The Law Society of British Columbia

Consultation on National Security

Submissions to the Ministry of Public Safety and Ministry of Justice

Law Society of British Columbia

December 2016

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DM1298029

Introduction

The Law Society of British Columbia (the Law Society) is an independent organization whose origins date back to 1869. Its membership comprises all lawyers who have been called to the Bar in British Columbia who remain in good standing pursuant to the *Legal Profession Act* S.B.C. 1998 c.9 and the Law Society Rules. It is governed by the Benchers, being 25 lawyers who have been elected by the membership, together with up to six persons who are not members of the Law Society appointed by the Lieutenant Governor in Council of British Columbia, as well as the Attorney General of British Columbia.

Pursuant to s. 3 of the *Legal Profession Act*, the Law Society's object and duty is "to uphold and protect the public interest in the administration of justice by" (inter alia) "preserving and protecting the rights and freedoms of all persons."

The Law Society supports measures to protect and preserve public safety, and recognizes the very real challenges arising from threats of terrorism worldwide. Canada has an enviable position in the world as a tolerant and just country that promotes personal rights and freedoms and encourages diversity. Ensuring that there is a robust protection of public safety is both consistent with Canadian values and, in turn, further protects the society in which those values are practised.

There is always a delicate balance to be struck, however, in the promotion of public safety and the protection of rights and freedoms, and the Law Society recognizes that the balance is not always easily accomplished.

The Law Society has on a number of occasions in the past made submissions regarding the proper scope of legislative efforts to address national security, particularly in the context of money-laundering and terrorist financing, interception of electronic communications (sometimes referred to as "lawful access") and most recently with respect to the *Anti-terrorism Act (2015)*. Many of our comments in this submission are consistent with submissions we have made on this subject in the past. The unifying theme of our submissions focuses on ensuring that proposed legislation appropriately balances public safety with the rights and freedoms guaranteed to all Canadians.

Canada is a country that is founded upon principles that recognize the supremacy of the rule of law.[1] It is incumbent on all justice system participants to ensure that this founding principle is upheld. This is done by preserving and protecting Canadians rights and liberties to the standards required by our Constitution. An excessive derogation of those rights and liberties in favour of

[1] Preamble, *Charter of Rights and Freedoms,* Schedule B., *Constitution Act*, 1982

increased state powers in the name of national security must be prevented. Failing to do so would be inimical to the democratic culture of this country, our international reputation as a tolerant, just society that promotes personal rights and freedoms and encourages diversity, and of recognized principles relating to the rule of law.

Opening Comments

The Law Society is encouraged that the starting point for this consultation is a commitment from the government to guarantee that Canadian Security Intelligence Service (CSIS) warrants comply with the *Canadian Charter of Rights and Freedoms*. Our submissions on the *Anti-terrorism Act 2015*, some of which will be restated in this submission, outlined several instances where the legislation contained provisions that were quite clearly contrary to the *Charter*. Instances where current legislation or where proposals that have been raised may infringe on solicitor-client privilege are also discussed in our submissions.

It is not enough, however, for the government to ensure that CSIS warrants will comply with the *Charter*. The government must ensure that *all* its legislation does not offend the rights and freedoms guaranteed by our Constitution. Further, the government must take steps to prevent, as much as it can, opportunities for security agencies to take measures that, even if well-intentioned, violate fundamental rights and freedoms or violate the rule of law.

Submissions

1. Clarity of Legislative Provisions

We are pleased that the government commits to "narrow overly broad definitions."

As we pointed out in submissions made on the *Anti-terrorism Act 2015*, we were and remain concerned about the vagueness of some of the terms in the various legislative efforts concerning terrorism.

Canada is founded upon the principle of the supremacy of the rule of law, as recognized in the *Charter*.

In his book *The Rule of Law*[2] the late Tom Bingham (a former Lord Chief Justice of England and Wales) identified several principles that underlie the rule of law. The first amongst these was

[2] Bingham, T. *The Rule of Law* Allen Lane publishers, © 2010

that "the law must be accessible and so far as possible intelligible, clear and predictable." He said:

> …if you or I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must do or must not do on pain of criminal penalty.[3]

There are several problematic definitions or provisions brought about by the *Anti-terrorism Act (2015)*, such as "activities that undermine the security of Canada" in amendments to the *Security of Canada Information Sharing Act*, as well as amendments to the *Criminal Code* that will created\ the new offence of "advocating or promoting terrorism,"[4] and introduce the concept of "terrorist propaganda" that can be ordered deleted from the internet if available to the public,[5] to name a few.

Terms, definitions, or general legislative provisions that are overly broad or generally too vague to permit people, without undue difficulty, to know whether their activity is or is not lawful must be avoided. They offend the rule of law. We urge the government to review carefully all legislation relating to national security to ensure that it does not create provisions that are too vague to permit people to know whether what they are doing will offend the law.

1. Canadian Security Intelligence Act

Part 4 of *Anti-terrorism Act (2015)* contains amendments to the *Canadian Security Intelligence Service Act*. These amendments alter the function of the Canadian Security Intelligence Service ("CSIS") from an intelligence-gathering agency to an agency whose role will include taking "measures" to prevent "threats to the security of Canada."

As a result of the amendments to the *Canadian Security Intelligence Service Act* enacted through the *Anti-terrorism Act (2015)*, laws , including rights and freedoms guaranteed by the *Charter*, can be violated by CSIS in the course of taking measures to reduce a security threat by virtue of an order made by a court in an *ex parte, in camera* proceeding. This order can be made in the absence of any arguments against granting the authorization.

Through this Act, the state seeks to create a mechanism whereby "the rights and freedoms of all persons" can be violated by the state. It risks making the judge hearing the application complicit

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[3] *Ibid*, page 37

[4] *Criminal Code* s. 83.221

[5] *Criminal Code* s. 83.222

in the state perpetrating otherwise unlawful acts and may thereby violate judicial independence. It strikes the wrong balance between security and freedom.

We agree with comments that have been made by a former Chair of the Security Information Review Committee describing the provisions that allow CSIS agents to apply to a judge for authorization for measures that could potentially contravene a *Charter* right as a "major flaw."[6] We submit that, from a constitutional perspective, it is a fatal flaw.

We submit that legislation that specifically authorizes a process for the violation of the rights of Canadians guaranteed by the *Charter* is, by its own terms, contrary to the *Charter.* Law enforcement agencies have many investigative tools and legislative powers that permit them, within the law, to investigate crime and criminal activities, including matters that may be commonly considered as terrorist-related activities. These measures have been shown to be highly effective in discovering and successfully prosecuting these activities.

Our concerns about the new provisions in the *Canadian Security Intelligence Service Act* are enumerated below.

(i) **Judicial Warrants Authorizing Violations of the Law**

Section 12.1 of the Act as amended by the *Anti-Terrorism Act (2015)* allows CSIS to take reasonable measures to reduce a threat to the security of Canada. The Law Society supports any legislation that seeks to preserve public safety provided it finds the proper balance with the rights and freedoms of Canadian citizens. The amended Act does provide limitations that would preclude CSIS, when taking a measure to reduce a security threat, from intentionally or through criminal negligence causing death or bodily harm, willfully obstructing, perverting or defeating the course of justice, or violating the sexual integrity of an individual. The Act further prevents CSIS taking measures if they will contravene a right or freedom guaranteed by the *Charter* or if they will be contrary to other law. In our respectful view, these are all appropriate limitations.

However, the legislation also provides that these limitations operate ***unless CSIS is authorized to do so by a warrant issued under s. 21.1 of the Act*** (section 12.1(3)). This provision is concerning.

In brief, section 21.1 provides that in order to reduce a threat to the security of Canada, a CSIS employee can, with ministerial approval, apply to a judge of the Federal Court for a warrant authorizing the person to whom the warrant is directed to do a number of things

[6] http://www.cbc.ca/news/politics/proposed-csis-powers-a-constitutional-mess-former-watchdog-warns-1.2991660

as set out in that section ***without regard to any other law, including that of any foreign state*.** The matters that must be specified in the application are set out in s. 21.1(2).

(ii) Authorization Required Only Where Proposed Measures "Will" Violate the Law

The application is only required where CSIS has determined that its activities ***will*** (not ***may***) violate the law – see section 12.1(3) - which we believe is the wrong test. It will be difficult, in advance, to know if certain measures ***will*** contravene a right or freedom or ***will*** violate the law. While some contemplated measures could undoubtedly be envisioned to violate the law (and we believe in a country governed by the rule of law, these should be discarded as appropriate measures in any event), the legality of others may be much less certain. The intention behind this provision is to allow for judicial consideration of the action before it takes place. Consequently, we consider that any measure that ***may*** violate the law should be presented to a judge, who may then consider, for the purpose of the issuance of a warrant, whether such measure is justified.

Moreover, we are concerned with the concept of a state agency being statutorily authorized to seek judicial approval to violate the law. While judicial oversight of police powers is a longstanding function of the courts, it has always been to ensure compliance with the law, not to authorize its violation. The history of courts in Canada is not one of ruling on permissible violations of the law and it is unfortunate that this possibility is now sanctioned by Parliament.

(iii) Assistance Orders

We are also concerned that, through section 22.3 (assistance orders), a judge may order any person to provide assistance in the execution of a warrant authorized under s. 21.1 – effectively requiring a person named in the assistance order to assist in the violation of a law. Private citizens should never be conscripted into assisting the state in taking measures against a third party through the violation of the law.

(iv) Oversight

We appreciate that there are two levels of preliminary oversight. First, the Minister must approve the application. Second, the application must be approved by a judge of the Federal Court. We are unaware, however, of any requirement that CSIS report back to the court on the measures it took pursuant to the warrant so that the court could assess whether the measures complied with the extraordinary authorization in question. While we recognize that there is some limited oversight available through the Security Intelligence Review Committee (section 38(1.1)), we believe that specific judicial

oversight of each authorization given under s. 21.1 ought to be required. . Knowledge that the execution of the authorization will be reviewed by the authorizing justice is a strong deterrent to acting beyond the scope of the authorization.

(v) Applications for Warrant are Made in Private

Pursuant to s. 27, the application is heard in private in accordance with regulations. We are unaware of any provision requiring a "special advocate" or other party to be present to ensure a balanced view of the circumstances, although we expect it is possible that the court itself may create such a requirement in the course of its development of law as applications proceed.

The private, *ex parte* nature of the application places the court in a very difficult position, and will require, at the very least, reliance on the disclosure of CSIS in the course of the application. There is always a danger that an agency seeking authority to discharge its obligations will present its case in the most favourable light. One of the great checks and balances in a democracy is the ability of the adversarial system to present opposing views. This legislation prevents that important function from taking place.

The private nature of the proceedings also means that the ultimate decision will be unlikely to be made public, creating the possibility of a body of secret jurisprudence with respect to CSIS acting beyond the law. This offends the rule of law.

(vi) No Provisions Permitting Appeals or Applications to Set Aside Warrant

There are no provisions on how to set the warrant aside nor is there any way to appeal the warrant. Either would be difficult to contemplate in any event given that the warrant is applied for in a private proceeding. However, each of these limitations removes a standard safeguard of judicial review and oversight.

We recognize that the state must be vigilant in meeting the danger that security threats can pose to the security of Canada, but we do not believe that legislation should conscript judges into permitting the state to violate the law when seeking to preserve the security of a country, whose foundation is based on the rule of law. Nor do we believe that legislation should be drafted that permits the state to violate the rights and freedoms guaranteed to Canadians on the premise, paradoxically, that it may be necessary at times to do so to preserve the very same rights and freedoms. Such laws do not reflect the values of Canadian society.

The recent judgment of the Federal Court cited at 2016 FC 1105[7] demonstrates the danger that state agencies may collect or retain data in ways that are not authorized and that may in fact be contrary to law. The case also demonstrates the surprise and frustration of the courts when state agencies do so. The comment by the Director of CSIS, in response to the case in question, that he really did not know why the court was not told of the activities undertaken by CSIS when it applied for the warrants is not reassuring in any sense. The fact that CSIS was found by the court to have violated its duty of candour ought to be a very troubling matter for the government and for all Canadians, and justifies the creation of stringent reporting and oversight requirements that are as transparent as possible to ensure Canadians can be confident that its state security agencies are not acting without regard to and above the law.

We therefore urge that the provisions of the *Canadian Security Intelligence Service Act* that authorize applications for a judicial warrant to violate the laws and the rights and freedoms of Canadians be repealed.

2. Investigative Capabilities in a Digital World

The Law Society agrees with the proposition that Canada's law enforcement and national security investigators must be able to work effectively in a digital world. However, they must not be permitted to violate fundamental rights and freedoms. Various "lawful access" proposals considered over the years have raised concerns that fundamental rights and freedoms are violated, and that Canadians privacy expectations are compromised. As these proposals are again under consideration, we raise the following issues that we submit should be considered in any consultation on national security.

(i) Solicitor-Client Privilege

Solicitor-client privilege is a fundamental principle of justice and a civil right of supreme importance in Canadian law. Because this privilege is such a fundamental principle of law, it has been held that the usual balancing of the exigencies of law enforcement against the privacy interests afforded by the privilege is not particularly helpful because the privilege is a *positive* feature of law enforcement, not an impediment to it.

In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*[8] the Supreme Court of Canada set out general principles that govern the legality of searches of law offices as a matter of common

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[7] *In the Matter of an Application by XXX for Warrants pursuant to ss. 12 and 21 of the Canadian Security Intelligence Act R.S.C. 1985 c. C-23* (October 4, 2016)

[8] [2003] 3 S.C.R. 209

law, meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege. "Law office" has subsequently been given a broad definition by the British Columbia Court of Appeal in *Festing v. Canada (Attorney General)*[9] as "any place where privileged documents may reasonably be expected to be located."

The Law Society considers that it is probable that many, and perhaps most, of the communications between a solicitor and his or her client occur, in today's world, by using telephones, cellular phones, computers and email. Proposals aimed at the lawful interception of, or access to the content of, such communications must take this into account. The Law Society believes that the principles stated by the Supreme Court in *Lavallee* are equally as applicable to the interception of privileged communications between a solicitor and a client as they are to the seizure of privileged information or documents under the authority of a search warrant.

Lawyers have ethical obligations not to divulge the confidential or privileged information of their clients. The Supreme Court of Canada has been mindful of the protection that must be given to solicitor-client privilege, which plays a fundamental role in the functioning of the criminal justice system and is essential to the protection of the constitutional rights of accused persons. The Supreme Court has held that "it is important that lawyers, who are bound by stringent ethical rules, not have their offices turned into archives for the use of the prosecution."[10]

The Law Society also considers that the definition of "law office" as it relates to the application of the *Lavallee* principles concerning search warrants is equally applicable to the interception of privileged communications. Therefore, any place where records of privileged communications may reasonably be expected to be found must constitute a "law office." Internet service providers, or telecommunication service providers who have records of communications between a lawyer and a client may, therefore, arguably be "law offices" for these purposes. We submit that it is important that the proposed legislative amendments take into consideration and address these complicated issues of protecting privilege where proposed production orders, preservation orders, or authorizations to intercept communications are authorized.

(ii) Lawyers are Obliged to Keep Clients Informed of Material Matters

Past "lawful access" proposals have proposed the creation of preservation orders that would permit a justice or judge to include a term or condition in the order preventing disclosure of the existence of the order. These sorts of provisions must be treated carefully, particularly where lawyers may be the target of the enquiries.

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[9] 2003 BCCA 112

[10] *Maranda v. Richer* [2003] 3 S.C.R. 193 at para 37

Although not all information obtained by a lawyer during the course of a retainer is subject to solicitor-client privilege, a lawyer is still required to hold in strict confidence all information concerning the business and affairs of a client acquired during the course of the professional relationship. The information may not be divulged without the consent of the client, or except as required by law or by a court.[11]

The lawyer also has a duty to act in the best interests of the client. The lawyer has a duty generally to disclose all relevant information to the client which may affect the retainer and also has a duty to disclose to the client all circumstances of the lawyer's relations to the parties which might influence whether the client selects or continues to retain the lawyer.[12]

Our concerns about statutory provisions requiring the disclosure or production of privileged information have been set out above. Equally troublesome, however, is any proposal requiring the production or preservation of confidential client information combined with the possibility of a prohibition preventing the lawyer from telling his or her client of the existence of such an order.

Any prohibition preventing a lawyer from disclosing to his or her client the existence of an order requiring the lawyer to disclose, produce or preserve confidential information about a client for the purpose of assisting the state in an investigation is the very antithesis of a lawyer's duty to the client. It is all the more troubling if the investigation by the state concerns the activities of the lawyer's client, because, by virtue of an order requiring the disclosure, production or preservation of the client's confidential information, the lawyer may, in fact, become a compellable witness against the client. The lawyer must be able to communicate that fact to the client. It would be contrary to the public interest in the administration of justice to prevent a client from knowing that a lawyer may be required to produce, disclose or preserve the client's confidential information to an agent of the state. In *Canada (Attorney General) v. Federation of Law Societies of Canada*[13] the Court held that is was a principle of fundamental justice that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes.

The Law Society therefore strongly urges that no legislation be created that would permit a judge to order that a lawyer be prohibited from disclosing to his or her client the existence of a production or preservation order that requires a lawyer to produce or preserve a client's confidential or privileged information or documents.

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[11] Rule 3.3-1, *Code of Professional Conduct for British Columbia*

[11] Rule 2.1-3(b), *Code of Professional Conduct for British Columbia*

[13] [2015] 1 S.C.R. 401

(iii) Extra-Territorial Application of Production and Preservation Orders

Investigative power proposals sometimes suggest that they are meant to permit the production or preservation of documents or information located outside of Canada. The Law Society strongly cautions against drafting legislation meant to have extra-territorial application. The Law Society does not believe that it would be in the public interest to require Canadians, by virtue of a law in Canada, to preserve or produce information under their control in a foreign country, particularly if the laws of the foreign country required the individual to maintain the confidentiality or privacy of the information. Such a result would place the Canadian citizen in an untenable position – requiring him or her to be forced to choose, in effect, which law to break. This is a criticism that has, for example, been made of the USA PATRIOT Act. Canada should not follow this example. The Law Society would encourage, instead, that efforts be undertaken to modernize existing treaties on the sharing of information.

(iv) Judicial Authorization and Standards to be Met

Infringements on the privacy of citizens ought to be available to law enforcement agencies only in limited circumstances. Individual citizens ought otherwise to be free from state interference in their private information and communications.

To this end, the Law Society believes that the public interest in the administration of justice requires interceptions of communications, whatever their nature may be, to be judicially authorized in all cases. Orders for the production of materials should also require judicial authorization. Peace officers should *not* be statutorily authorized to make orders for the preservation of materials or information. These powers should only be left to a judge, and should only be exercised after evidence has been presented explaining the rationale and justification for the order sought, together with evidence that it is necessary for the investigation of an offence. There should be no lesser standard of proof for the interception, seizure or preservation of differing types of communications or evidence. Standards and thresholds for obtaining or intercepting information must also not vary depending on the type of technology involved.

(v) Interception Capabilities

Proposals that contemplate requiring all telecommunication and internet service providers to build into their systems the technical capacity to intercept communications in order to assist law

enforcement agencies with quicker and easier access to information should be closely scrutinized.

The Law Society is concerned that these sorts of proposals negatively affect rights and freedoms related to the privacy of communications, and therefore compromises the public interest in the administration of justice. The imposition of such a requirement, especially if done in combination with the imposition of penalties should the requirement not be met, may reasonably be seen by many as conscripting service providers to assist in surveillance for the State. The Law Society understands that difficulties may be faced by law enforcement agencies in accessing communications if such intercept capabilities are not in place, but the public interest in the administration of justice is not strengthened if the State were to compel individuals or entities to assist in the State's investigation capabilities.

(vi) Broad Application of Lawful Access Proposals

Search warrants and orders for the interception of communications have been available for a number of years, and a considerable body of law has developed around such provisions. The Law Society understands that the current provisions may not always be ideally suited for intercepting electronic documents or communications.

New proposals, however, should not apply to *all* information, documents and communications over which access is sought during the course of an investigation. If new provisions are truly required to deal with the development of communications technology, then they should (subject to dealing with the concerns raised above) only apply to the new technology. The current laws should continue to exclusively apply to the seizure of such items as paper documents and the interception of telephone communications, for example.

Conclusion

We reaffirm that the Law Society supports efforts by Parliament to uphold, protect and enhance the security and safety of Canadians. We support efforts by the government to review and update legislation to make such improvements.

However, such efforts must be consistent with the rule of law and must find the appropriate balance between preserving public safety and preserving the rights and freedoms for which Canada is envied. The matters that we have addressed in these submissions, in our respectful opinion, identify specific areas of concern that the government must address when considering legislative proposals to address national security matters.