanchard in October 2007 found that the Court did not have jurisdiction to authorize the extraterritorial warrant requested (SCRS 10-07) and cast doubt on some of the Service's [CSIS] arguments about customary international law, about its overseas collection mandate, and about the need for protection against Charter prosecutions. Given the Court's concern about authorizing an activity that might be in breach of international law, owing to infringement on the territorial sovereignty of a foreign state, Justice Blanchard found that "absent an express enactment authorizing the Court to issue an extraterritorial warrant, the Court is without jurisdiction to issue the warrant sought." [1]

That decision was not appealed. Instead CSIS brought forward a new extraterritorial warrant application in 2009 (CSIS 30-08), which was heard by Justice Mosley of the Federal Court. The warrant application involved 2 Canadian targets, previously subject to warrants issued in 2008 for execution within Canada, to cover intrusive targeting while these individuals were travelling abroad. Justice Mosley granted the warrant in January 2009, based on representations that the interception of the communications of these two individuals would take place from within Canada by CSIS with the assistance of the Communications Security Establishment. These extraterritorial warrants became known as "30-08" warrants and others of similar type were authorised subsequent to Justice Mosley's decision in early 2009.

The next step in the legal saga resulted from the tabling in Parliament of an annual report by the Communications Security Establishment Commissioner in August 2012. The annual report included a recommendation that "CSEC advise CSIS to provide the Federal Court of Canada with certain additional evidence about the nature and extent of the assistance CSEC may provide to CSIS." The public version of this recommendation followed a secret report provided earlier by the CSEC Commissioner to the Minister of Defence on a review of "CSEC Assistance to CSIS under part c of CSEC's mandate and Sections 12 and 21 of the CSIS Act." It is important to note that the Commissioner stated that he had forwarded relevant information to the chair of SIRC on this matter. He also stated that CSEC had advised him that "it raised the recommendations—which relate to matters that are controlled by CSIS or require agreement from CSIS—with CSIS." [2] Clearly neither CSIS nor the Minister of Public Safety, assuming he was knowledgeable about the matter, chose to act on the CSE Commissioner's recommendations to inform the Federal Court. Justice Mosley, who had issued the first CSIS 30-08 warrant was left to learn about this matter from the public report tabled subsequently in Parliament.

Justice Mosley took speedy action to review the circumstances of the 30-08 warrant, hearing evidence from CSIS and CSEC officials, and submissions from the Deputy

Attorney General of Canada and an amicus appointed to assist the Court. Justice Mosley issued his decision in classified form on November 22, 2013. A redacted version was released by the Federal Court on December 20, 2013. Justice Mosley found that CSIS had breached its duty of candour in terms of the information it provided to substantiate the necessity of the original warrant application and that it had failed to inform the court about the practice by which CSIS requested through CSE the assistance of foreign agencies in the interception of the telecommunications of Canadian persons abroad. No legal authority was provided in the 30-08 warrant for this practice. As Justice Mosley stated "It is clear that the exercise of the Court's warrant issuing authority has been used as a protective cover for activities that it has not authorized." [3]

Justice Mosley's decision was subsequently appealed by the Attorney General and the case heard by the Federal Court of Appeal, which issued its ruling on July 31, 2014, with a public version released on November 4, 2014. The appeal court's ruling predates by some three months the tabling of C-44.

The Appeal court basically upheld Justice Mosley's ruling. It agreed that CSIS had breached its duty of candour in filing for extraterritorial warrants and that Section 12 of the CSIS Act contained no provisions that authorized CSIS to outsource intelligence collection to foreign partners. On the issue of whether the Federal Court has jurisdiction to authorize a warrant for interception of telecommunications abroad it left open the case of when such interception occurs contrary to the laws of the country in which it takes place (which of course will be many, if not most, occasions). [4]

C-44 does not respond to the key findings of the Federal Court of Appeal. It adds no clarity to the issue of invoking the assistance of foreign partners under Section 12 investigations (despite repeated media assertions to this effect) and does not specify the circumstances in which the Federal Court may authorise warrants for CSIS collection overseas.

Instead of seeking statutory clarity around CSIS powers through legislation, the Government decided to appeal the ruling to the Supreme Court. In its application for leave to appeal, originally dated September 29, 2014 and unsealed in November 2014, the Attorney General stated the grounds of the appeal were two issues of public importance, namely: [5]

1. "What is the scope of the Federal Court's jurisdiction under s. 21 of the CSIS Act to issue warrants governing the interception of communications of Canadians by foreign agencies at Canada's request? Is such a warrant required and is it available?"

2. "What is the scope of CSIS's disclosure obligations on warrant applications."

Summarising these two issues, the Attorney General argued that "this case is about how the Canadian Security Intelligence Service may lawfully enlist the aid of foreign security

agencies in monitoring the activities of that small number [of Canadians who leave the country to engage in activities that threaten national security]." [6]

Whatever is ultimately decided by the courts with regard to the lawful enlistment by CSIS of foreign security agencies, there are other issues of principle and practice at stake. The most important such issue concerns sovereign control. To enlist the aid of foreign security partners, such as the Five Eyes countries, in intelligence sharing is one thing. To outsource intelligence collection to a foreign partner, no matter how close and trusted an ally, is another. Outsourcing means potential loss of control of an investigation, loss of control of Canadian intelligence, and loss of control over outcomes. The Security Intelligence Review Committee commented on this matter by saying:

"The risk to CSIS, then, is the ability of a Five Eyes partner to act independently on CSIS-originated information. This, in turn carries the possible risk of detention or harm of a target based on information that originated with CSIS. SIRC found that while there are clear advantages to leveraging second-party assets in the execution of this new warrant power [the CSIS 30-08 warrants]—and indeed this is essential for the process to be effective—there are also clear hazards, including the lack of control over the intelligence once it is shared." [7]

As SIRC states, the norms of the Five Eyes partnership means that "ideally" Canada would take the lead in any shared operation targeting a Canadian overseas. [8] But should CSIS be given, in future, clear lawful authority to engage the assistance of foreign partners from the Five Eyes or beyond in the intrusive targeting of Canadians abroad, then this lawful authority must be matched with the strongest possible insistence on Canadian control of any such targeting, the strongest possible use of caveats on the dissemination of the intelligence take from any such investigations, rigorous internal accountability up to an including the Minister, and the highest levels of review by independent agencies and by Parliament. Such a system, which would have to be built, would not only be designed to avoid or mitigate unwonted harm to Canadian persons, but would also be designed to ensure that a measure of proportionality, involving not only the significance of the investigation but the relative benefits and costs, could be systematically adduced and kept under constant review.

In general, C-44 provides CSIS with statutory authority to conduct overseas operations and provides the Federal Court with the power to authorize CSIS to acquire warrants for the surveillance of Canadian persons abroad. In so doing, it cements the evolution of CSIS into a hybrid agency that conducts both domestic security intelligence and foreign intelligence missions. Clarification of the legal standing of CSIS in these regards poses the danger of closing off discussion of the eventual need for a separate foreign intelligence service, as a better solution to Canada's intelligence needs and a solution more in keeping with the practices of our close Five Eyes partners.

More important that what C-44 does is the question of what it does not do. What it does not do is provide any sensible underlying definition of the kind of hybrid agency that CSIS has become, and it does not provide any added controls, accountability measures,

cooperative frameworks, or transparency measures around increased overseas operations. It distorts the governance and democratic framework in which CSIS must continue to operate.

Issues Arising from C-44:

C-44 applies legal bandaids to the conduct of Section 12 and Section 16 operations only because we persist with a wholly artificial, legacy distinction between security intelligence and foreign intelligence. CSIS officials used to make the distinction between security intelligence and foreign intelligence in terms of security intelligence being what Canada "needed" to have and foreign intelligence being a category of knowledge that it might be "nice" to have. That distinction was always dubious and reflected an age where intelligence was considered less relevant to Canadian policy, when boundaries could be drawn around threats (largely from State actors), and when resource scarcity was a greater issue. The distinction was never adopted by our close intelligence partners in the Five Eyes community, all of whom have created separate agencies with distinctive mandates to conduct domestic security operations and foreign intelligence, both long regarded as important contributors to national security. In a post- 9/11 world, I would suggest that a distinction between foreign and security intelligence is meaningless for Canada and the fact of its meaninglessness underscores the need for a more root and branch redrafting of the CSIS Act. It also should force us to reconsider the long-term need for a separate foreign intelligence agency for Canada, as the Conservative party once indicated it was their intention to create.

C-44 does not add any clarity to the circumstances in which CSIS should apply for an extraterritorial warrant. Here I draw on comments made by my colleague, Professor Craig Forcese in a post on his national security law blog. As Professor Forces states, because of legal precedent arguments (especially the Supreme Court in *Hape*) it is possible "you never need to actually seek the warrant for overseas investigations that the Act will now permit you to get from the Federal Court." [9]

Having decided to appeal to the Supreme Court the Federal Court of Appeal ruling with regard to the Mosley judgment on CSIS use of extraterritorial warrants, the legislative provisions of C-44 may be rendered null or may require further amendments depending on whether the Supreme Court agrees to hear the appeal and depending on the nature of its findings. The Federal court of Appeal decision was available to the government long before C-44 was tabled. Why the Government decided to go down two separate forks of the road: with partial amendments to the CSIS Act and with an appeal to the Supreme Court, when these two forks might well bring them to a collision at a future juncture remains a mystery to me.

C-44 does not add any new provisions to the CSIS Act to ensure proper consultation between the Service and its Minister, the Minister of Public Safety, and the two departments most likely to be impacted by CSIS overseas operations, the Department of Foreign Affairs, Trade and Development and the Department of National Defence. DND, under the umbrella of a new command, the Canadian Forces Intelligence

Command, established in June 2013, has created its own intelligence collection branch, JTF-X, for military intelligence collection overseas. [10] A DND public document notes that JTF-X "provides strategic, operational and tactical human intelligence resources in support of DND programs and CAF operations." [11] CSE is an independent agency of the Department of National Defence, reporting directly to the Minister. It can, as we have seen, provide assistance to CSIS under its part c mandate.

DFATD has established a program known as the Global Security Reporting Program (GSRP) involving officers posted abroad under diplomatic cover to collect information on security issues. While an MOU [Memorandum of Understanding] exists regarding intelligence cooperation between CSIS and DFATD, the most recent annual report from the Security Intelligence Review Committee suggests that at the working level at overseas stations, the relationships between CSIS and DFATD officials may not be positive, "with little awareness, appreciation, or support for each other's work." As a result of its past findings, SIRC plans a more comprehensive examination of the CSIS-DFATD relationship. [12]

C-44 does not clarify the circumstances in which CSIS may join with the Communications Security Establishment (CSE) in the joint conduct of overseas (Section 12) or foreign intelligence (section 16) investigations under CSE's part c mandate. This is particularly important in the context of establishing whether CSIS can lawfully outsource intelligence collection to foreign partners, exactly the issue that arose in Justice Mosley's ruling on the use made by CSIS of its extraterritorial warrants.

C-44 does not add any statutory requirements on the part of the CSIS Director to inform the Minister with regard to the undertaking of sensitive overseas intelligence collection. The most recent SIRC annual report found that CSIS needed to keep the Minister more fully informed about foreign operations and Section 16 investigations. SIRC in a special study of what it calls a "Sensitive CSIS Activity" also urged that CSIS reporting to the Minister be done in a "formal and systematic manner." [13] These are indications that not all is well in terms of the relationship between the Service and the Minister and that Ministerial accountability for CSIS may be less rigorous than it should be.

C-44 does not add any statutory requirement on the part of CSIS to provide an annual public report on its functions, an important element in contributing to greater transparency on the part of CSIS. The CSIS public annual reports that have been issued since 1991 were a product of recommendations made by the special committee that conducted the statutory five year review of the CSIS Act, but there is no statutory requirement to produce these reports and they could be abandoned at any time should the CSIS Director or Minister decide to do so.

C-44 does not restore the functions of the Inspector General's office, originally established in the CSIS Act in 1984 and closed down by the Government as part of an omnibus budget implementation bill in 2012. The role of the Inspector General function as the "eyes and ears of the Minister" might be considered all the more critical in an age of expanding CSIS overseas operations. As the former, long-serving CSIS IG, Eva

Plunkett stated, the abolition of the IG function was a "huge loss" for Ministerial accountability. [14]

C-44 adds no new clarifying mandate or resources for the Security Intelligence Review Committee in keeping with the statutory provisions authorising CSIS collection under Section 12 abroad.

C-44 is silent on the issue of the need for a dedicated, security cleared Parliamentary committee or Committee of Parliament, to ensure the ability of Parliament to properly scrutinize the activities of CSIS and related Canadian intelligence agencies in an age of globalised operations and diverse threats to national security. Such a committee of parliament was recently proposed by Joyce Murray in her Private members bill, C-622, and has also been proposed in a Senate bill S-220 advanced by now-retired Senators Hugh Segal and Romeo Dallaire. Wayne Easter of this committee earlier offered the House a similar version of proposed legislation, Bill C-551, to create an Intelligence and Security Committee of Parliament. The government continues to deny the need for such a new structure, despite all-party support for just this thing in 2005.

Bill C-44 is, in my view, a poor quality bandaid. It may also be a very temporary one, depending on a future Supreme Court ruling. It is unimaginative and fails to address the most significant legacy issues around an Act that is 30 years old and was created for a different threat environment, in a different technological age, and in a different climate of democratic legitimacy. It persists with an artificial statutory distinction between security and foreign intelligence, offers insufficient clarity about CSIS powers, and offers no new measures of transparency and accountability concomitant with the new and increased role played by CSIS.

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[1] Federal Court of Canada, SCRS 10-07, The Honourable Justice Blanchard, "Reasons for Order and Order," October 22, 2007 at para. 55.
[2] Communications Security Establishment Commissioner, Annual Report 2012-13, tabled August 21, 2013, pp. 21-25.
[3] Federal Court of Canada, 2013 FC 1275, Justice Mosley. "Redacted Amended Further Reasons for Order," d. November 22, 2014, at 110 (p. 43)
[4] Federal Court of Appeal, 2014 FCA 249, paragraphs 102 and 103
[5] Attorney General of Canada, Application for leave to Appeal, paragraph 21
[6] ibid, paragraph 1
[7] Security Intelligence Review Committee, Annual Report 2012-2013, "Bridging the Gap," 30 September 2013, p. 19
[8] ibid., p. 18

[9] Craig Forcese, "A Longer Arm for CSIS: Assessing the Extraterritorial Spying Provisions," October 28, 214, http://craigforcese.squarespace.com/national-security-law-blog/
[10] Backgrounder, "Establishment of the Canadian Forces Intelligence Command," September 19, 2013
[11] ibid.
[12] Security Intelligence Review Committee, Annual Report 2013-2014, "Lifting the Shroud of Secrecy," tabled Friday, October 24, 2014, pp. 24-26
[13] ibid, pp. 11, 19.
[14] Quoted in the Canadian Press, August 10, 2012.