

Canada's spy agencies lied to the courts

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The Canadian state's principal spy agencies—the Communications Security Establishment Canada (CSEC) and the Canadian Security Intelligence Service (CSIS)—have been found by a senior federal judge to have “systematically” lied to the courts, omitting and concealing information in numerous warrant applications.

In late November a handful of reports appeared in the press referring to a secret Nov. 22 ruling by Federal Court Justice Richard Mosley. Identified in these reports as “Canada's foremost jurist on national security,” Justice Mosley was said to have complained that CSIS and CSEC had concealed from him that they were enlisting the help of the CSEC's “Five Eyes” partners in spying on Canadian “terrorism” suspects when they travelled abroad.

The “Five Eyes” unites CSEC, the US National Security Agency (NSA), and the eavesdropping agencies of Britain, Australia and New Zealand in a global consortium that—as has been revealed by the whistleblower Edward Snowden—illegally spies on the world's communications.

A state-redacted version of Justice Mosley's “Further Reasons for Order” was released late last month. The veil of government censorship notwithstanding, the public version of Mosley's ruling makes clear that CSIS and CSEC have been concealing information from the courts for years and have done so in order to get legal sanction for operations that otherwise would not have been approved.

Mosley found that Canada's intelligence agencies had deliberately kept the courts in “the dark” when obtaining 35 or more special “CSIS 30-08” warrants. Such warrants authorize CSEC to provide technical assistance to CSIS in intercepting the electronic communications of Canadians traveling abroad whom CSIS has designated as domestic security threats.

The spy agencies, ruled Mosley, had misrepresented

“the scope and extent of the foreign collections that would flow from the Court's issuance of a warrant” and done so in at least two ways.

CSIS and CSEC had claimed the spying would be done from Canada and they concealed CSEC's intention to enlist its “Five Eyes” partners' help in conducting the surveillance.

In 2007 another Federal Court judge, Justice Edmond Blanchard, had refused to grant a warrant authorizing CSIS and CSEC to spy on Canadians outside of the country and to enlist Five Eyes help as needed, saying that the courts lacked the jurisdictional authority to do so.

The following year, CSIS and CSEC renewed their attempt to get court sanction for spying on Canadians abroad, this time applying for a warrant from Justice Mosley. Canada's spy agencies were apparently anxious to get some legal cover for their ever-expanding activities, especially as CSIS's and the Royal Canadian Mounted Police's connivance in the detention and torture of several Canadians travelling abroad, including Maher Arar, had led to a public outcry and forced Canada's government to convene two public inquiries.

However, the 2008 warrant application was framed differently. Fearing it might again be denied, CSIS and CSEC omitted mention of enlisting the help of “second parties”—i.e. CSEC's Five Eyes partners—and stipulated that Canadians' electronic communications would be spied on from listening posts within Canada.

Indeed, reports Mosley in his “Further Reasons” finding, when former CSEC director James Abbott was recalled before the court last fall, he “candidly stated” that the evidence he had given five years before in applying for the first-ever 30-08 warrant had been “‘crafted’ with legal counsel to exclude any reference to the role of the second parties.”

Mosley continues: “Based on the documentary record

before me and Mr. Abbott’s evidence, I am satisfied that a decision was made by CSIS officials in consultation with their legal advisors to strategically omit information in applications for 30-08 warrants about their intention to seek the assistance of the foreign partners. As a result, the Court was led to believe that all of the interception activity would take place in or under the control of Canada.”

The judge concludes, “The failure to disclose that information was the result of a deliberate decision to keep the court in the dark” and this deception constituted “a breach of the duty of candour owed by” CSIS “and their legal advisers to the court.”

In his ruling, Justice Mosley insists he would never have authorized CSIS and CSEC to ask CSEC’s Five Eyes partners to spy on Canadians, noting that it could lead to violations of their rights by foreign states. Commenting on this part of Mosley’s decision, University of Ottawa law professor Craig Forcese, said, “Imagine a circumstance where CSIS says, ‘We’ve got concerns about these Canadians overseas and we’d like you to intercept their communications ... And the [CIA] decides it’s time for a Predator drone.’”

The exposure of CSEC’s and CSIS’s systematic lying before the courts comes at a time when the federal Conservative government has been rattled by revelations that CSEC—in flagrant violation of the law—has been systematically spying on the metadata of Canadians’ electronic communications and acts as a veritable arm of the NSA in its spying operations around the world

The government’s response has been to mount a campaign of disinformation and lies. Claims that CSIS and CSEC are committed to defending Canadians’ constitutional rights and bound by the law are trumpeted at every opportunity.

While this was most assuredly not his intention, Justice Mosley’s finding that CSIS and CSEC systematically lied to the courts to extend their powers is a stunning refutation of the government’s claims.

CSIS and CSEC have effectively rejected Justice Mosley’s decision. In response to it, CSEC declared its “activities respect Canadian laws and Canadian values”, while CSIS asserted, “Everything that CSIS does, alone or with trusted partners, is consistent with Canadian law and Canadian values.”

It is possible that Canada’s spy agencies will appeal

Justice Mosley’s ruling. Whether they do or not, their cavalier dismissal of his ruling is tantamount to a declaration that in practice they will ignore it and continue to expand their collaboration with the NSA and CSEC’s other Five Eyes partners, including in spying on Canadians.



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