Federal Court  Cour fédérale

The Honourable Simon Noël

Federal Court, Designated Judge

Ottawa (Ontario) January 16, 2006

Salutations

The Federal Court, as its name suggests, handles many of the justiciable matters relating to the power or authority of the Canadian Federal Government. Unlike the situation in the United States, where the Federal Courts are divided into geographically organized districts, our Court is based in Ottawa, and individual Judges must therefore travel across the country to hear cases. Because we live in such a large country, this means that we all spend a great deal of time in airplanes, cars, and hotels. And, because we live in a bilingual country we hear cases in French and English.

For most Federal Judges an enjoyable and challenging job is somewhat spoiled only by the amount of time we have spend on the road, or reading files in hotels. If anything, the way the case load at the Court has evolved in recent years has increased the amount of travel required of Judges. Also a relatively new and specialized area exclusive to the jurisdiction of the Federal Court is now expanding. For Judges designated by the Chief Justice to hear cases in the specialized area of National Security, while there might be a little less travel because some of the work takes place in Ottawa, there is an extra burden on us nevertheless for the following reasons.

That new burden comes from the steadily increasing number of National Security matters coming before the Court, and the increasing complexity of many of those cases. There are three main sources for this rather special workload. Under the CSIS Act, the Federal Court has the jurisdiction to authorise search warrants of various types when presented with convincing applications from the Security Service. Last year 247 warrants were issued by the Court. The Court is also seized with dealing with all Security Certificates signed by the requisite two Government Ministers under the Immigration and Refugee Protection Act. Further, all disputes between the Government and other parties arising from the Canada Evidence Act - the Act designed to prevent the public release of sensitive security information - are decided by the Court. Finally, the Court can also be asked to deal with other matters of a National Security nature; money laundering and terrorist financing, for example.

As far as I am aware, no other National Court bears the decision-making responsibility in all of these areas. And, though experience in hearing warrant applications for example might be perceived as being of some help to a Judge who is preparing for an Immigration Security Certificate case, the two types of hearings are usually so different, and raise such entirely unrelated questions, that experience in one area is of limited use in the other. The same point can be made regarding hearings under the Canada Evidence Act.

Why is this worth mentioning? It is important because in these areas designated Judges can hear some of the evidence in camera. Each hearing is conducted, therefore, by a Judge who, for crucial parts of it, hears only the Government's position, has no opposing counsel in court to cross-examine the Government's representative, and has, as I mentioned a moment ago, very limited, directly relevant personal experience in the intelligence world. This makes the execution of the Judge's role very challenging indeed.

A hundred years ago, perhaps, none of this would have mattered. Indeed in many parts of the world today there would not be any cause for concern, at least openly! But in Canada, and in the countries represented in this room, it matters a very great deal. For many decades the observance of the Rule of Law in our countries has made steady progress towards what we all see as the ideal situation in which no person appearing before our Courts is unfairly treated. A situation where the human rights of every citizen - and usually non-citizens as well - are treated with the greatest possible respect. Of course, there have been some difficulties along the way on this progressive path. We all know that there were times when we did not do as well as we could have done during the height of the Cold War. Nor were human rights given the respect they are accorded today during the Second World War. But, until very recently, we thought that all of that was behind us. We thought that we lived in an age where all elements of our society agreed upon - and usually worked hard to achieve - a full respect for human rights. We were sure that we were making every effort to provide justice for all, and, for the most part, that we were succeeding.

Now, to our surprise, we find ourselves in the midst of what Supreme Court Justice Ian Binnie has so aptly described as "a clash of Titans". The clash between Human Rights and National Security has become more evident with each terrorist attack and with each new effort to pass laws designed to enhance people's safety. Unlike the Cold War where a major part of each side's effort was to counter the intelligence work of the other side, the current situation very often pits our intelligence services against people who live among us and against people who are not working for a foreign state, but are motivated by an ideology or by a hatred that is totally alien to our traditional way of thinking.

In this new era, in a typical national security hearing, the Court finds itself presented with Government evidence that purports to show that the person or group concerned is, or is reasonably likely to be, a threat to the safety of persons in Canada or abroad. The information provided by the Government is usually very sensitive, so that the person concerned is not told the details of the evidence that is alleged against him or her. Nor is his or her legal counsel given that information or allowed to be present when the evidence is adduced by the government. The usual protections afforded by cross-examination and argument - the very soul of our modern system of justice - may not be apparent. Faced with these constraints, the Court cannot simply throw up its hands and rubber- stamp the Government's position. There is, in fact, only one possible path to take: the Court must conduct its own testing of the evidence, its own probing questions, which is normally provided by opposing counsel.

I think everyone here with experience of court procedures, of intelligence agencies, or of both, will understand that having the presiding Judge take over the responsibilities of both chief examiner and final arbiter presents significant challenges. Justice, carried out in camera, is presently the most acceptable forum to protect Human Rights and to deal at the same time with the National Security issues. The Security Certificate hearings are held in public except for the part where National Security information is being dealt with. The role of the designated judges is to balance Human Rights and National Security issues. The involvement of the designated judge is to ensure that the person subject to a security certificate is sufficiently informed of the allegations and that he or she is treated fairly and that the interest of justice prevails. It is logical to suggest that National Security cases - even though we cannot rely on the conventional adversarial system - can achieve a certain sureness of outcome. I believe that an honest assessment would be that, in these circumstances, the very best we can do is to strive to find creative non-cosmetic methods to enable us to reach the fairest possible balance between the rights of the individual or group and the safety of our citizens. What we must do, however, is use our intelligence and our experience to improve the way national security cases are handled to the very limit of our ability.

In the Federal Court we are doing this by pressing the Government to provide the greatest possible amount of information to the person concerned; often considerably more than originally planned. And, as part of this process, designated Judges take a personal role in preparing the summary of evidence provided to the person concerned. A well prepared summary can significantly assist the person in answering the Government's case, without compromising National Security. We insist that the Government provide exculpatory as well as incriminating evidence, and we examine the file in great detail and challenge the Government's thesis in every possible way. We do not say that this effort replaces our traditional adversarial system, but it is the most acceptable forum to render justice considering the issues at stake. Also, we can say that we are doing our best in circumstances that are unlikely to get any easier in the foreseeable future. We see our role as including the duty to achieve the best possible balance between Human Rights and National Security.

We are also trying to improve our ability to test the Government's case as time goes by. It is absolutely clear that Judges cannot become intelligence officers; the subject is much too complex and vast to allow anyone to become de facto officers without actually working in the field for quite some time. We have no intention of trying to become such officers, but that doesn't mean that we can't become quite well informed in areas that are of particular importance in our work. The FISA Court Judges in Washington, D.C. receive regular briefings from the intelligence and security Agencies, and the SIAC in Britain makes use of a lay expert as one of a three person panel (together with two High Court Judges). We believe that we have learned enough from other jurisdictions, and from our own experience, to be able to design a level of judicial education that is very useful without going overboard. As we all know, the "savoir" of the intelligence world is not accessible in public format or forum and is not taught normally in universities. Therefore, our Court has to take the lead to acquire such knowledge without in any way hurting the independence of justice.

Therefore, we have already started this educational process by meeting with experts representing a wide variety of views. We will continue this series of informal discussions, so as to gain an understanding of the broader context - and a little more specialized knowledge perhaps - to assist us in our work. We will also receive some technical briefings - methods and techniques, not rationale or justifications - from the Government. I want to reiterate that we do not want to become intelligence officers. We would simply like to take meaningful practical steps to give us some comfort that we are adopting the best approach possible, in circumstances that are challenging for everyone.

Ladies and Gentlemen, this is an ongoing tale. There is no pithy conclusion to give you. And there is no elegant solution at hand to solve the almost intractable problems we face in an era of ideologically motivated terrorism. What we must do is put our best minds to work trying to find better methods, more transparent procedures, and more evidently just outcomes. And we will all do much better if we learn from each other, as we are doing here this week. All too often in the past, the Courts adopted the Ivory Tower mentality that the Universities were forced to abandon (for the most part!) decades ago. But Terrorism is a global phenomenon and we do our nations and the Justice System itself a grave disservice if we do not learn from each other's experience and adopt each other's best practices.

The Federal Court and its designated Judges are meeting the challenges of the 21st Century. And our system of justice will continue to improve if all of us keep on learning and enhancing the way we do things for the better protection of individuals and Society as a whole.

Until we once again see peaceful times, we can only do our very best to try to manage the "Titanic" struggle without damaging our treasured civil liberties, and without allowing the outlaws to win. Thank you.