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Chair

Mr. Daryl Kramp

Standing Committee on Public Safety and National Security

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● (1530)

[*English*]

The Chair (Mr. Daryl Kramp (Prince Edward—Hastings, CPC)): Welcome, witnesses and colleagues, to meeting number 41 of the Standing Committee on Public Safety and National Security.

Today we have, of course, two hours of testimony and statements and questions. For the first hour we'll have three witnesses. For the second hour we'll have three witnesses also. In the second hour two of them will be joining us by video conference.

I would just bring to the attention of the committee that while of course we always have opening statements of up to 10 minutes and we generally limit them to that in order to allow time for questioning, I've been advised by one of our witnesses that his opening statement would be substantially longer. He has agreed to abbreviate his statement but he would like his full statement put into the record so that it is available to the committee to be evaluated. You're not going to hear his full statement. You'll hear his abbreviated version, and of course in Q and A you can ask him about anything. His full statement will be available to the committee for observation.

[*See appendix*]

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): Mr. Chair, the full statement beyond what he says will be translated first before it's made available.

The Chair: Yes, absolutely. The only other alternative would be to lengthen the statement but then, of course, if we go full length with the statement, that will mean less time for the committee to be able to discuss with our witnesses. The chair thought that would be the best way to approach that, and I thank you for your cooperation.

So, we now have with us Craig Forcese, associate professor with the faculty of law at the University of Ottawa. We also have Wesley Wark, professor at the graduate school of public and international affairs at the University of Ottawa. From the Canadian Police Association we have Tom Stamatakis, president.

Gentlemen, we will go straight to your opening statements for this first hour.

We'll start off with Mr. Forcese, please.

Prof. Craig Forcese (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Thanks very much, and thanks to the committee for asking me to testify today.

I'm going to focus exclusively on the foreign surveillance aspects of the bill that is before this committee. Later today Professor Kent Roach will be appearing before you and he will be speaking to the informer privilege component.

These are my views in brief. I support the proposed amendments to sections 12 and 21 of the CSIS Act. That said, I think there are three omissions in this bill that this committee should correct. I see these corrections as necessary to pre-empt another half-decade of litigation, controversy, and uncertainty.

Clause 8 in the bill addresses the core confusion flowing from three Federal Court decisions. In enacting these amendments, you will now be emphatically asking a court to bless CSIS covert surveillance that may violate international or foreign law. In our system, Parliament has authority to expressly grant powers that violate international law so long as those powers do not then also violate the Constitution. I see no constitutional complaint, assuming we are confining our discussion to surveillance issues and not, for instance, including interrogation or other more aggressive forms of investigation.

As noted, however, I do see several critical omissions in this bill.

First, it is not clear when the service will be obliged to obtain a foreign surveillance warrant. The existing statute speaks of belief on reasonable grounds that a warrant is required. In a domestic surveillance operation, these grounds arise when failure to obtain a warrant would violate section 8 of the charter governing searches and seizures or Part VI of the Criminal Code. But the applicability of these two laws, and especially the charter, to foreign surveillance is uncertain. As a consequence, the existing reasonable grounds threshold is unhelpfully ambiguous when applied to the new warrant powers in this bill.

I think in the final analysis a warrant will be required whenever foreign surveillance involves covert interception of telecommunications. I also believe the amendments may be interpreted as requiring a warrant any time an operation may violate international or foreign law. These would be sensible standards, but because the bill is not emphatic, establishing these standards may require another round of litigation. Therefore I strongly urge the committee to pre-empt the necessity of another half-decade of uncertainty by adding clear language on the trigger for seeking a foreign surveillance warrant. I have proposed language in an annex to my brief, which I have supplied to the clerk, and which will be available to you pending translation.

Second, since this bill was tabled, the Supreme Court has issued its decision in Wakeling. That case concerned the RCMP but in practice the holding extends equally to CSIS. A majority of the court concluded that section 8 of the charter applies to sharing intercepted communications between Canadian authorities and foreign counterparts. To be constitutional, a reasonable law must authorize intercept sharing. A reasonable law is one that includes sufficient accountability and safeguard regimes, according to the court. Right now, there is no clear law on CSIS international intercept sharing. At best there is generic, more open-ended permission in the Privacy Act, which seems unlikely to survive a constitutional challenge.

I would strongly urge this committee to again pre-empt years of litigation by codifying an express statutory authorization for intercept sharing that also includes required safeguards. I have proposed language in the annex addressing this issue.

Last, we are now at the 10th anniversary of the Arar commission. I note with profound concern that Parliament has failed to legislate any of that commission's critical recommendations dealing with coordination between the review bodies for CSIS, CSE, and the RCMP. Instead, we have closer and deeper coordination among security services but review remains firmly limited to institutional silos, and indeed we have reported instances of the security services questioning and perhaps impeding the ability of review bodies to coordinate their review functions.

This bill gives CSIS a freer hand and will necessarily deepen its relationship with CSE and foreign agencies. The bill should also include provisions that augment the authority of the review bodies to keep tabs.

● (1535)

Again, I propose language in the annex that addresses this concern.

Let me end with a related plea. CSIS' review body, SIRC, is suffering the effects of neglect. Its membership has been below strength for a considerable period of time. It has been rocked by scandal at the leadership level, and its level of resourcing has not kept pace with growth in the operational budget of CSIS. For all of these reasons, I would ask this committee to move on the issue of accountability.

Let me end there.

Thank you very much.

The Chair: Thank you very much, Mr. Forcese.

We will now go to Mr. Wark.

You have the floor, sir.

Mr. Wesley Wark (Professor, Graduate School of Public and International Affairs, University of Ottawa, As an Individual): Thank you, Mr. Chair.

Ladies and gentlemen of the committee, it's a privilege to appear before you. I'm grateful for the opportunity. I'm the long-winded witness, so I'm going to read a condensed version of my statement.

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' functions have changed enormously since the 9/11 attacks, and also, clearly, since the passage of the original CSIS Act itself, and have changed both in terms of the kinds of threats that CSIS must operate against and in terms of its geopolitical scope.

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. This history begins in 2005 and follows a winding and complex path down to the present. There is not time in these hearings to adequately summarize this history, but let me note that the current stage was set by a ruling from the Federal Court of Appeal this past summer, which has been followed by an appeal by the Attorney General to the Supreme Court that remains pending.

In his application for leave to appeal, originally dated September 29, 2014, and unsealed in November of this year, the Attorney General summarized what was at stake as follows, “This case is about how the Canadian Security Intelligence Service (CSIS) 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.

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 operation, 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
>
> —that is, the Five Eyes countries—
>
> in the execution of this new warrant power
>
> —the so-called 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 has been shared.

C-44 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 much more in keeping with the practices of our close Five Eyes partners.

More important than 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 now become, and it does not provide any added controls, accountability measures, cooperative frameworks, or transparency measures around increased overseas operations by CSIS.

● (1540)

I want to conclude with a selection of some of the issues that I see arising from Bill C-44.

Bill C-44 applies legal band-aids 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.

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 itself.

Having decided to appeal to the Supreme Court, the Federal Court of Appeal's ruling with regard to the Mosley judgment on CSIS' use of extraterritorial warrants, the legislative provisions of Bill 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's decision was available to the government long before Bill C-44 was tabled. Why the government decided 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 junction, remains a mystery to me.

Bill 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 expanded CSIS overseas operations—the Department of Foreign Affairs, Trade and Development and the Department of National Defence. Both of these departments engage in their own overseas intelligence and information collection through dedicated branches.

Bill 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".

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.

Bill 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 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 that the abolition of the IG function was a "huge loss" for ministerial accountability.

Bill 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.

Last but not least, Bill C-44 is silent on the issue of the need for a dedicated, security-cleared parliamentary committee to ensure the ability of Parliament to properly scrutinize the activities of CSIS and related Canadian intelligence agencies in an age of globalized operations and diverse threats to national security. Such a committee of Parliament was recently proposed by Joyce Murray in her private member's Bill C-622, and has also been proposed in the Senate Bill S-220 advanced by now-retired Senators Hugh Segal and Romeo Dallaire. And Wayne Easter of this committee earlier offered the House a similar version of proposed legislation, Bill C-551. The government continues to deny the need for such a new structure, despite all-party support for just this thing in 2005.

In conclusion, Bill C-44 in my view is a poor quality band-aid. It may also be a very temporary one, depending on a future Supreme Court ruling. It is unimaginative and it fails to address the most significant legacy issues around the CSIS Act, which is now 30 years old and was created for a different threat environment, in a different technological age, and in a different climate of democratic legitimacy.

● (1545)

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 being played by CSIS.

Thank you.

The Chair: Thank you very much, Mr. Wark.

We will now go to Mr. Stamatakis, please.

Mr. Tom Stamatakis (President, Canadian Police Association): Thank you, Mr. Chair.

Good afternoon, members of the committee.

I appreciate having the opportunity to speak with you all today, in person for a nice change, regarding your ongoing study of Bill C-44. I'm appearing today on behalf of the Canadian Police Association, an organization that represents over 54,000 front-line civilian and sworn police personnel serving Canada's communities from coast to coast to coast.

My opening statement will be quite brief this afternoon as I hope to leave enough time to answer any questions you might have. I'm going to focus particularly on the area of the protection of human intelligence sources by law enforcement in the course of our duties. That being said, this is my first opportunity to appear here in Ottawa since the tragic events that took place on October 22, which claimed the life of Corporal Nathan Cirillo only a few blocks from where we're sitting today. He was shot by a terrorist who would have claimed even more victims if not for the courageous actions of those who are sworn to protect Canadians. To members of the Ottawa Police Service, the Royal Canadian Mounted Police, and the House of Commons Security Services, I'd like to offer my personal thanks for their efforts that day.

I raise this, particularly in the context of my appearance here today, to highlight the need to adapt our laws in this country to provide law enforcement with the necessary tools to combat the rapidly evolving threats that can very clearly cause tremendous danger here in this country. That is why we're quite pleased to speak in support of Bill C-44 here today.

One of the most important jobs that have been given to our national security services, which would certainly include both municipal and provincial police, is the gathering of the necessary intelligence that would eventually help our members prevent attacks from taking place within our communities. Gathering that intelligence, however, has never been more difficult. Technology has given criminals and terrorists rapidly evolving tools that often allow them to appear to be steps ahead of those who are working to protect Canadians. Whether it is in the national security context or dealing with local street crime, finding and protecting informants is often an invaluable tool for police when it comes to levelling the playing field and obtaining the intelligence necessary; and I firmly believe that Bill C-44 and the provisions within it that deal with the protection of sources will be a positive step in protecting Canadians.

I should also note, particularly with respect to informants, that their use often goes beyond one single case, and that fact underscores their continued importance and the reason so many efforts are taken to protect their identities. Compromising their anonymity can not only put their personal safety at risk but also jeopardize months' and sometimes years' worth of investigations and police personnel time.

Furthermore, informants would often be reluctant to step forward to provide valuable information to law enforcement without as many guarantees as possible regarding their safety and anonymity, as they are often called on to testify against those who may know them best —their former and sometimes even current colleagues, family members, and other people with whom they've developed relationships.

As I mentioned, I did want to keep my opening remarks brief as I understand members may have questions regarding the current practices within law enforcement in Canada, and I'll try to do my best to provide that information.

Once again, thank you very much for the invitation to appear today. I look forward to any questions you might have.

● (1550)

The Chair: Thank you very much.

Thank you, gentlemen, for giving the committee time to ask questions.

We'll start the first round of questioning for seven minutes.

Ms. James.

Ms. Roxanne James (Scarborough Centre, CPC): Thank you, Mr. Chair.

I'm actually going to pass my time to Mr. Norlock.

The Chair: Fine.

Mr. Norlock.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you very much, Mr. Chair, and through you to the witnesses, thank you for attending today.

I want to especially thank Mr. Stamatakis for the statement he just made, because my question was going to be based on human resource protection as it relates to criminal investigations, and in this case, protecting Canadians through intelligence sources. One of the key components in this legislation—and there are basically only three—has to do with protecting human sources.

I'm going to go through a few things. One of the complaints we've heard is that if you know who some of the players are, why are they not arrested? Would you agree with me that sometimes during the course of investigations you let the little fish go because you're actually trying to identify a bigger fish that will lead you to a better conclusion to the problem that you already have?

Mr. Tom Stamatakis: That's very true, and it's a practice that occurs every day in law enforcement.

Mr. Rick Norlock: You may have enough to charge an individual with some offence, but that offence is probably minor in regard to what you're really after, which is the kingpin, let's say, or the person involved in the investigation.

Mr. Tom Stamatakis: Often it's a higher-level player, particularly when you're dealing with organized crime or some of the activity we've seen more recently in Canada with respect to the recent incidents, one of which I referred to. The focus is always on making the greatest impact with the resources we have at our disposal to prevent, to be proactive, and to protect Canadians.

Mr. Rick Norlock: Drawing similar conclusions between the two, because they're almost one and the same, let's say you're doing some investigations within Canada over a certain type of crime—we don't need to get into the types of crime—and, through your human resources, it might lead you to the knowledge that some of the people you need to get information from are outside your borders. In other words, they're in other countries, there are people there who you need to talk to, and they may have information that might lead you to your ultimate goal.

Does it make sense to you—and I think in your opening statement it's quite obvious—that in order to protect those human sources of information, which CSIS does not have the legislative power to protect now, this piece of legislation gives them the kinds of protections the police have when utilizing human sources?

Mr. Tom Stamatakis: It makes perfect sense to me from a front-line law enforcement perspective, absolutely.

Mr. Rick Norlock: When you looked at this piece of legislation, would I be correct in saying that this is what you personally observed?

Mr. Tom Stamatakis: Yes. In fact, the comment I would make is that it probably doesn't even go as far as what the police have at their disposal locally. I think this is very much a step in the right direction in terms of protecting human sources—for sure.

Mr. Rick Norlock: We did hear from CSIS. CSIS commented on Monday that they would possibly have to drop cases if they were forced to give up their sources, as they are often sources for other investigations as well.

Do you think it would be advisable to have CSIS unable to assist in the following through on criminal investigations and prosecutions? Or would protecting the source of multiple future prosecutions be advisable?

● (1555)

Mr. Tom Stamatakis: Very advisable, and I think I reflected that in my comments.

Mr. Rick Norlock: Yes, thank you. I just needed to get a couple of these questions answered, because we hear various comments from different quarters that are wondering about the need to do these things.

If we can relate the protection of human sources of information, both locally and internationally, to what currently are accepted investigative procedures in Canada, I think it helps the average citizen. Because I try, at least, to make my messaging from Parliament not so much for the people who populate here, but for the people at home, so they can understand what we're doing and appreciate what we're doing in trying to protect them, in this case from events, as you rightly mentioned, like those on October 20 and 22.

I especially want to thank you for mentioning the great men and women of the parliamentary precinct who protect us, and who protected us, but I think the Sergeant-at-Arms, who is, quite frankly, I think, our collective hero right across the board in Parliament, is especially worthy of mention.

Mr. Forcese, I noticed that you saw some things in this legislation that you think we need to continue to do. Thank you for that.

I wonder if you've given some thought to.... I guess one of the protections that people have as far as protections go under the charter is that CSIS would still have to obtain warrants with regard to receiving or obtaining information from certain sources. I'll go back to some notes I made. You thought that was appropriate, but I thought you made a couple of other suggestions in regard to those warrants.

Prof. Craig Forcese: Yes, the CSIS Act, in its present form, indicates that the government or CSIS needs to obtain a warrant where there are reasonable grounds to believe that such a thing is necessary, which is essentially coded language for saying where there's a charter interest in play under section 8 or to immunize and intercept what would otherwise be a crime under part VI of the Criminal Code.

The problem is that this implicit trigger and its application outside of the country is unclear because we don't know when the charter will reach outside of the country. In fact, we have a Supreme Court case called R. v. Hape suggesting that many forms of police investigations, and presumably also CSIS investigations, don't trigger the same charter implications when they take place outside of the country.

If I were now left to ponder this provision, and I was asking when I need to go to Federal Court in order to obtain a warrant, I'd have to puzzle through that, and it wouldn't necessarily be very clear.

As I noted—I had some proposed language or sample language—I was proposing that there be an emphatic instruction inserted in the bill indicating when this foreign surveillance warrant would be required. As CSIS, when would you be obliged to go to court to get it?

Mr. Rick Norlock: What you're basically saying is that it should be more prescriptive.

Prof. Craig Forcese: I think it should be clearer; it should be more definite. Yes, absolutely.

The Chair: Mr. Scott, for seven minutes.

Mr. Craig Scott: Thank you, Mr. Chair, and thank you to our witnesses.

It's important to know, as Mr. Garrison made clear on Monday, that these are very abbreviated proceedings for something that, with witness after witness, we're now learning is more complicated and involves a lot more need for attention than we're giving it.

This is our only day as official opposition to have two witnesses we specifically wanted to hear and they're getting part of one panel in one half of a two-hour session. This is really an inadequate process.

I am very grateful to the witnesses for making sure that the whole question of oversight and review has not been lost in this. The fact that the Inspector General is gone, and the fact that since the Arar inquiry we've known we need much better oversight and review mechanisms, including parliamentary review and much better co-ordinated oversight mechanisms for all intelligence agencies....It's just Intel Oversight 101 and yet a decade later we're still not there.

It's important to note that the Privacy Commissioner is supporting exactly what you're saying. In a letter he sent today, Mr. Therrien wrote:

> Clear statutory rules should be enacted to prevent information sharing by CSIS from resulting in a violation of Canada's international obligations.

That's on the whole clarity point. It also, ultimately, has implications on the Wakeling case. He also wrote:

> A balanced legislative approach would also, in my view, include in Bill C-44 measures to make the activities of all federal departments and agencies involved in national security subject to independent oversight.

He goes on to elaborate that a little bit.

People thinking about the implications of both clarifying and extending CSIS' powers are also saying that we shouldn't be doing this without a more comprehensive understanding of how oversight and review needs to catch up, not only with the problems in the past but with what's now happening in the bill.

I'd like to focus, Professor Forcese, if I could, on a couple of your points. On the warrants, basically clause 8 indicates that a new section 21(3.1) would say:

> Without regard to any other law, including that of any foreign state, a judge may, in a warrant...authorize activities outside—

The activities that he or she authorizes are investigative activities. That refers to an earlier provision.

You've indicated that you're assuming this would only be confined to surveillance and not interrogation. Is there anything in the language that would suggest that's necessarily the case?

● (1600)

Prof. Craig Forcese: No. There's the historical context; that is, the Federal Court cases that are the genesis of this bill have dealt with extraterritorial surveillance. But of course the CSIS mandate in section 12 is not confined to surveillance, covert or otherwise.

Of course, we do have instances where CSIS members have gone abroad to conduct interrogations. The most notorious example of that is at Guantanamo Bay with Omar Khadr. Presumably, in conducting that interrogation, they were acting within their section 12 mandate.

The issue, in my view, is what sort of supervision might there be in a context above and beyond surveillance for overseas activities. I think if we're talking about CSIS conducting interrogations overseas, the constitutional issues are potentially dramatically different in the sense that it's no longer a question of section 8 of the charter anymore; now it's a question of section 7, the very provision that was at issue in the Khadr case.

That's one reason, just to refer back to the comments about clarifying language, that I would hope the committee might consider including very specific language indicating that in every circumstance where the conduct of CSIS "may" infringe international law or foreign law, there be an obligation first to go and get this warrant. So it's not confined simply to overseas surveillance but every form of CSIS operation. Presumably at that point it's subject then to direct oversight by a court, that can presumably then impose conditions on the nature of whatever overseas operation might be involved, including, presumptively, interrogation.

Mr. Craig Scott: I'll come back to that, because I'm not quite sure what it would look like to involve our courts in.... When CSIS comes and says, "We're going to do something that we think may, likely, or will violate international law, or foreign or local law, and now we want you, a domestic judge, to tell us we can do it", I'm not exactly sure what tests they would apply to say "Here's your warrant". We have to figure that one out, I think.

As well, when it says "without regard to any other law", is this a term that means any other legal system, or does it mean any other law in Canada?

Prof. Craig Forcese: That would be a question of—

Mr. Craig Scott: It could just be excluding the charter, for example.

Prof. Craig Forcese: Well, it's not sufficiently emphatic to constitute a use of section 33 of the Charter of Rights. It's not an override of the charter. Presumptively, "any other law" would include the bill of rights, although, again, I'm not sure if it's sufficiently emphatic there.

My reading of this, my assumption, has been that "any other law" refers to international law. By including foreign law, we know that, for example, the law of the foreign jurisdiction is inapplicable—its rules on privacy, say, but also international law principles that might relate to sovereignty; those presumably would be inapplicable.

● (1605)

Mr. Craig Scott: I do have some concerns about how unclear that is.

What about the question of foreign law, where the issue is that CSIS is going to do things that would not be allowable under the foreign law? The minister told us that's not an issue, because we have better laws than dictators do. Well, there are many other states where CSIS would operate that have perfectly functional systems where their own authorities may need to get warrants. We have heard in the past that CSEC, the Canadian security establishment, has on occasion done the bidding of foreign service agencies, if you believe some of what's in the famous book called *Spyworld* by Mike Frost. We may even have been involved in spying on cabinet ministers in the U.K. at the behest of the intelligence agencies there, because it would be against the law for them to do it. Whether or not this is true factually, it's a scenario.

I'm wondering what you would say to a judge if CSIS were completely forthcoming and said, "This is what we want to do. We want to do something that the foreign intelligence agency cannot do under its own law."

Prof. Craig Forcese: You can imagine that a Federal Court judge confronted with that prospect, and the prospect of being enlisted in an operation conducted by CSIS, would be a diplomatic firestorm if it were ever revealed. That Federal Court judge, I think, would be quite anxious to make sure that CSIS had crossed its t's and dotted its i's.

In net, I think, the fact that a Federal Court judge is invested in supervising these sorts of activities is a gain for accountability because of the anxiety that would likely be produced by being placed in this position. What a Federal Court judge might do in practise, it's hard to discuss outside of an immediate factual context, but I would imagine that Federal Court judge would rush to superimpose all sorts of conditions on the conduct of the operations, which would minimize the degree to which it violates the foreign law and would limit the prospect that it will have these knock-on effects that would embarrass both CSIS and the Canadian government.

The Chair: Fine, thank you very much.

Thank you, Mr. Scott, and thank you, Mr. Forcese.

We'll now go to Ms. Ablonczy, please, for seven minutes.

Hon. Diane Ablonczy (Calgary—Nose Hill, CPC): Thank you.

Thank you to the witnesses for your thoughtful comment and analysis. It's very helpful.

As you know, the CSIS Act is about 30 years old, so it certainly has not kept up with the rapidly evolving pace of the threats to our country, unfortunately.

The purpose of this bill is fairly simple; in fact, I believe someone has called it the "Filling Gaps Identified in Recent Court Cases Act". There have been some questions that the court has raised and this bill attempts to address that, to give authority for CSIS to conduct investigations outside Canada, to confirm that the Federal Court can issue warrants for such investigation, to give the Federal Court authority to consider only relevant Canadian law, and to protect the identity of both CSIS sources and employees. There may be other areas that will have to be addressed, but this is the purpose of this law.

I wonder if either of the professors can tell us what kinds of requirements are on the intelligence communities in our allies: the Five Eyes, or in the countries we cooperate with. Are any of these required to get court warrants before they undertake activities in other countries? How is our regime comparable to those of our allies?

Prof. Craig Forcese: It's a bit of a mixed bag. Not purporting to have reviewed in detail the laws of hundreds of foreign countries, I would say this bill is unique in the degree to which it emphatically now authorizes a judicial officer to allow a Canadian executive agency to violate foreign law.

In other jurisdictions that I have looked at that have foreign intelligence operations, their laws are creatively ambiguous on that point. The reality, as we all know, is that spies spy and in the course of spying they may violate the laws of the countries in which they spy and international law in terms of state sovereignty.

Again, not having exhaustively reviewed all the comparative law, I am not aware of a statute that as emphatically indicates that a court may authorize spying in violation of international and foreign law.

I think also in the text of the document you were referring to earlier, I called it "courageous" at some level that the Parliament of Canada is prepared to put its stamp on a law that emphatically signals that we are prepared to violate the laws of foreign countries, potentially including allies, in conducting foreign surveillance.

That potentially has political implications, and I imagine there are people at the Department of Foreign Affairs who are quite exercised or potentially quite exercised about the potential fallout that this might occasion.

But to answer your question, in my albeit limited experience, this law is fairly unique.

● (1610)

Mr. Wesley Wark: If I could just add to that, we could look at the Five Eyes partners, in particular, and I think we would find in that look that they all have different forms of judicial or executive authorization for surveillance abroad, and indeed for surveillance at home. They're probably all variations on a theme.

I think what makes the Canadian legislation unique is a product of the fact that we're trying to find a legislative scheme for an agency that is, as I've said, a hybrid. CSIS started out being a domestic security intelligence service and we fashioned laws to allow them to perform that function and to control that function in terms of possible abuses. Now it is, in addition, a foreign intelligence service in a way that there is no parallel among any of our Five Eyes partners.

All of our Five Eyes partners have separate foreign intelligence services and domestic security intelligence services. They have made those separations over time for reasons that they think are very good reasons, and I think they're reasons that stand up in terms of international perspective as being very good reasons.

They are very different skill sets, very different training regimes, very different resources, very different kinds of forms of internal accountability and external review that are required for those two very different kinds of operations, operating abroad versus operating at home.

We're trying to find a legislative fix-up for an agency that we've allowed to evolve into this hybrid model, without giving that evolution any serious consideration. That is the concern that, I think, Parliament and anyone interested in the functioning of the Canadian intelligence community should have.

Hon. Diane Ablonczy: Right. Well, it's always an interesting debate. That's why academics love this kind of thing. But it does have implications and I appreciate your letting them out.

Mr. Stamatakis, you mentioned the events of October 22, and of course the apprehension that Canada is vulnerable to these kinds of activities that threaten the security of smaller or larger groups in our country.

I just want to ask you where you see the need for tools for our security agencies heading in the future. As I mentioned, this act has a fairly limited scope, but we know that there has to be other tools provided to our security agencies. Can you comment on what those might look like, from your point of view?

Mr. Tom Stamatakis: I don't know that I'm qualified to make any kind of comprehensive suggestions. My experience is limited to local Canadian law enforcement, and from our perspective, this is a step in the right direction in terms of the human source handling piece, the ability to gather intelligence.

I can tell you that municipal and provincial police, and the RCMP engaged in municipal and provincial policing activities in this country, are actively gathering that kind of intelligence from citizens who are obtaining information from the people they know and are engaged in relationships with. That's certainly an important tool.

I certainly think it's appropriate for our security services that are going to be engaged in those activities, internally and externally, to have the same sorts of tools that our local law enforcement has in terms of the ability to engage in activities and practices that allow them to get the best information in a timely way, so that they can be in a position to proactively prevent incidents or activities that pose a risk to Canadians.

I think that these are the kinds of discussions that we need to be having and we need to be moving forward on. But I'm not in a position here to make a lot of recommendations in that regard.

● (1615)

The Chair: Thank you very much, Mr. Stamatakis.

We will now go to Mr. Casey, please. You have seven minutes.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

Witnesses, I expect that you were probably expecting to see Mr. Easter in this seat. I am not a former solicitor general, as he is. Usually I'm on the justice committee, so I'm not as well armed. If my questions appear to be less eloquent and clumsier, there's good reason for that. Although I will say that yesterday we went clause by clause through the victims bill of rights, and one of the decisions that was taken in connection with that bill was to not include victims of terrorist acts abroad, such as the 9/11 victims. So there's a peripheral connection.

I'd like to start with you, Professor. Towards the end of your remarks, you referenced accountability and you talked about the vacancies within SIRC. Could I ask you to expand on that a little further? As you know, Mr. Easter and Joyce Murray, as was referenced by Professor Wark, have championed parliamentary oversight, and Professor Wark went into some detail on that. But could I ask you to talk a little further about what needs to be done, in your view, to get the level of accountability that you referred to up to the international standards of our allies?

Prof. Craig Forcese: Structurally at SIRC, ideal membership is five. Even when they are at five, they're part-time, and it's an enormous undertaking for a review of CSIS if you are full-time let alone part-time. They've been at three for some time. As you know, two chairs have resigned in controversy, and as a consequence the continuity of leadership has been uneven at SIRC.

Resource-wise, you can map the growth in operational funds of CSIS. SIRC's operational funds have also increased but not proportionately. And so what was always an auditing function.... SIRC when it reviews CSIS doesn't look at everything CSIS has been doing, it is piecemeal. And presumably, because its scale is now diminished relative to the scale of CSIS operations, it's even more piecemeal than it has been in the past.

It's a question of staffing it seriously and earnestly, of making the members full-time appointees and resourcing those members properly. Legislatively, it means reacting to the Arar inquiry's very important recommendations that there be the capacity for the three review bodies we have in essence to coordinate their review functions, so that they can actually follow investigations across institutional boundaries.

There was some reporting from *The Globe and Mail* earlier this past year suggesting that an informal effort was made by the commissioner of the CSE in one of his reviews to coordinate with SIRC, and the government response was to challenge the legal competency of the commissioner to do so. In fact, as I understand it, there was some threat that the commissioner might be in violation of his and his staff's secrecy and security obligations by coordinating. That requires a legislative fix and it's a long time in coming.

Mr. Sean Casey: With regard to parliamentary oversight, in your view is it necessary and what's the optimal model? If you agree that it is necessary, what should it look like?

● (1620)

Prof. Craig Forcese: I believe it is necessary. I don't believe that the arguments that are made that it's redundant have resonance. I think the more eyes on the spies, the better, if you'll forgive my alliteration.

I also think it's important to enhance your ability as parliamentarians to understand the inner workings of the security services so there's institutional knowledge within Parliament itself.

The ideal model in my view is one where there is robust capacity on the part of the parliamentary committee to access the information they need.

If you look at the models that are deployed by the allies, U.K. and Australia being notable examples, there is some variability in terms of how much information the committee can actually extract from the security services. On one level the Australian model is better in terms of the way that it's structured, but it's not all that robust in terms of their capacity to compel the presence of information from the services. I would look as a primary ingredient of any parliamentary committee model for the ability of parliamentarians to access the information in question, subject to, obviously, secrecy obligations then that are imposed on parliamentarians themselves.

Mr. Sean Casey: Professor Wark, Professor Forcese talked about how the response that we get when we ask for parliamentary oversight is that it's redundant. You talked in your remarks in some detail about the decline of ministerial accountability and the measures that have been attempted to bring in parliamentary oversight. I take it that you've also studied or at least read the debates and the positions taken by the various parties on it.

I would invite you to critique the responses that we get when we ask for parliamentary oversight. So it's redundant. We already have adequate oversight. What's your critique of those positions?

Mr. Wesley Wark: Mr. Casey, I think it's an excellent question.

Let me first give you my view of the nature of the critiques, and they're very close to the way in which you present them. One of the responses to any kind of measure to reform the nature of the parliamentary review of security and intelligence in Canada is an argument that existing departmentally focused, if you like, parliamentary committees can adequately do this job. This committee can adequately review the security and intelligence practices of the Canadian community.

It seems to me that there are two problems, perhaps more than two problems, but two problems that immediately come to mind with that.

One is that, in terms of parliamentary committees' construction focused on the activities of individual government departments, that's not how the Canadian security and intelligence community writ large is actually organized. It's an integrated or semi-integrated collection of different agencies operating under different departmental mandates and controls. One of the things that the Arar inquiry pointed out is that we lack any capacity with regard to an independent review body to look at that overall work of the security and intelligence community and, in regard to Parliament, we don't have that capacity at the moment to do that integrated kind of review. As my colleague Craig suggests as well, there is a deep problem in terms of access to the kind of information that a parliamentary committee or a committee of parliamentarians would genuinely need in order to scrutinize properly the activities of a secretive intelligence and security community.

There are models that have been made to work among our Five Eyes partners that are of long standing. The model that we have typically looked to post 9/11 in Canada has been the British model, the model for the intelligence and security committee, which is a rather unusual construction, admittedly. It's a committee of parliamentarians, not a standard parliamentary committee. It was built that way on the assumption that it would provide better access to classified information according to the provisions available to them and that it would also generate significant sustained, serious, non-partisan discussion of these issues if it was constructed in a certain manner.

I assisted Joyce Murray in the construction of her private member's bill, and we looked at various models very seriously, but I think the essence of what parliament needs is a dedicated committee that can look at the broad range of security intelligence operations that may need to require membership of both the House and the Senate. It would certainly need additional resources compared to what an ordinary parliamentary committee would have in terms of research staff and it would need—

The Chair: If you could sum up, please, Mr. Wark.

Mr. Wesley Wark: —a non-partisan atmosphere to work.

The Chair: Fine, and thank you very much for the little overtime there. I think you can understand.

We will now go to Mr. Scott.

● (1625)

Mr. Craig Scott: Thank you, Chair.

I believe I have five minutes so I'll try to be short and also ask the witnesses to respond as quickly as possible.

There are two things I want to look at. One is the lack of any provisions in this bill for the kinds of consultations that both of you raised, in particular Professor Wark. I think I'm correct that there's no provision in this for the need for CSIS to have first consulted with the Department of Foreign Affairs before they come to the court, and no requirement that the judge requires that before he or she would issue the warrant. It would have to be left to the good graces of judges to say, “Wow, this is the kind of thing I think we need to know a bit more about, what its implications are, and am I right the person to judge it? Get the Minister of Foreign Affairs to weigh in.”

Am I correct on that, that there's nothing in the bill that would require CSIS, now that it's formally and officially venturing around the globe, to consult and coordinate with either the Department of Foreign Affairs or, for example, the Department of National Defence?

Mr. Wesley Wark: That's absolutely correct. There's nothing explicit in the bill at all, and what the existing practice is in that regard informally is a matter of official secrets.

Mr. Craig Scott: Professor Forcese also picked up on that theme, and I'm not sure if he revealed a bit more than he wanted to, but he indicated that it almost sounded to me like there were at least rumours from the other side of Ottawa, at least in the Department of Foreign Affairs, that people are not necessarily all that thrilled about CSIS now being given this formal mandate in a way that's converted it into an agency that may in practice had elements of, but was never official.

Am I correct that Foreign Affairs would want to be more connected to CSIS when it starts operating abroad, or are they happy for CSIS to do whatever it wants?

Prof. Craig Forcese: That was entirely speculation on my part. I don't pretend to have ears inside the Department of Foreign Affairs.

Mr. Craig Scott: But you were speculating for a reason, were you not?

Prof. Craig Forcese: I was speculating only on the basis...I was inferring from the context. That is, if you've got CSIS conducting extraterritorial operations, it may violate foreign laws, and that then becomes a matter of the record and suddenly it's on the front page of *The Washington Post*. That then creates certain headaches for the diplomatic corps.

Mr. Craig Scott: So then I'd come back to the question I said I'd leave the last time, which is what would you want a judge to do, keeping in mind there's an element of the dignity of the courts within the framework of the comedy of nations where courts are basically there to say to other courts, "we're not in the business of contributing the violation of your laws"? However much international spying is kind of internationally lawful unlawfulness, the question involving our courts in this, especially where you said one of the triggers should be any time CSIS thinks they might be breaching international or foreign law, could you just indicate to me what a judge would do with that? How would the judge say, okay, go ahead and do it, even though that's the reason you're coming to me—you're going to break foreign law and now I'm going to go on the record saying you can do it.

Prof. Craig Forcese: Well, to be honest, I'm not in a position to imagine what a judge would do in every individual case. I do note though that the warrant provisions that would apply for both domestic and foreign warrants require CSIS to demonstrate that this is really a necessary undertaking, that there are no other means available other than to engage in this practice in order to gather information necessary for its investigation.

The best answer I can give you, Mr. Scott, is that I would imagine a court confronted with this warrant application would be extremely demanding of CSIS and already my understanding is that—if you speak at least to the folks in CSIS, they will tell you this—the warrant application process is quite an arduous one and the courts are quite demanding.

Mr. Craig Scott: Internally....

Prof. Craig Forcese: Of course it's *ex parte* in camera proceedings.

I would imagine that a Federal Court that risks the prospect to be dragged into some international scandal would be even more adamant that there was a necessity undergirding this investigation and it would superimpose all sorts of obligations.

Mr. Craig Scott: Thank you, that's great.

I did want to return to the Wakeling case that just came down roughly a week ago from the Supreme Court. You indicated that, from the combined majority holding, already this law is going to need at least an amendment with respect to much clearer legal provisions on some of the aspects of what the warrant might authorize, including sharing of the information that might be produced by the activities authorized by the warrant. That's clear from the majority reasoning. So this bill already needs an amendment based on the Supreme Court case.

The dissent agrees with that but they went a bit further. I want to read a passage and ask whether you think this as a policy matter is something we as Parliament should take seriously:

> However, when information is shared across jurisdictional lines, safeguards apply and domestic investigations lose their force.—

The Chair: —I'm going to have to interrupt, Mr. Scott.

● (1630)

Mr. Craig Scott:

> ... The requirement of prior judicial authorization does not provide sufficient protection against inappropriate future use.

i.e. with partners, intel partners.

Further, "The failure to require caveats" in the law itself "on the use of disclosed information is unreasonable."

The Chair: Sorry, Mr. Scott. Your time is well over and we have no time for response. You were well into that. Thank you very much.

We have just about two minutes left for Mr. Carmichael.

Mr. John Carmichael (Don Valley West, CPC): Thank you. That's generous.

Well, let me welcome our witnesses today. Thank you for being here.

Mr. Forcese, I'd like to just start with you, if I could. That may be as far as we go.

Clearly, we all recognize that terrorism is a global threat today and Canada after last month's activities is not immune. In an article in the *National Post* back in October, I believe it was you or your colleague who was quoted, it said:

> The new bill puts surveillance outside Canada on a clear legal footing. This is a reasonable fix in a globalized security environment. Indeed, the bill is diplomatically courageous...

—as you've already stated. You go on to say:

> There do, however, remain outstanding issues: When CSIS investigates abroad, the risks of misconduct, including complicity in human-rights violations, increase. That behaviour would raise legal issues.

So I'm concerned. Or, confused, I guess, is probably closer. We have the new act that we all agree is the right direction. We've talked about our allies and some of the models. One of you referred to the Canadian version as, I believe, a hybrid of those models. I'm just wondering what the right fix is. I hear you on how we have warrants and Federal Court inclusion. We have put in the safeguards that will ensure that we do the job right ideally. What am I missing?

Prof. Craig Forcese: I guess I would just confine myself to the solutions to some of the omissions that I addressed to my presentation. That is, there is some clarifying language that might accommodate some of these concerns that I've raised, which you're pointing to. Again, indicating when the trigger point is for seeking these warrants, and then also engaging the Federal Court judge in supervision of overseas conduct that might be problematic....

And at the end of the day, I'll just harken back to the Arar report that said that there are instances where we really can't engage in this conduct. In the context of information sharing, there are circumstances where we simply can't share the information, and where the human rights implications are so dire. There are legal fixes and then there's also good judgement.

The Chair: Thank you very much. I know you'd love to continue, Mr. Carmichael, but we have now expended our first hour.

On behalf of the committee, the chair would like to thank our witnesses for your experience and your thoughtful comment here today. Once again, it's a very serious issue. Public safety, the protection of the public, there really is no greater responsibility of parliamentarians, so we thank you for your contributions here today.

We will now suspend while we go to the second hour.

● (1630)

(Pause)

● (1635)

The Chair: We're back in session. We will now proceed with the introduction of our witnesses.

We have Kent Roach, professor, Faculty of Law, University of Toronto, welcome, sir; and by video conference, from Burnaby, British Columbia, as an individual, we have Garth Davies, an associate professor at Simon Fraser University, welcome, sir. We will have joining us also by video conference, but it'll be another 15 or 20 minutes before he's live with us here, Christian Leuprecht, associate dean of the Faculty of Arts and associate professor in the Department of Political Science and Economics at the Royal Military College in Kingston.

Ladies and gentlemen, we will start with opening comments.

We will go to you, Mr. Roach.

Prof. Kent Roach (Professor, Faculty of Law, University of Toronto, As an Individual): Thank you very much, Chair. I'd like to thank the committee for inviting me to appear here today.

The terrible terrorist attacks last month confirmed Parliament's wisdom in 2013 in enacting four new terrorist offences that can apply to foreign terrorist fighters. Unfortunately however, Bill C-44 may have the unintended effect of making it more difficult to apply these valuable new offences to potential foreign terrorist fighters. That will be my primary focus in my submissions.

My second focus will be that the "innocence at stake" exception to the new CSIS human source privilege is required by the charter, but it is unconstitutionally under-inclusive as applied to non-criminal proceedings where section 7 charter rights are in play.

Finally, I will suggest that while it is correct that Bill C-44 gives CSIS new powers to conduct investigations outside of Canada and that this responds to the threat environment that we live in, there is a concern that we need new and integrated review mechanisms as well as better ministerial and parliamentary oversight of CSIS foreign activities.

To move to my first point, Bill C-44 would overturn the Supreme Court's recent decision in Harkat as well as reject the recommendations of the commission of inquiry into the bombing of Air India that CSIS informants not be given the same privilege as police informants. Both the Supreme Court and the Air India commission stress the danger that because of its intelligence-gathering mandate, CSIS may make premature promises of anonymity to informants, which could hinder or even thwart subsequent prosecutions.

Clause 2 of Bill C-44 would give CSIS human sources a veto on disclosure of any identifying information once they have received "a promise of confidentiality" from CSIS. The courts have most recently, in 2013, in the context of police informer privilege, said that these promises of confidentiality may even be implicit. I have a concern that virtually every human source CSIS talks to under the proposed legislation would then have the benefit of the privilege and a veto on any identifying information being disclosed, whether it's to defend a search warrant in a terrorist investigation or to be called as a witness in a terrorism prosecution.

These are not hypothetical concerns, and I should mention that I spent four years as director of research and legal studies on the Air India commission studying this question. In 1987 the prosecution of Talwinder Singh Parmar, the alleged mastermind of the Air India bombing, collapsed when an informer refused to allow his name to be disclosed. Now, that informer was in a very difficult position, and the crown attorney at the time said in open court that if he were in that informer's position, he would make the same decision because of fear for his life—as you have heard from earlier witnesses. But the fact is, that prosecution fell apart because of the informer privilege and the informer's ability to veto disclosing any identifying information.

This legislation would have given the two informants in the Toronto terrorism prosecution a veto on whether they would be called as witnesses or on disclosing any identifying information about them. As you heard yesterday, CSIS is not in the business of collecting evidence, and it was for this reason that the Air India commission warned it would have an incentive to promise anonymity and confidentiality when necessary to fulfill CSIS' intelligence mandate.

This is not an issue of CSIS deliberately abusing the privilege, but simply because of its functions, it will have an incentive to promise confidentiality. And then later on down the stream, perhaps months or even years later, the police and prosecutors may have a very difficult time dealing with the consequence of this near absolute privilege that would be bestowed on all CSIS human sources under Bill C-44.

● (1640)

The Air India commission was acutely aware that there is a dilemma. Sometimes it is more important to have intelligence than prosecution, but its solution was that this dilemma should not be resolved unilaterally by CSIS or, indeed, by the RCMP, but that decisions should be made in the public interest on the basis of all available information, by the Prime Minister's national security advisor.

The second point is simply that the "innocence at stake" exception in paragraph 18.1(4)(b), as required by the charter, would apply in criminal prosecutions. But the Supreme Court, in Charkaoui, has made it very clear that section 7 also applies in the non-criminal context, and in particular the security certificate context. It would be my submission that you should consider expanding the "innocence at stake" exception to allow judges to order disclosure that would pierce the privilege whenever it is required under section 7 of the charter.

Similarly, I realize that a policy decision to extend the privilege may have been made, but I would also propose that when you go into clause by clause, you should look at the section 2 language of the promise of confidentiality. That language should at least be limited so that it is only an explicit promise made by CSIS of anonymity that would trigger this broad privilege that, as I suggested, could hinder subsequent police investigations and prosecutions.

Finally, my last point is that I agree that, given the threat environment, CSIS needs to be able to conduct its investigations outside of Canada. But I do have some concerns about the "without regard to any law including that of any foreign state" language. I have concerns that this may override the restrictions that the National Defence Act places on CSEC or signals intelligence agency. I also think there is a need for an integrated review, or at least statutory gateways, as recommended by the Arar commission and as Professor Forcese in his submission advocated to you, and indeed has proposed some language to that effect.

I would also add that there is a need to ensure both ministerial and parliamentary oversight as CSIS uses its new powers to act abroad.

Thank you very much.

● (1645)

The Chair: Thank you very much, sir.

We will now go to an opening statement from Mr. Davies, please.

Mr. Garth Davies (Associate Professor, Simon Fraser University, As an Individual): Thank you very much for inviting me here today. I want to keep my comments brief.

I would echo pretty much everything that's been said up until this point in terms of the need for ministerial oversight. I think we all agree with that. I would think we would all agree that the context we're talking about, in terms of the changing nature of terrorism, is such that we need to allow CSIS to have the appropriate tools to operate in an environment that is changing rapidly and is really, in many ways, different from what we've sort of experienced historically in terms of the level of threat that we're talking about with regard to the foreign fighter problem, with regard to the nature of groups such as ISIS, and trying to balance that with the rights and freedoms that we all cherish so dearly.

I really wanted to be here today to try to be of assistance in any way I could in terms of answering any questions people may have. I wanted to minimize my time here and cede the floor to people who had anything else they would like to say.

Thank you.

The Chair: Fine, and thank you very much.

We will give Mr. Leuprecht a moment to settle in and get comfortable. He's actually a little earlier than we anticipated, so we'll give him a couple of minutes and suspend for a minute or two.

● (1645)

(Pause)

● (1645)

The Chair: Mr. Leuprecht, you have the floor for an opening statement for up to 10 minutes, should you wish, sir.

[*Translation*]

Dr. Christian Leuprecht (Associate Dean and Associate Professor, Department of Political Science, Royal Military College of Canada, As an Individual): Ladies and gentlemen, I will give my presentation in English, but I can answer any of your questions in either official language.

Mr. Chair, distinguished members of the committee.

[*English*]

I have entitled my intervention "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 Canadian security intelligence's areas of operations or AOR, beyond Canada—CSIS' areas of operations beyond Canada—one might say that Canada does not have a human foreign intelligence service, certainly not one of the scope of the human services operated by some of our key allies, especially in the Five Eyes—CIA, MI5, and ASIS, the Australian Secret Intelligence Service.

Canada has a foreign signals intelligence service, the Communications Security Establishment, and a good and respected one at that. Canada has compensated for AOR limitations on CSIS in several important ways.

Two of the key mechanisms had been under specific conditions. First, the 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. The New Zealand Security Intelligence Service, similar to CSIS, does not have a broad foreign human intelligence mandate akin to that of the U.S., U.K., and Australia.

Second, under specific conditions, the 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, the Communications Security Establishment.

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 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 2013 ruling he rebuked CSIS and the Communications Security Establishment for breaching their duty of candour to his court. 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. 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 Judge Mosley's decision, with respect to that particular instance of disclosure to the court aside, raises at least two fundamental issues. First, in light of at least 130 Canadian extremist travellers who 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 travellers 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 it reports, and the ability to liaise tactically with criminal intelligence and enforcement agencies, notably the RCMP and CBSA.

Second, 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 belabour 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 and 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.

Constitutionally, 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:

> 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.

● (1650)

Insofar as security is demonstrably of national concern, it falls within the purview of the federal government. Such is the case in terms of national security intelligence and its interactions with foreign security intelligence entities.

Second, 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 the Supreme Court of Canada and shall not detain us here. 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 in terms of polling.

I shall skip over this section and it can be read into the record at a later time.

[*See appendix*]

My point here is that people may have concerns about particular issues, but by and large, confidence in our security institutions and the federal government's handling of national security is very high.

The security sector, of course, is one form of government intervention. One might argue that it is actually the ultimate form of government intervention precisely because it empowers the government to curtail 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 case like Arar's would be highly unlikely to recur given the changes in policies now in place. Moreover, it is public knowledge that intelligence from the Arar case came from the RCMP and not from CSIS. And so to be sure, there are other cases where judges have had certain questions about CSIS evidence but none of this has called into question the professionalism and lawful conduct of the organization. Similarly, CSE's watchdog has repeatedly affirmed the lawful and professional conduct of its activities.

So where does the skepticism arise?

It appears to be driven by a curiously denatured interpretation of the Canadian Constitution since the introduction of the Canadian Charter of Rights and Freedoms that somehow the sole and primary purpose of the Constitution is somehow to limit government intervention in the lives of citizens. The result of this interpretation would have it that privacy, civil liberties, and due process, as well as judicial supremacy, should trump any and all other considerations. As someone who has published on Canadian constitutional politics, the conventional view is that of the Constitution that actually 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 an anathema to lawyers, but certain dimensions of security intelligence would be difficult to carry out without such confidentiality and the trust that we have as a result from our allies.

Again, here, is a section that will be read into the record.

[*See appendix*]

Allies such as the U.K., France, Germany, and Spain have had to learn to live with terrorism 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 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 ones who will be first to complain why CSIS did not do more, should an extremist traveller return to Canada and commit mischief here. Overall, they fail to account for the possibility of keeping individuals safe in spite of themselves, that sharing intelligence may allow for intervention abroad to prevent individuals from harming themselves, Canada, Canadians, and 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, so the onus is on such citizens to conduct themselves in a manner so as not to run afoul of the amendment being proposed. 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.

● (1655)

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.

The Chair: Could you sum up then, please, Dr. Leuprecht?

● (1700)

Dr. Christian Leuprecht: In essence, I endorse the current amendments, however, Bill C-44 does commit one sin of omission, in my world. Many 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 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.

The Chair: Fine.

Thank you very much. We appreciate that and thank you for closing off as well. We will now go to the round of questioning.

We will go to Mr. Carmichael who was so short-changed the last time. It is seven minutes for you, sir, so you get the bonus.

Mr. John Carmichael: Welcome to our witnesses.

Mr. Davies, I'd like to start with you, if I could.

Today, I think we have universal agreement that terrorism is a global threat and certainly last month's tragic events demonstrated Canada is not immune to that threat, whether initiated overseas or internally.

I wonder if you could tell us why it is important that CSIS have the clear mandate to conduct investigations outside Canada.

Mr. Garth Davies: I think we have to consider these days that we're increasingly talking about the issue of the foreign fighter problem. I think we understand they constitute an increasing theat to our country. There is evidence that while they don't engage in a significant number of acts when they come back to their countries of origin, the acts that they do engage in are increasingly problematic in levels of seriousness.

I also think what has been lost in some of the discussion of the foreign fighter issue is that by allowing these foreign fighters to go overseas, we're continuing to supply these groups, ISIS. At least in some instances, they appear to be increasingly dependent on foreign fighters to maintain their operations and their tactics. I'm focusing on one particular issue, but I think we need to be cognizant of CSIS' ability from both perspectives. It's not simply a matter of their coming back here, which is problematic, but we're providing a pipeline for these groups, and we probably need to consider very closely stemming that flow.

Mr. John Carmichael: Dr. Leuprecht, would you like to briefly add to that?

Dr. Christian Leuprecht: If I may, I will read you one paragraph that I skipped over that I think responds to your question.

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, including foreign intelligence activity. The Canadian public gives Parliament and the security agencies that report to Canada's political executive the benefit of the doubt.

I would go so far as saying that given the current global security environment, including the challenge of extremist travellers, the federal government has an obligation to Canadians to pass precisely the sorts of amendments that Bill C-44 proposes, and that those are in the vital interest of Canada and Canadians. Tactically, operationally, strategically, and fiscally, this is the sort of way to compensate for the limits on CSIS to engage in foreign human intelligence gathering.

In light of the current global security environment, it is vital that CSIS be able to conduct and have the capacities that are being introduced in sharing with foreign human and security intelligence so the Canadian government can realize its responsibilities.

Mr. John Carmichael: Thank you very much.

Welcome, Mr. Roach.

I'd like to just step back. It's important that the CSIS Act be clarified for explicit authority for activities overseas and outside of Canada specifically. How do these amendments compare to laws governing allied nations and security agencies? That's number one.

Also, are judicial warrants required for other western nations? That's something I've heard about briefly today. As well, are they held in such high judicial authorization?

● (1705)

Prof. Kent Roach: Well, certainly not in the United Kingdom, where there's ministerial authorization, much as is available with CSEC. In the United States, the Foreign Intelligence Surveillance Court does grant warrants. I think there are some examples of a judicial warrant and there are some examples of a ministerial warrant.

Bill C-44 has decided to opt for the judicial model. I think that's probably a wise choice.

Mr. John Carmichael: Some concerns we've heard are in regard to the ability of the Federal Court to issue warrants within the scope of relevant Canadian law when issuing warrants to authorize CSIS to undertake certain activities to investigate a threat to the security of Canada outside of Canada. Some may wonder why warrants would not be more appropriate coming from the nation the activities were taking place in, and clearly we've had some examples of that today.

Could you comment on why this is important? Some of those countries may not exactly have a court system that can be approached for a warrant. As well, there is the transnational nature of these investigations.

Prof. Kent Roach: As you've heard from Professor Forcese, and as we argued in our joint *National Post* piece, Parliament is being candid about the reality that some of these warrants may actually violate foreign law. It seems to me that one of the remedies for that really has to be more political and ministerial than judicial. Obviously, courts will have to grapple with this problem, but I agree with Professor Forcese, in that I think we need some ministerial oversight.

Of course, in our security environment—and this is part of the general accountability problem—it makes a lot of sense to have a whole-of-government approach to our security threat. The problem is that too often we're still remaining in silos. One of my concerns is that there might be a warrant granted under Bill C-44 that not only should the Minister of Public Safety be aware of, but that his or her cabinet colleagues in Foreign Affairs and Defence should also be aware of. I do think it's necessary for CSIS to be able to act outside of Canada, but I think the political risks of that are significant, and I think Bill C-44 could be improved by having some form of ministerial notification.

I would note that SIRC,, in its latest report, for 2013-14, has raised concerns that CSIS is not always keeping the minister informed. I agree that under a parliamentary system the responsible minister has to be aware, but I think that in the post-9/11 environment, where we have a whole-of-government approach to security, ultimately the accountability must rest at the prime ministerial level.

That was one of the reasons why, after a lot of thought and deliberation, the Air India commission recommended not what Bill C-44 is enacting, which is a privilege for CSIS, but rather a privilege for the Prime Minister's national security advisor, who the commission thought would be in the best position to determine the competing poles of promising confidentiality to get intelligence now —and that's sometimes going to be the right decision—or not promising confidentiality because we want to be able to prosecute people after. These are very difficult tensions. There's no one-size-fits-all solution.

My concern about Bill C-44 is that it may mean that CSIS makes even rational decisions at a preliminary stage of a counterterrorism investigation that could actually have repercussions and prevent us from being able to successfully prosecute extremist foreign terrorist fighters down the road.

The Chair: Thank you, Mr. Roach. Time is up, Mr. Carmichael.

Mr. Scott, for seven minutes.

Mr. Craig Scott: Thank you, Mr. Chair, and thank you Professor Roach for being here.

I wanted to follow up on the conversation you were just having with Mr. Carmichael, so that everybody listening is clear. The issue, if I'm correct, is that in this intelligence context there are not the same overarching considerations or incentives for the intelligence community to take care in giving promises to sources because they're not thinking about down the road prosecution.

That's the real difference, am I correct?

● (1710)

Prof. Kent Roach: That's right, and that is partly the story of Air India. However, the Air India commission also looked at the contemporary relationship between the RCMP and CSIS, and found that there were still some problems.

Again, I'm not saying that this is a personal fault of either of those two organizations, but you have organizations that have very different mandates and sometimes those are conflicting mandates.

Mr. Craig Scott: Is there a way to deal with the concern?

It's true that the court said that there doesn't exist a current, in common law, class privilege, and that's what now being accorded by Bill C-44.

Is your sense though that the courts were more or less content with the case-by-case qualified privilege? Is that what you think should remain?

Prof. Kent Roach: Yes. The case-by-case privilege makes a lot of sense because, certainly, CSIS will tell you this enables us to give an ironclad guarantee to all our human sources, that there will never be any identifying information. That's not quite right in law, I must say, because the "innocence at stake" exception also applies to people who become material witnesses or agents during a counterterrorism investigation.

Given the breadth of terrorism offences, it may very well be that CSIS sources may actually lose that privilege. It seems to me that, at the end of the day, this is a difficult area. Absolutes are frankly not possible. That's why I would prefer a case-by-case judicial decision and tailor it.

Mr. Craig Scott: Is the case currently that under the class privilege, the innocence exception applies in any case? It would apply whether it's case-by-case or whether it's this broader class.

Prof. Kent Roach: Exactly.

Mr. Craig Scott: To be fair to the way the government is thinking about this, I'm assuming it's not just....Sometimes the issue is, it's more important to have intel than to have prosecution. Yes, in a very operational frame. In a broader frame, I suppose we could say the decision that we have to be conscious is being made in the bill, maybe, is that it's more important to have prevention than prosecution.

If the government were to present it that way, at least we would be conscious of the trade-off. Would you agree with that?

Prof. Kent Roach: Yes, although I do go back to what I started with. I very much mean this and I've written this, not only for domestic but for international audiences. I think Parliament was ahead of the foreign terrorist fighter curve when they enacted the four new terrorism offences in 2013.

I support those offences and the best way to deal with the foreign terrorist problem....Sure, prevention would be great, but there needs to be denunciation and incapacitation.

I know this is not the intent of the government, but my concern is that one of the unintended consequences of this bill may make prosecutions, under those very new valuable offences, more difficult rather than less difficult.

Obviously, not all the information is out about what happened at Saint-Jean-sur-Richelieu, but we have to ask ourselves the question, why was there enough intelligence to take away that person's passport, but not enough to charge him under one of the many terrorism offences that we have in our Criminal Code?

Mr. Craig Scott: I'd like to move on to constitutionality. You referred to the unconstitutional under-inclusiveness because the provisions here are limiting the right to have the identity of the human source revealed by a judicial decision after an application to prosecutions, and not to all the other contexts in which that source could be behind jeopardy for people's interests, whether it's deportation or security certificates, etc.

I clearly understand that you've told us that this is a constitutional problem for that, despite, I'd have to say, the minister telling us two days ago that this is the most constitutional law the government had ever put forward—so I appreciate that.

But there's another point. With respect to the applications either to reveal the identity because it's necessary to make a defence for the person being charged, or for this slightly more nebulous seeking an order declaring an individual's not a human source or that the identity of the—well, we'll leave it at that, that other provision. In each case the hearing is held in private and in the absence of the applicant and their counsel, unless the judge orders otherwise.

I have serious concerns about that, as does the Canadian Federation of Law Societies. I'm just wondering if that's included in your worries about constitutionality. Are you okay with that?

● (1715)

Prof. Kent Roach: I actually have been reading up on the case law there, and I have to say that I'm a little less concerned than the Federation of Law Societies—I hope they don't take away my certificate to practise law.

The Supreme Court jurisprudence on this actually does suggest that at the first level hearing, it does have to be done in camera, which means with the public not there and with the other side not there. That is because this privilege is viewed as such an absolute, or near absolute, privilege.

On further reflection, I think that proposed subsection 18.1(7), which you're referring to, would present problems if it didn't have the phrase “unless the judge orders otherwise”. I think that gives the judge enough leeway to follow the Supreme Court's instructions, which are that closed hearings without the applicant being present are sometimes necessary in order to preserve the privilege.

Once the person's identity is out, the person's identity is—

The Chair: I'm sorry, we're well past time.

We will now go to Mr. Falk, please.

Mr. Ted Falk (Provencher, CPC): Thank you, Mr. Chairman.

I want to thank all the witnesses for coming here today with their interventions.

Dr. Roach, I'd like to start with you. One of the first comments you made is that this proposed legislation adds new powers, and yet we've heard from the minister and also from previous witnesses that this act does not provide any new provisions. Can you perhaps expand a little further on that seeming contradiction?

Prof. Kent Roach: The issue of whether CSIS has extraterritorial powers is a matter that has actually been under litigation under the act before Bill C-44. Justice Blanchard said in a decision that it didn't have extraterritorial powers. Justice Mosley—and here my interpretation is a little bit different from Professor Leuprecht's—actually said that it did have extraterritorial powers. He only drew it back when he found out they were using the Five Eyes to exercise what he had authorized as extraterritorial CSIS investigations.

When I say “new powers”, I mean this a matter of legal dispute. Leave to appeal in the Justice Mosley decision is now, I understand, being sought from the Supreme Court of Canada. It is possible the Supreme Court of Canada will hear that case, we really don't know right now.

When I say “new powers” I mean black letter law, new powers that spell it out.

But you're right that the Attorney General of Canada has argued that in the existing CSIS Act there are powers for CSIS to conduct investigations outside of Canada.

Mr. Ted Falk: Right, and that this act just provides more clarity to that. In general, would you agree with that?

Prof. Kent Roach: Yes, I would.

Mr. Ted Falk: You've also referenced that there could be implied confidentiality. Is that something we could inadverently do or unintentionally provide for someone?

Prof. Kent Roach: Yes.

Mr. Ted Falk: Can you expand a little bit on how we might address that or why you believe that to be the case?

Prof. Kent Roach: Sure.

Well, with reference in clause 2 of the bill, I can understand why “a promise of confidentiality“ was chosen. That is used in the jurisprudence. But in the 2013 Supreme Court of Canada case called R. v. Named Person B, the Supreme Court said it could also be an implied promise of confidentiality. My worry is that, if you're going ahead with a CSIS privilege, perhaps you should revisit that language, and talk about an explicit promise of anonymity.

My concern is that when CSIS agents go to talk to someone, it's almost always confidential. My concern is that this privilege will apply to virtually every human source that CSIS interacts with. I think it is important for there to be legislative guidance that narrows that privilege, because of the potential downstream effect of the privilege on the prosecution process.

I would also add that it might be wise to require some form of review or ministerial oversight about how this privilege works out if it is enacted. Because, as I said, rightly or wrongly, after four years of deliberation, the Air India commission certainly looked at this proposal, but on balance, rejected it because of concern that this might hinder terrorism prosecutions.

● (1720)

Mr. Ted Falk: Good. Thank you.

Mr. Davies, I have a question for you. Why do you think it's important for the CSIS Act to be clarified to give explicit authority to conduct investigations outside of Canada?

Mr. Garth Davies: I think that right now the legal grey area that they're operating in is probably holding them back from the kinds of things that we would need from them in terms of gathering information. I suspect that it is limiting what they feel they can do. They're operating with one arm tied behind their back. I think the clarification is required for them to know they'll be safe in terms of the information that they're collecting.

Mr. Ted Falk: Good. Thank you.

Mr. Leuprecht, you've indicated in your interventions that you feel your personal rights and freedoms would take a second seat to national security issues. Could you expand a little further on how convinced you are of that statement?

Dr. Christian Leuprecht: The precise nature of the statement was that I'm concerned that, when hard-pressed, we have a tendency in Canada to err on the side of individual freedoms, civil liberties, and privacy rather than on the side of public safety and security for Canadian society as a whole.

I would suggest that some of our allies have perhaps struck what I might term a bit more of a mature balance, because they have had to live with the phenomenon of terrorism much longer than we have. We need to recognize that there are certain collective obligations that the government has, and that, given the nature of the security environment in which we live, when forced to make a choice between the two, I would err on the side of peace, order, and good government rather than the side of necessarily protecting itemized individual civil rights and privileges if, as a result, the life, liberty, equality, and justice of Canadians and Canadian society as a whole may be called into question.

Mr. Ted Falk: This bill says that when CSIS or CSIS agents operate on an international level, they must operate within the scope of Canadian laws. Do you think this is an appropriate balance?

Dr. Christian Leuprecht: I do indeed. Teaching at the Royal Military College, this is the framework in which the Canadian Forces are deployed. I think we have ample examples, not just of the Canadian Forces, but, of other government departments, conducting operations abroad, and doing so within the legal and constitutional framework that Canada applies and expects of those organizations.

The Chair: Mr. Casey, you have the floor, sir.

● (1725)

Mr. Sean Casey: Thank you, Mr. Chair.

I'd like to start with you, Professor Leuprecht. At the end of your remarks you indicated that—and I'm paraphrasing here—the biggest weakness or the biggest error is an error of omission with respect to accountability—but not oversight, I think—and you cited the Belgian model as the gold standard. Could you talk a little more about the Belgian model and highlight the differences between what we have here and what we would need to do to get to what you think is the optimum model?

Dr. Christian Leuprecht: The Belgian model came out of a catastrophic failure in the Dutroux case. I would suggest that one of the reasons we would want to look at accountability is precisely to avoid any risk of such catastrophic failure of a security system. I won't go into all the details, but I would be happy to provide the committee with the contact information of the senior judge who heads the organization in Belgium, who I know quite well. The key about the organization of Belgium is that the accountability is provided through a mechanism that is paid for by Parliament, and the mechanism is directly accountable to Parliament and not to the political executive. It has a staff of about 100 people. The key element of their accountability capacity is that they do not provide accountability just for files that are closed, but they have the ability to see files of any active investigation that is being carried out within the Belgian security framework. So it doesn't just provide accountability after the fact; it provides accountability in the actual process of investigations.

The challenge, I think, that we currently have in Canada is that we have annual reviews and after-the-fact accountability, but we don't have a mechanism that provides ongoing accountability in as effective a manner as we could have. We have a mechanism that reports to the political executive rather than being accountable to Parliament. The major change that would require is for members of Parliament to be security-cleared to have privileged access to the information they are being provided, and this would be a significant step for Canadian Parliament to take.

Mr. Sean Casey: But you feel it would be one that would represent the best practices internationally.

Dr. Christian Leuprecht: I do think the Belgian model is perhaps one of the most effective in terms of the accountability it provides both in terms of the tack in operational accountability for the organizations in question and in the way that accountability is reported to the legislative branch.

Mr. Sean Casey: Thank you.

Professor Davies—and perhaps I'll get Professor Roach to chime in on this as well—yesterday the committee received a letter from the Privacy Commissioner of Canada. The Privacy Commissioner expressed concerns related to privacy issues, and the means by which information is gathered related to the extraterritoriality provisions of the bill. He also commented specifically on the adequacy of existing safeguards to ensure against the risk of such violations, including the risk of torture.

Could I have Professor Davies and Professor Roach offer any comments they wish on the concerns expressed by the Privacy Commissioner of Canada to the committee yesterday?

Hon. Diane Ablonczy: On a point of order, at our last meeting we had a discussion about the fact that the Privacy Commissioner put forward certain views but declined to attend to answer questions on the views. I don't know whether we made a decision about whether to deal with his views absent his appearance before the committee. Can you just clarify that for me?

The Chair: The chair does recall that the Privacy Commissioner did not appear.

Mr. Clerk, was he invited?

The Clerk of the Committee (Mr. Leif-Erik Aune): The Privacy Commissioner was not invited to appear before the committee for its study of Bill C-44.

Hon. Diane Ablonczy: Why do we have this information then?

The Chair: What I'm suggesting, then, is that obviously the Privacy Commissioner was not invited as a witness prior to...; however, he did send a letter, and the letter was received by the committee, but it has not been authorized to accept it as evidence, other than as having been received by the committee. It would take a motion by committee to establish it as evidence within the committee; otherwise, it is there for the committee's personal use.

● (1730)

Hon. Diane Ablonczy: Is this question in order, then?

The Chair: There has been an objection raised. It would be up to this committee now to decide whether or not they wish to.... It is in order unless an objection is made. If there is an objection, the objection can be sustained based on whether or not it's in order.

Hon. Diane Ablonczy: We're always happy to have information, but does that mean anybody can write a letter to the committee and then we have to consider it? That could get a bit messy, I would think.

The Chair: I will read from the paragraph that applies to this, because it is open ball. It says:

> There are no specific rules governing the nature of questions which may be put to witnesses appearing before committees, beyond the general requirement of relevance to the issue before the committee

Now, there is an issue of relevance, in that when the letter was directed to the committee, it was relevant to Bill C-44. It is relevant, so at this particular point, it would then be admissible and accepted, according to the paragraph that is in here.

So yes, it is in order.

Hon. Diane Ablonczy: Thank you, Mr. Chairman.

The Chair: Carry on, please.

Mr. Sean Casey: Professor Roach, Professor Davies, are you okay with the question? Do you need me to repeat it? Are you ready to respond?

The Chair: I'm sorry, sir, but we are running out of time now. We have about 30 seconds left.

Prof. Kent Roach: Just quickly, it goes back to the need for parliamentary oversight and parliamentary access to secret information. Certainly, the resolution of the Afghan detainee case shows that there are some problems there.

The Chair: Fine. Thank you very much.

The time is now over.

I have one little budget issue that I would like the committee to deal with; however, I would excuse the witnesses and thank them very kindly on behalf of all of the committee and its members.

Colleagues, I have a budget request that you have had sent to you.

[*Disturbance in the audience*]

Mr. Rick Norlock: On a point of order, Mr. Chair, this is an interference in a parliamentary process.

The Chair: Excuse me. Could we have this gentleman removed, please? I would like you to call security, please.

Colleagues, I have a budget request for witness testimony. Is it approved?

Some hon. members: Agreed.

The Chair: Thank you. The meeting is adjourned.

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.

House of Commons
Standing Committee on Public Safety and National Security
Meeting No. 41,
November 26, 2014

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.