

# **Submission to the Public Safety Canada Consultation on National Security**

by

**Canadian Unitarians for Social Justice<sup>1</sup>**

2016-12-14

## **1. The Canadian democratic vision is rooted in ethical and spiritual beliefs**

Canadians are held together by a number of defining ideas. The most important of these is the idea that Canada is a democracy. This does not refer just to our machinery of elections and government. It implies that power is vested in the people and that there is equality of rights and privileges.

The democratic vision is a profoundly optimistic view of people and their capacity to create a just and peaceful society. It has a spiritual dimension as “an expression of faith in the power of human beings to shape their own lives”.<sup>2</sup>

The equality that is central to the democratic vision can be seen as growing out of the Golden Rule, that one should treat others as one would wish to be treated oneself, which appears in different forms in many religions and ethical traditions.<sup>3</sup>

Theologian Reinhold Niebuhr has pointed out the impossibility of perfectly implementing the democratic ideal, given that both individuals and the community tend to inordinately expand their power so that it infringes the freedom of others. He says “ ... democracy is a method for finding proximate solutions for insoluble problems.”<sup>4</sup> So, any democratic system of laws and institutions is a work in progress and will need to be adapted to changing conditions. But, though the law at any time is imperfect, “ ... there are no living communities which do not have some notions of justice, beyond their historic laws, by which they seek to judge their legislative enactments.”<sup>5</sup>

Accordingly, the Canadian democratic vision, and its laws and institutions, can be seen as evolving from before the time of the Magna Carta 801 years ago and continuing in the present. Today's vision requires, not only that every person be treated equally, but that citizens be able to interact with their government on an equal footing. We require the government to obey the law just as citizens must.

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2 Earl K. Holt. 1998. The right of conscience and the use of the democratic process within our congregations and in society at large in E.. A. Frost, ed., With Purpose and Principle - Essays About the Seven Principles of Unitarian Universalism. Skinner House. Boston.

3 Wikipedia, Golden Rule. [https://en.wikipedia.org/wiki/Golden\\_Rule](https://en.wikipedia.org/wiki/Golden_Rule) accessed 2016-12-02.

4 Reinhold Niebuhr. 1944. The Children of Light and the Children of Darkness. Charles Scribner. New York. Section 2.iv.

5 Niebuhr. 1944. Cited above. Section 3.iii.

When citizens come into conflict with the government, they have access to impartial judges and juries and appear before them on an equal footing with their governmental adversaries. This relationship of equality between citizens and government is crucial to the legitimacy of government power. These principles and the mechanisms that implement them have taken centuries to develop and must be honoured.

## **2. Canadian society is peaceful because the democratic vision is honoured**

Not only is honouring the democratic vision the right thing to do, it also fosters a society that is peaceful and that allows people to fulfill their greatest potential.

The optimism of the democratic vision is supported by fact. Cognitive scientist Stephen Pinker has assembled convincing evidence that, beginning in prehistoric times and continuing to the present day, the trend is for violence in human society to decrease.<sup>6</sup> Although modern communication technology can make the public instantly aware of violent events anywhere on the globe, study shows that society in the 21st century is less violent than in any other period of history. In spite of many limited conflicts, which are devastating to those directly affected, the 70 year period since the end of World War II has been relatively peaceful in most of the world. Pinker identifies the widespread adoption of democracy as contributing to this “Long Peace”. He also identifies, as a contributing factor, the reduction of systemic violence against minorities, a consequence of the democratic vision of equality.

Evidence from the social sciences confirms that the prevalence of democracy contributes to our present state of relative peace and order. A quarter century ago, social psychologist Tom Tyler gathered data to show that “people comply with the law not so much because they fear punishment as because they feel that legal authorities are legitimate and that their actions are generally fair”.<sup>7</sup> His work yielded more specific results in relation to interactions between citizens and law enforcement officers, including a finding that the perception of legitimacy depends in part on whether law enforcement officers treat citizens with proper respect as human beings, each with his or her own needs for dignity, privacy, and so on. Since then, his conclusions have been confirmed and extended by many others in the social sciences.<sup>8</sup>

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6 Steven Pinker. 2011. *The better angels of our nature - why violence has declined*. Viking Penguin. New York.

7 Tom Tyler. 1990. *Why People Obey the Law*. (Quote from jacket.) Princeton University Press.

8 Anthony Bottoms and Justice Tankebe. 2012. Beyond procedural justice: A dialogic approach to legitimacy In criminal justice. *Journal of Criminal Law and Criminology* 102(1):119-170. <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7419&context=jclc> accessed 2016-12-14.

It follows that William Blackstone's 1765 statement, "It is better that ten guilty persons escape than that one innocent suffer"<sup>9</sup> is not only a moral principle. It is also a practical prescription for effective law enforcement that is supported by present-day scientific evidence.

The evidence complements the teachings of the 18th century humanist philosopher Immanuel Kant. He identified the importance of a free society in the development of moral character, so that people learn to do the right thing by their own choice. A contemporary philosopher considered Kant's teaching in the light of present day trends and commented, "One of the goals of moral education is to cultivate a conscience – the little voice inside telling us that we should do what is right because it is right. As surveillance becomes increasingly ubiquitous, however, the chances are reduced that conscience will ever be anything more than the little voice inside telling us that someone, somewhere, may be watching."<sup>10</sup>

Canadian society has some major flaws; for example, its treatment of its indigenous peoples. Nevertheless, it has evolved to provide a peaceful and safe home for most of its people. This has come about because the democratic vision has been honoured and people comply voluntarily with the law. The flaws are largely the result of departures from the vision. When considering measures designed to enhance security, legislators must consider the overall long term effect on Canadian society. To be effective, it is not enough that they make law enforcement more efficient. It is crucial that those measures be fair, moral, and respectful to every citizen so that they foster voluntary compliance with the law. The perceived legitimacy of government, though intangible, is ultimately what has made Canadian society peaceful and safe.

### **3. Security agencies cannot appropriately balance freedom with security.**

It is unreasonable to expect security agency personnel to unilaterally make appropriate tradeoffs between their powers and the democratic need for equality and fairness. They are passionately committed to protecting Canadians from perils of all kinds. For certain, one of their fears is that our country will suffer some kind of damage or attack because they were not zealous enough in rooting out the wrong-doers. That is a heavy load to carry. South of the border, Michael Hayden, former director of both the CIA and the NSA, had a policy of "playing to the edge" of legality<sup>11</sup> and it would be foolish to expect other security agency people to act

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9 William Blackstone. 1765. Commentaries on the Laws of England. Quoted in Wikipedia article (same title). [https://en.wikipedia.org/wiki/Commentaries\\_on\\_the\\_Laws\\_of\\_England](https://en.wikipedia.org/wiki/Commentaries_on_the_Laws_of_England) accessed 2016-11-25.

10 Emrys Westacott. 2010. Does surveillance make us morally better? in Philosophy Now 79, available at [https://philosophynow.org/issues/79/Does\\_Surveillance\\_Make\\_Us\\_Morally\\_Better](https://philosophynow.org/issues/79/Does_Surveillance_Make_Us_Morally_Better) .

11 Michael Hayden. 2016. Playing to the Edge: American Intelligence in the Age of Terror. Penguin

differently. It is natural that in their minds, a small possibility of a real security failure should outweigh the probability of long term damage to the intangible democratic spirit of our country. Yet, if that spirit is not honoured, if citizens feel that they are the subject of pervasive surveillance, unreasonable disruption or worse, government loses legitimacy and the result may be even more dangerous to national security in the long term. For that reason, Parliament must take responsibility for placing clear limits on security agency behavior and provide effective mechanisms to enforce those limits.

#### **4. Public adversarial proceedings are the proven method of oversight**

Canada has inherited a law enforcement system with roots in both English and French traditions. The principles for the administration of law and justice introduced through the Magna Carta more than 800 years ago have been developed and expanded over the centuries.

The proven mechanisms are those that allow citizens to deal with government on an equal footing. When security agencies act against an individual, that person must be informed and have access to judicial processes to right any injustice that has occurred. There may be valid reasons for delaying notice, but one-sided hearings which remain permanently secret will certainly result in injustice. Those who are accused of wrongdoing must be able to face their accusers in open court.

The courts function on an adversarial system: the accusers and the accused argue their case before an impartial judge or jury. The use of the adversarial system is based on the obvious reality that a judge cannot be expected to be all-knowing or all-wise. Proceedings in which one party is allowed to argue for a court order without representation from the persons whom it would adversely affect will often result in injustice. The requirement for open proceedings is based on the long standing principle that “Justice must not only be done but must manifestly and undoubtedly be seen to be done.”<sup>12</sup>, which relates directly to the need for legitimacy that is discussed above.

Under the present system, officials in some cases can ask a court to make an order “ex parte”, without an adversarial proceeding. For example, a search warrant can be obtained without informing the person who is the subject of the warrant, if warning the subject could result in the destruction of evidence. Even in these cases, the subject of the warrant is informed of its existence after the fact and given the opportunity to challenge the legality of the warrant in an adversarial hearing. This serves two purposes. First, it provides the affected person recourse if

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Press. New York.

12 R. Sussex Justices, Ex parte McCarthy([1924] 1 KB 256, [1923] All ER 233). Quoted in [https://en.wikipedia.org/wiki/R\\_v\\_Sussex\\_Justices,\\_ex\\_p\\_McCarthy](https://en.wikipedia.org/wiki/R_v_Sussex_Justices,_ex_p_McCarthy) accessed 2016-10-06.

the warrant violates the requirements of justice. Second, in the long term, it provides a means for the courts to clarify the law by ruling on specific cases. When surveillance decisions are made by the security agencies, or in court proceedings in which the affected persons are never informed or represented, there is no opportunity for the courts to develop a body of case law that can be applied to future requests.

Parliament should act to require judicial authorizations for all actions against individuals by security agencies, to require notice to the individuals who are affected with the minimum practical delay and to provide them with judicial recourse. It should repeal legislation that authorizes actions against people who have not committed criminal acts and that widens the definition of criminality to include thoughts and speech. Finally, it should act to prevent the creation of legal and technical infrastructure for pervasive surveillance that affects innocent people.

## **5. Citizens must be kept informed in order to exert democratic control over security agencies**

On a larger scale, security agencies must publish information about the methods that they use and their scope so that citizens can realistically exert control over such activities.

In the democratic vision, power is vested in the people. Ultimately, government must answer to and be controlled by citizens. Ordinary citizens cannot have informed opinions, and cannot instruct their elected representatives, if they have no information about the activities that they are supposedly controlling. This creates a tension between security agencies and democracy. As noted above, security agencies have difficulty making appropriate trade-offs between security and the requirements of a democratic society. They typically resist the publication of even the most general information about their activities.

A case in point is the refusal of a 2010 Freedom of Information request for the number of persons on the Canadian no-fly list, which was still being litigated in 2016.<sup>13</sup> While the publication of this number might be of some marginal value to an organization plotting violence, it is difficult to see how it would be used in practice. Yet this slight possibility, in the security agency mind, outweighs the need for citizens to quantify the effect of the no-fly list on innocent travelers. This is in spite of ample precedent for the publication of statistics about law enforcement activities. For example, legislation requires the annual publication of a statistical

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

report on the use of electronic surveillance under Part VI of the Criminal Code.<sup>14</sup>

In addition to keeping information about their activities secret, security agencies have on occasion, used secret legal opinions to authorize some activities. This appears to have been a factor<sup>15</sup> in the recent case in which the Federal court ruled that CSIS illegally retained bulk data about innocent people for a decade.<sup>16</sup> Court hearings with no representation from the affected persons are prone to injustice. Secret legal opinions go further by dispensing with the inconvenience of an impartial judge, instead relying on the opinion of a lawyer selected and paid by the government itself. This is a pernicious practice.

It is up to Parliament to legislate a better balance, and take responsibility for the consequences, by mandating that descriptive and statistical information on security agency methods and techniques be regularly published.

## **6. The “going dark” story is misleading and factually incorrect.**

At present, security agencies are aggressively campaigning for new surveillance powers by focusing public attention on the so-called “going dark” story. This is the idea that security agencies are unable to do their work because they are not able to access telecommunications of criminals. This argument has been widely used to justify demands for warrantless access to communications, as well as requirements for encryption “back doors”, long term telecommunications data retention, and interception-enabled telecommunication infrastructure. All these measures facilitate pervasive surveillance, that is, a condition in which each person in Canada is aware that they may at any time be subject to surveillance and large numbers of innocent people are actually monitored.

The dramatic term “going dark” is misleading. It implies that criminals have created a growing, untouchable underworld in which law enforcement is helpless to intervene. Yet over the last 20 years, during which new Internet and smart phone technologies have become commonplace, the police-reported crime rate in Canada has declined steadily. In 2013 the overall rate was about half the rate in 1992, and was at its lowest point since 1969.<sup>17</sup> This casts doubt on the need for

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14 Public Safety Canada. Annual report on the use of electronic surveillance - 2014. <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/lctrnc-srvllnc-2014/lctrnc-srvllnc-2014-eng.pdf> accessed 2016-12-08.

15 Christopher Parsons. 2016-11-07. Dissecting CSIS’ Statement Concerning Indefinite Metadata Retention. <https://www.christopher-parsons.com/dissecting-csis-statement-concerning-indefinite-metadata-retention/> accessed 2016-12-14.

16 Globe and Mail. 2016-11-03. In scathing ruling, Federal Court says CSIS bulk data collection illegal. <http://www.theglobeandmail.com/news/national/in-scathing-ruling-federal-court-says-csis-bulk-data-collection-illegal/article32669448/> accessed 2016-12-09.

17 Statistics Canada. 2016. Canada's crime rate: Two decades of decline. <http://www.statcan.gc.ca/pub/11-630-x/11-630-x2015001-eng.htm> accessed 2016-11-24.

new security agency powers.

The claim that criminals are “going dark” is factually incorrect. Sixty years ago, people communicated over mechanically switched telephone lines and used manually sorted letter mail; anyone could buy an airline ticket for cash and board without presenting any identification at all. Compare present day financial transactions to the situation in 1956, before standardization of MICR cheque encoding<sup>18</sup> and the first general purpose credit cards<sup>19</sup> (both events happened in 1958). Individuals made purchases with cash or by cheque. Cheques were processed manually and physically returned to the cheque writer's bank branch. Depositors' records were also maintained manually. Cash was untraceable unless a record of serial numbers could be made (manually) before the transaction. There was no way to centrally access any of these systems or to automatically search for a specific depositor or a specific cheque. Collection of data required laborious manual work and (in the case of telephone wiretaps before 1965) the installation of bulky equipment<sup>20</sup>. Today, given a warrant, information including credit card purchases, cellular phone location data, airline travel plans, and communications metadata, is quickly accessible in centralized systems. The amount of available information is greater than ever before. There are other weaknesses and factual errors in the information put forward in the security agency campaign. Researcher Christopher Parsons has published detailed analyses<sup>21,22</sup>.

Not only is the “going dark” idea wrong, it is not proven that the requested measures would improve security. The huge flood of data that would result and the problem of false positives make that questionable. But in any case, these measures would tilt the power balance away from citizens and towards the state. It would divide people into the watchers and the watched, giving the elite of watchers great power over the lives of the watched and destroying the equality that is essential to the democratic vision, with a long term negative impact on the perceived legitimacy of government and consequently, voluntary compliance with the law.

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18 Wikipedia. 2016. Magnetic ink Character recognition. [https://en.wikipedia.org/wiki/Magnetic\\_ink\\_character\\_recognition#History](https://en.wikipedia.org/wiki/Magnetic_ink_character_recognition#History) accessed 2016-12-08.

19 Wikipedia. 2016. Credit card. [https://en.wikipedia.org/wiki/Credit\\_card#BankAmericard\\_and\\_Master\\_Charge](https://en.wikipedia.org/wiki/Credit_card#BankAmericard_and_Master_Charge) accessed 2016-12-08.

20 Wikipedia. 2016. Telephone tapping. [https://en.wikipedia.org/wiki/Telephone\\_tapping#History](https://en.wikipedia.org/wiki/Telephone_tapping#History) accessed 2016-12-08.

21 Christopher Parsons. 2016-11-15. Pleading the case: How the RCMP fails to justify calls for new investigatory powers. <https://www.christopher-parsons.com/pleading-the-case-how-the-rcmp-fails-to-justify-calls-for-new-investigatory-powers/> accessed 2016-11-26.

22 Christopher Parsons and Tamir Israel. 2016-11-21. RCMP is overstating Canada's ‘surveillance lag’. Toronto Star. <https://www.thestar.com/opinion/commentary/2016/11/21/rcmp-is-overstating-canadas-surveillance-lag.html> accessed 2016-11-26.

The vast majority of independent experts in the field of cryptography has stated repeatedly that encryption back doors cannot be provided to law enforcement without endangering everyone's security.<sup>23</sup> More important, when citizens know that they have been deliberately deprived of the ability to communicate in private, it destroys the perception that government's power is legitimate.

Warrantless access was struck down by the Supreme Court's 2014 Spencer decision.<sup>24</sup> Prior to that decision, law enforcement made requests for subscriber information affecting more than one million user accounts per year.<sup>25</sup> It is difficult to believe that all of those million people targeted were actually criminals or even suspects. For comparison, the total number of criminal cases completed each year in Canada is about 400,000<sup>26</sup>, while the total number of persons in the provincial and federal corrections systems at any time is about 140,000<sup>27</sup>. Yet, it is reasonable to expect that, if warrantless access were restored by new legislation, the number of innocent citizens affected would return to the pre-Spencer level.

Warrantless access has been discussed widely in Canada. Public opinion is clearly opposed to it. For example, in a survey of Canadians commissioned by the Privacy Commissioner, a majority stated that they were “not comfortable” with government “requesting telcos to provide personal information without a warrant”.<sup>28</sup> Canadians do not accept warrantless access as legitimate.

Mandated data retention is pervasive surveillance. If data about a person is retained for the sole purpose of facilitating future access to it by security agencies, that person is under surveillance. The fact that the data is being retained in the telecommunication provider's servers, rather than the government's, does not change that reality.

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23 H. Abelson et al. 2015-07-06. Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications. Computer Science and Artificial Intelligence Laboratory Technical Report MIT-CSAIL-TR-2015-026. <http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf?sequence=8> accessed 2016-12-07.

24 Michael Geist. 2014-06-13. Supreme Court Delivers Huge Victory for Internet Privacy & Blows Away Government Plans for Reform. <http://www.michaelgeist.ca/2014/06/scc-spencer-decision/> accessed 2016-12-08.

25 Michael Geist. 2014-04-30. Canadian Telcos Asked to Disclose Subscriber Data Every 27 Seconds. <http://www.michaelgeist.ca/2014/04/telco-disclosures/> accessed 2016-12-08.

26 Statistics Canada. 2015. Adult criminal court statistics in Canada, 2013/2014. <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226/c-g/c-g-a-eng.htm> accessed 2016-12-14.

27 Statistics Canada. 2015. <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm#a1> accessed 2016-12-14.

28 Phoenix SPI. 2014. Survey of Canadians on Privacy - Prepared for the Office of the Privacy Commissioner of Canada p. 38. [https://www.priv.gc.ca/media/3484/por\\_2014\\_12\\_e.pdf](https://www.priv.gc.ca/media/3484/por_2014_12_e.pdf) accessed 2016-10-11.

Finally, if mandated interception and data retention were built into telecommunication systems, they would need to be used carefully in order to prevent abuse. No doubt those who advocate such a development intend to be exercise care. In spite of good intentions, the stored data and the interception capability would invite attack by criminals and misuse by those with access to them. Even more important, government intentions can change overnight. On October 9, 2016, south of the border, one presidential candidate told an audience of 65 million that if elected, he would use the power of his office to jail his opponent.<sup>29</sup> In a robust democracy we should not create an infrastructure that could readily be misused by future governments or individual miscreants in any government.

In considering the needs of security agencies, Parliament must realistically assess the limitations of the technological responses that have been proposed, their effect on the power balance between citizens and government, and their effect on the perceived legitimacy of government.

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29 E. J. Dionne. 2016-10-09. A vicious presidential debate. *in* Washington Post. [https://www.washingtonpost.com/opinions/2016/10/09/718556e4-8e93-11e6-9c85-ac42097b8cc0\\_story.html?utm\\_term=.5511780a6895](https://www.washingtonpost.com/opinions/2016/10/09/718556e4-8e93-11e6-9c85-ac42097b8cc0_story.html?utm_term=.5511780a6895) accessed 2016-12-08.

## **7. Recommendations**

One purpose of this submission is to identify general principles that should be followed when specific legislation related to National Security and Public Safety is considered. We recommend that the following principles be formally accepted by the government:

- Acknowledge that there is a tension between security agency activities and the health of our democratic society.
- Acknowledge that it is Parliament's role to define clear limits on security agency activities that protect the health of Canadian democracy, within which limits those agencies can aggressively address public safety issues.
- Recognize that any legislation which allows security agencies to conduct surveillance or disruption of an individual must require prior court approval of that activity and notice to the individual, if necessary after a delay approved by the court.
- Recognize that any legislation which authorizes security agency activities must also mandate that the public be kept informed of methods, scope, and statistical summaries of those activities.

Our specific recommendations are as follows:

- Stop promoting the misleading and factually incorrect “going dark” story.
- Reject demands for warrantless access to telecommunications or other personal data.
- Reject demands for mandated data retention and interception capabilities.
- Reject demands for power to compel production of passwords or encryption keys, while allowing courts to compel decryption of specific documents with appropriate safeguards against self-incrimination.
- Repeal legislation that authorizes actions against people who have not committed criminal acts and that widens the definition of criminality to include thoughts and speech.

## **Canadian Unitarians for Social Justice**

Present day Unitarian-Universalism has its historic roots in the Christian churches of the Protestant reformation in 16th century Europe and of 18th century America. In the present day, it is a non-creedal faith which embraces a wide range of beliefs; significant numbers of members espouse humanist, Christian, agnostic, atheist and other beliefs. With no prescribed doctrine, members are bound together by a number of principles, including one that each person will engage in a “free and responsible search for truth and meaning”. Unitarian-Universalists generally agree spiritual values are relevant to the everyday world; that spiritual values of their faiths and others demand that each person should promote the well-being of other people; and that a free society is necessary in order for full spiritual development to occur. Unitarian-Universalists generally agree to “affirm and promote the right of conscience and the use of the democratic process within our congregations and in society at large.” In Canada today there are 48 recognized Unitarian-Universalist congregations from coast to coast.

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