

Post-Snowden Mass Government Surveillance in Canada:

A secondary research analysis of government mass monitoring activities in Canada

By: Lily Harris

Abstract

This paper examines Canadian surveillance policies, specifically Bill C-51 and Bill C-59, to understand how mass monitoring affects citizens in the post-Snowden era. This paper reveals that mass government surveillance practices are challenging citizens' non-derogable rights laid out in the Canadian Constitution through the use of secondary research on privacy and mass surveillance in Canada and the United States (U.S.). Specifically, Canada's emphasis on reducing anti-terrorism acts through the implementation of Bill C-59 puts the individual freedoms of expression and confidentiality at risk. Surveillance theory, current legislation and concepts like non-derogable rights are discussed throughout this paper. Jeremy Bentham's Panopticon and the chilling effect are used to conceptualize the consequences that surveillance technologies have for individual action.

This paper argues that mass surveillance and privacy rights are one of the most important political issues facing Canadians today, due to individual constitutional rights being undermined in the pursuit of national security. Canada must protect individual rights outlined in the Constitution in order to truly call itself a democratic nation-state. Increased whistleblower protection and further amendments to Canadian surveillance legislation, including Bill C-59, are two recommendations that are posed as a solution to maintain both governmental and individual rights and freedoms.

Research Questions

Are surveillance technologies in Canada beneficial for the nation's citizens? Do policies like Bill C-59 place Canadian security above individual constitutional rights?

Edward Snowden's leak of classified National Security Agency (NSA) information in 2013 brought topics of surveillance and privacy to the forefront of international discussions (Pohle & Van Audenhove, 2017). This act of whistleblowing drew attention to the scale and extent of surveillance internationally. Today, surveillance efforts are framed by governments as a means of ensuring national security and protecting citizens. It's naïve to think that with greater globalization and the softening of international borders, surveillance trends would not trickle over to neighbouring countries.

In this paper, I argue that although surveillance measures are framed as protecting citizens, they actually hinder the very constitutional rights that our Canadian democracy was intended to defend. Government surveillance practices currently threaten the independence of Canadians because they compromise individual freedoms outlined in the Charter of Rights and Freedoms. Due to this, issues relating to privacy and surveillance are some of the most pressing problems in Canada at the moment. First, I engage in a literature review of the research in order to gain a better understanding of the data and conceptualize the impact of surveillance technologies on Canadian citizens. A modern-day analysis of the current political climate, provided by Michael Nesbitt and Ryan Alford, is built on the foundation set by Jeremy Bentham's concept of the Panopticon. Second, this paper outlines the implications that widespread surveillance has on the nation's people. Finally, I propose future options for addressing this pertinent issue in Canada; these involve more scrupulous regulation of surveillance policy and the introduction of better whistleblower protections.

Literature Review of Surveillance Theory

Surveillance literature in the post-Snowden and technological era explores the power that "watcher" technologies hold over individuals (van der Vlist, 2017, p. 138). Much of the research

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engages in qualitative data analysis consisting of longitudinal studies, questionnaires and interviews, built on the foundation of secondary research. Both traditional and modern surveillance literature uses Jeremy Bentham's Panopticon to express the ways in which surveillance technologies control individual action (Stoycheff et al., 2019). Stoycheff et al. exhibit this through their analysis of the U.S. government and its monitoring systems that mimic the "panoptic design" (Stoycheff et al., 2019, p. 603). Through this, citizens adhere to expected norms "under the threat of omnipresent surveillance," resulting in chilling effects and the suppression of political dissent (Stoycheff et al., 2019).

Julie Pohle and Leo Van Audenhove hone in on the Snowden revelations of 2013 and provide a historical understanding of global changes in surveillance policies (Pohle & Audenhove, 2017, pp. 1-6). The authors also outline the concepts of civil disobedience and whistleblowing, which although contentious, are necessary for government transparency and accountability purposes. Michael Geist adds an interesting perspective to surveillance discussions, connecting the Canadian and American governments, which both remain relatively silent about their collection of metadata and private records (Geist, 2015, p. 234). In addition, Geist expands the research by providing the potential negative consequences of mass monitoring, as well as suggestions on how privacy laws can be improved.

With respect to Canadian-specific literature, there are a number of researchers who argue that, although Canada is relatively quiet about its surveillance activities, policies like Bill C-59 exert control over Canadian citizens. Ryan Alford provides a significant amount of evidence to back up the claim that Bill C-59 jeopardizes Canadians' non-derogable rights, which are those that cannot be suspended even in a state of emergency (Alford, 2018, p. 57). Similarly, Michael Nesbitt's piece for the Alberta Law Review reveals that Bill C-59 grants CSIS the power to limit

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constitutional rights with proper documentation and authorization (Nesbitt, 2019, p. 245). His article highlights how Bill C-59 undermines Charter freedoms. Together, these authors take a strong stance in arguing that Canadian surveillance bills threaten the constitutional rights of Canada's citizens. In his critical cartography of mass surveillance, Fernando van der Vlist illustrates the connections between nations and governmental bodies to demonstrate the extent to which surveillance permeates global networks (van der Vlist, 2017, p. number)

Canadian Surveillance Efforts & Policy

The public has many concerns regarding privacy and surveillance, including: transparency, accountability, reforms and protection (Geist, 2015, pp. 226-238). Metadata is collected with the expressed intention of protecting individuals; this changed drastically in the period following Sept. 11, 2001, starting with the U.S. and extending across the world (p. 239). Geist states, "since Snowden, the Canadian government has been relatively quiet about their role in collecting metadata and challenging privacy" (Geist, 2015, p. 234). While Canada has been quiet about its privacy-related efforts, the nation is not shy to state that any kind of surveillance is done for the protection of all Canadians.

Bill C-51 & Bill C-59

Bill C-51 deals with anti-terrorism law and expands information sharing among federal government institutions that have responsibilities relating to national security threats (Library of Parliament, 2015, pp. 1-4). Through this, the Canadian Security Intelligence Service is granted "disruption powers" that can involve blocking emails, controlling websites and using discretion to alter individual agency online (International Civil Liberties Monitoring Group, n.d.). Previously, the Royal Canadian Mounted Police was one of the only federal bodies with the authority to utilize disruptive powers. Additionally, the bill expands the Passenger Protect

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Program, which focuses on individuals who are suspected of posing a threat to transportation security.

Bill C-59 became an “Act of Parliament” on June 21, 2019 and was originally passed to amend many of the unconstitutional and controversial elements of Bill C-51 (Nesbitt, 2019, pp. 233-234). One of the primary concerns regarding Bill C-59 is CSIS’ ability to still engage in disruptive activities that monitor and alter the activities of Canadian citizens (Canadian Civil Liberties Association, 2017, para. 7). Another issue regarding Bill C-59 is the way in which it sets the grounds for “further surveillance and criminalization of dissent” on behalf of CSIS and CSE (International Civil Liberties Monitoring Group, n.d.). While the bill is purported to have made several improvements to Bill C-51, many alterations still need to occur in order for Canadians to feel comfortable with the powers given to government bodies like CSIS and CSE. Michael Nesbitt considers Bill C-59 unconstitutional, due to its ability to limit citizen rights outlined in the Charter of Rights and Freedoms (Nesbitt, 2019, p. 256).

Analysis: Implications for Canadians

From the perspective of citizens, there has been an increased push for limiting state surveillance and providing better safeguards for individuals and their privacy (Pohle & Van Audenhove, 2017, p. 1). The Snowden revelations did in fact reveal that the NSA and its allies were spying on international leaders and organizations (p. 2). Although the leak occurred in the United States, it had widespread consequences for surveillance policy and governments around the world. Pohle and Van Audenhove explain that there is a clear lack of “whistleblower protection” in many countries, which discourages individuals from calling governments out on their privacy policies and reforms (Pohle & Audenhove, 2017, p. 3). Surveillance is extensive and all-encompassing. Fernando van der Vlist’s study, involving a “critical cartography of mass

surveillance technology after Snowden” ties governments and organizations together in a global network of mass monitoring entities (van der Vlist, 2017, p. 138). This illustrates that all international surveillance organizations have some kind of complicated connection with one another, further demonstrating how extensive surveillance structures are in nature.

The International Civil Liberties Monitoring Group mentions that the consequences of Bill C-59 could involve the increased criminalization of dissent from minority groups, or those who challenge the “status quo” (International Civil Liberties Monitoring Group, n.d.). This could eventually encompass things like Indigenous land claims, blockages and protests if these acts are believed to “undermine the sovereignty and territorial integrity of Canada” (International Civil Liberties Monitoring Group, n.d.). As stated in the literature review, authors Stoycheff, Liu and Xu describe the “chilling effect,” a term that refers to the suppression of free speech among populations for fear of repercussions (Stoycheff et al., 2019, pp. 602-619). The authors’ surveillance findings were retested through a sample of Muslims in the United States. They found that their sample was less likely to engage in political behaviour, particularly dissent, because of their awareness of being watched by government bodies; this demonstrates that the power proposed by traditional surveillance theory runs rampant in 2020. The study done by Stoycheff et al. focused on the United States; however, due to the concerns regarding Bill C-51 and Bill C-59, this is something that also threatens Canadians.

Section 2(b) of the Canadian Charter of Rights at Freedoms states, “Everyone has the following fundamental freedoms: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication (Department of Justice, n.d.). Ryan Alford believes that the powers given to CSIS, although reduced, “still give the Service the power to violate non-derogable rights in a future major public order emergency” (Alford, 2018,

p. 57). In his discussion on the dangers of a government with ad hoc derogation of Charter rights,

Alford (2018) says:

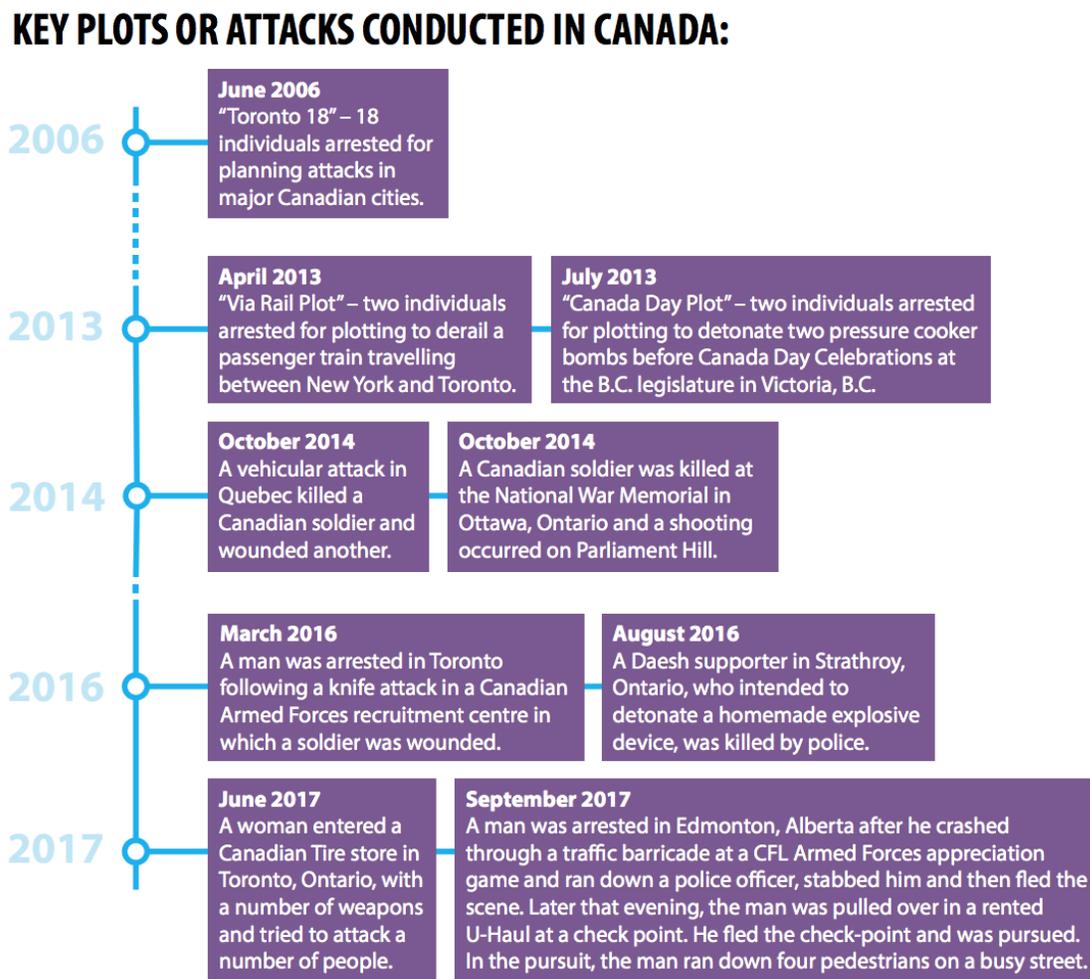
The warrant regime created by Bill C-51 was subjected to substantial scholarly criticism, as its amendments to the CSIS Act authorize the Service to take “measures” either inside or outside Canada to “reduce the threat” to the nation, noting only that CSIS may not “cause... death or bodily harm... willfully attempt in any manner to obstruct, pervert or defeat the course of justice; or... violate the sexual integrity of the individual.” Until the enactment of Bill C-59, these are the only limitations to what a warrant from the Federal Court made under section 12.1 of the CSIS Act might authorize. The CSIS Act continues to explicitly authorize the Service to seek warrants to undertake measures that will violate Charter rights, should it conclude that these actions “will’ (not ‘may’) contravene a Charter right or Canadian law. (p. 82)

Based on the information provided by Alford, Canadians should be concerned about the status of their constitutional rights relating to freedom of speech and confidentiality. This is one of the most important political issues facing Canadians today, based solely on the fact that the status of citizens’ democratic rights is unclear in Canada, a democratic country. As the federal government continues to transfer authority from citizens to the state, it begins to blur the clear definition of a democracy.

Counterpoint: Benefit for Canada

As stated previously, the events of Sept. 11, 2001 changed the way that the world viewed acts of terrorism. The third revision of the *2018 Public Report on the Terrorism Threat to Canada* reveals that “the threat posed by extremist travellers is significant and presents difficult challenges to Canada” (Public Safety Canada, 2019). National security is the primary benefit to mass monitoring done by the Canadian government and governments across the world. Observed below in Figure One is a timeline of the largest attacks that have occurred in Canada since 2006 (Public Safety Canada, 2019, p. 7).

Figure One: Key Plots or Attacks Conducted in Canada:



This document communicates to Canadian citizens that Bill C-59 will enhance accountability, amend elements of current policies and ensure that national intelligence bodies remain aware of evolving security threats (p. 25). Although the Canadian government assures the public that Bill C-59 will combat terrorism and improve transparency, public interest groups like the Canadian Civil Liberties Association contend that the bill only marginally addresses public concerns (Hill, 2018, para. 8).

Recommendations for the Future

This paper by no means asserts that national security should suffer because of a prioritization of individual constitutional rights. As a nation that is built upon the founding principle of peace, order and good government, Canada must employ legislation that protects the safety of all Canadians, both from national and international threats. However, governmental powers must be kept in check to ensure that they don't encroach on the rights of Canadians. The literature suggests that constitutional limitations should be enacted on the governmental powers that are bestowed by Bill C-59 (Alford, 2018, p. 95).

Additionally, Canada should enhance its whistleblower protection in order to maintain its reputation as a truly democratic state that grants its citizens their freedom of expression. Canada recognizes, on its official website, that its current framework for whistleblowing is "outdated and out of step with internationally recognized best practices" (Transparency International Canada, 2020, para. 1). It is important for Canada's democracy that individuals working in both the public and private sectors are able to speak up without fear of persecution (para. 5). Now that we are in a period of constant surveillance, whether it is through official government technology or a simple iPhone video, Canadian citizens must be able to hold the government accountable for its mass monitoring and privacy-related practices.

Conclusion

Today, Canadians face many tribulations, one of which is the concern for global and national terrorism. Due to increased globalization and growing Canadian interests overseas, government officials state that there is a medium National Terrorism Threat Level in Canada (Public Safety Canada, 2019, pp. 5-6). Although the rate of terrorist attacks in Canada has decreased overall, policymakers contend that extremist groups still have the intent and the

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capability to threaten Canada's national security. While Canada's surveillance policies have attempted to address this potential threat to Canadian livelihoods, the public has criticized the government for legislation that limits individual rights and freedoms included in the Constitution.

More specifically, policies like Bill C-59, Canada's national security legislation, can suspend citizens' rights to freedom of expression and confidentiality, particularly in national states of emergency. Consequently, I contend that at this time, government surveillance policies pose the most risk for Canadians' democratic freedoms and that this is one of the most important issues facing our nation's citizens. This argument is built on a theoretical understanding of Jeremy Bentham's Panopticon and an analysis of the chilling effect and North American scholarly works. In order to uphold the nation's democracy and dedication to peace, order and good government, Canada must establish better whistleblower protections and amend Bill C-59 by updating its policies and limiting governmental powers possessed by CSIS and CSE. By modifying the nation's surveillance policies and better distributing governmental powers among its citizens, Canada will be able to protect its people while prioritizing its democratic values system.

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