Federal Court Cour fédérale

National Security, Human Rights and the Federal Court

Speech delivered by the Honourable Anne Mactavish before the International Commission of Jurists in Ottawa, on February 4, 2013[1]

Good afternoon. I have been asked to speak to you today about the work of the Federal Court in the national security field, and the efforts that we make to balance national security and human rights.

In 2004, Justice Ian Binnie, then of the Supreme Court of Canada, gave a speech to the Hong Kong Conference on the Criminal Law. He concluded his remarks by describing the conflict between human rights and national security as being €œtruly a clash of the titans.

In Canada, the task of reconciling these titanic issues falls mainly on the shoulders of a small group of judges of the Federal Court who have been designated by its Chief Justice to exercise the Court's jurisdiction in this area.

I am going to speak to you this afternoon about the unique role that Parliament has entrusted to the Chief Justice and designated judges of the Federal Court in connection with national security matters, and the challenges that this presents to these judges as we try to strike a balance between human rights and Canada's national security.

Let me start with the caveats.

First and foremost, as a sitting judge, it is simply not appropriate for me to debate or comment upon the policy choices which Parliament has made in legislation concerning national security matters. That is a matter for informed debate between Canadian citizens and their Parliamentarians. Designated judges of the Federal Court can, however, provide information to the public about our role in national security matters in order to help inform that debate.

Secondly, my work as a designated judge requires that I have access to highly sensitive information, and it is therefore important that I maintain a degree of judicial restraint and discretion in my comments. This may limit my ability to fully address questions that you may have that may touch on protected information.

Finally, my comments today are my own and I do not purport to speak for my fellow designated judges.

With this in mind, let me start by talking about the whole idea of national security.

National Security Defined€œNational security is a something that is more difficult to define than one might think.

The McDonald Commission2 suggested in 1981 that two concepts were central to national security: the need to preserve the territory of our country from attack, and the need to preserve and maintain the democratic processes of government. Any attempt to subvert these by violent means is a threat to the security of Canada.

The *Canadian Security Intelligence Service Act3* also defines €œthreats to the security of Canada as including espionage and sabotage, foreign influenced events detrimental to Canada, efforts to threaten or use serious violence to achieve a political, religious or ideological objective, and efforts to overthrow the government.

A threat to Canada's security, as defined by the Act, does not include lawful advocacy, protest or dissent, unless it is carried on in conjunction with any of the above activities. Historically, national security may have been equated with the defence of the realm, but it is now generally recognized that terrorism in one country may well implicate national security interests in other countries.

Thus, in the *Suresh4* case, a case involving a member of the Liberation Tigers of Tamil Eelam (more commonly known in Canada as the €œTamil Tigers), the Supreme Court of Canada concluded that a danger to the security of Canada is not limited to a direct threat to Canada itself.

What is required, the Supreme Court said, is €œa real and serious possibility of adverse effect to Canada. But the threat need not be direct, rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security5.

Canada's National Security Policy6 identifies three core interests, which reflect the inter-relation of our security with that of other countries.

These are: 1. Protecting Canada, and the safety and security of Canadians at home and abroad; 2. Ensuring that Canada is not used as a base for threats against our allies; and 3. Contributing to international security.

Over the years, the nature of the threats to Canada's national security have changed. During the Cold War, the major threat to Canadian security came from the Warsaw Pact's military and intelligence capabilities.

However, as Angela Gendron, a Senior Fellow at the Canadian Centre of Intelligence and Security Studies at Carleton University wrote in an article entitled €œ*Just War, Just Intelligence: An Ethical Framework for Foreign Espionage*7: Since September 2001, national security specialists have been in general agreement that the greatest threat comes from international terrorist networks, motivated by religious extremism and prepared to use powerful conventional explosives and chemical, biological, radiological, or nuclear weapons of mass destruction.

This is a very different threat to that posed during the Cold War when our western intelligence agencies worked, in largest part, to counter the work of East Block security agencies. Today, our intelligence services act to deal with the threat posed by individuals motivated by ideology. As the so-called €œToronto 18 case showed us, some of these individuals may be €œhome grown citizens, born and raised within the very societies that they wish to target.

Combating terrorist threats from external or internal sources is, of course, the responsibility of the executive branch of government. It must use police, military, or intelligence resources with due regard to our civil liberties, Canadian values and the rights protected by the Charter of Rights and Freedoms.

By enacting laws to achieve these aims, Parliamentarians have given the Federal Court a substantial role to play in exercising its jurisdiction under the *CSIS Act*, the *Canada Evidence Act*[8], the *Immigration and Refugee Protection Act*[9], the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[10] and under amendments to the *Criminal Code* made pursuant to the *Anti-Terrorism Act*[11].

The Challenge for the Court

No one can seriously dispute that maintaining Canada's national security is of considerable importance. As U.S. Supreme Court Chief Justice Warren Burger observed in a 1981 decision, €œno government interest is more compelling than the security of the Nation[12] for the simple reason that without such security, it is not possible for the state to protect other values and interests such as human rights.

The right of the state to take strong measures proportionate to the threats posed against it in order to protect national security is recognized in international law, in international covenants such as the *International Covenant on Civil and Political Rights*[13] and in the jurisprudence of the Supreme Court of Canada in cases such as *Chiarelli*[14] and *Ruby*[15]. In the 2005 *Medovarski* case[16], the Supreme Court held that the objectives of the *Immigration and Refugee Protection Act* indicated a Parliamentary intent to prioritize Canada's national security in immigration matters. At the same time, however, liberal democracies such as Canada, with its entrenched *Charter of Rights*[17], define themselves by the respect they show to the Rule of Law and the protection that they provide for civil liberties and human rights. Canadians expect, and are generally guaranteed, open courts, transparent decision-making, political accountability and robust reporting by a free press.

The tension that exists between the imperatives of the collective interest in security and individual rights is thus readily apparent, and the challenge for us, as designated judges, is to strike the appropriate balance between legitimate national interests and security on one hand, and the rights and equality of individuals, as well as public accountability and transparent decision-making, on the other.

Finding this balance is, I have to say, an extraordinarily difficult task.

The Work of the Federal Court

So, with all of this in mind, who are the designated judges of the Federal Court and what is it exactly that we do?

First of all, let me explain that not all Federal Court judges are involved in national security work - rather, there is a small group of judges designated to sit in national security matters. It should be noted that the selection of these judges is made by the Chief Justice of the Court, and that the Government of Canada has *no involvement whatsoever* in their selection.

Having only a small number of judges doing the national security work allows for the development and concentration of expertise, and encourages collegiality and consistency in our decision making, while recognizing that it always remains open to each judge to decide each case independently, as he or she sees fit.

Having a small group of judges doing this work also limits the potential for the inadvertent dissemination of highly sensitive information.

To expand our expertise in the area, the designated judges meet frequently to discuss national security issues, new developments in the jurisprudence, and best practices. We have also developed educational programs dealing with issues of human rights and civil liberties, privacy, technology, international affairs and national security, and we meet from time to time with national security judges from other jurisdictions and with scholars in the field.

All proceedings that involve national security matters are conducted in a specially-designed facility within the National Capital Region. This facility contains a secure Registry for receiving and storing confidential information, secure offices and computer systems, and secure hearing rooms. We have specialized Registry staff who deal exclusively with national security matters, and every staff member who is involved in national security proceedings has a Top Secret level security clearance and is bound by the *Security of Information Act*[18] to permanently maintain the secrecy of classified information.

Insofar as the work that we do is concerned, I think that there may be a perception based upon media reports that the Federal Court's involvement in national security matters is relatively recent, and is limited to Security Certificate cases. Neither perception is accurate.

The Federal Court has been involved in national security matters for nearly 30 years, and national security issues may arise in a variety of cases coming before the Court. As I noted earlier, we exercise national security jurisdiction under various acts, including the *CSIS Act*, the *Canada Evidence Act*, the *Immigration and Refugee Protection Act*, the *Criminal Code* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. I will discuss our role under each of these acts next.

The *Criminal Code and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

Before getting into the three main sources of the Court's jurisdiction in national security matters, I will touch briefly on the most recent sources of the Court's national security jurisdiction, which are the *Criminal Code* amendments brought in by the *Anti-Terrorism Act* and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

The *Criminal Code* was amended in 2001 by the *Anti-Terrorism Act* to give the Federal Court jurisdiction to judicially review the listing by the Governor in Council of any entity for which there are reasonable grounds to believe has carried out, attempted to carry out, participated in or facilitated a terrorist act. The Court was also given jurisdiction to issue warrants for the seizure or forfeiture of property owned or used by a terrorist group. In addition, under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act,* the Federal Court has been given jurisdiction to consider applications made by CSIS for disclosure of information held by FINTRAC (the Financial Transactions and Reports Analysis Centre of Canada) and jurisdiction to review decisions of the Director of FINTRAC objecting to the disclosure of information to police officers for use in a criminal investigation.

Turning now to our better known areas of jurisdiction, I will start with a discussion of our work under the *CSIS Act.*

The CSIS Act

As you know, CSIS is one of the organizations charged with protecting Canada's national security. The Service is established pursuant to the *Canadian Security Intelligence Service Act*, and it has two principle mandates.

The first is to collect, analyze and retain information and intelligence respecting activities that may, on reasonable grounds, be suspected of constituting threats to the security of Canada. The Service's second main mandate relates to the defence of Canada and the conduct of its international affairs. In furtherance of this mandate, CSIS is to assist the Minister of National Defence and the Minister of Foreign Affairs, within Canada, in the collection of information relating to the capabilities, intentions or activities of any foreign state, group of foreign states, or any person (other than a Canadian citizen, a permanent resident of Canada, or a corporation incorporated in Canada).

As Ms. Gendron explains in the article referred to earlier, much of the information referred to as €œintelligence is actually gathered from open sources such as websites and newspaper reports. Some information, is however, is gathered by covert means. This is necessary to assess the threats posed by hostile groups and regimes that are clandestine in their operations. Put simply, secrecy is required in order to counter the activities of those who operate in secret. However, CSIS cannot simply do what it pleases in carrying out its statutory mandate. The Rule of Law requires that there be judicial supervision and authorization of intrusive methods of intelligence gathering that would otherwise be illegal. It is the designated judges of the Federal Court that exercise such jurisdiction. On an application made by CSIS, which application must be personally approved by the Minister of Public Safety, the Court may issue warrants to enable the Service to investigate a threat to the security of Canada or to assist the Minister of Foreign Affairs or the Minister of National Defence in collecting intelligence on matters relating to the conduct of international affairs or the defence of Canada.

How are these warrants obtained?

There is a designated judge on duty on a 24/7 basis to respond to any warrant applications that may be filed, sometimes on an urgent basis. The identity of the duty Judge is not disclosed in advance to avoid any possibility or perception of judge shopping.

The *CSIS Act* stipulates that warrant applications are to be conducted in private[19], and they are heard in the Court's secure premises in Ottawa. The application and the evidence filed in support of an application are filed with the Court on a confidential basis.

The duty judge studies the materials filed by CSIS very carefully in order to ensure that the record meets all of the requirements of the *CSIS Act* for the issuance of a warrant. These requirements are set out in sections 7 and 21 through 28 of the Act. There is a lengthy list of approvals required and statutory conditions that must be met before a warrant can issue, and it is the role of the designated judge to ensure that all of these have been satisfied. It can take hours to prepare for a warrant hearing.

An oral hearing is then held, and a typical hearing is attended by counsel for CSIS, the CSIS affiant, and CSIS analysts knowledgeable about the application. Court is formally opened by a Court Registrar, who remains in Court, as in any hearing. The judge has an opportunity to question the affiant or the analyst under oath on matters of fact, and we routinely question the affiant very closely with respect to the facts underlying the warrant application.

Any concerns that the duty judge may have are raised and addressed, and the judge may require that additional information be provided if he or she is not satisfied with the information that has been provided by the Service. Counsel for CSIS may also be questioned on matters of law.

On occasion, where a warrant application raises, for example, a novel question of jurisdiction, the Court may appoint an *Amicus Curiae* to ensure that the matter is fully argued and the Court has the benefit of competing views. The *Amicus* will usually be a security-cleared lawyer with experience in national security matters.

As our former Chief Justice has noted publicly[20], over the past several decades, the Court's designated judges have provided constructive criticism to the Service and its counsel, keeping in mind human rights, privacy and other issues that have arisen in the warrant context. This has led to a steady improvement in the quality of applications for, and the terms of, the warrants granted by the Court.

As was noted earlier, the *CSIS Act* stipulates that warrant hearings must be held *in camera*. The reason for this is obvious - the purpose of the warrant would be thwarted if the subject of the warrant was made aware that his or her communications were to be intercepted.

However, the Court has, from time to time, released public versions of decisions issued in warrant cases that raise important issues of law or jurisdiction. Decisions have been published dealing with matters such as geographical jurisdictional issues that have arisen as a result of the use of new intelligence-gathering technology[21], and questions of statutory interpretation with respect to who may and may not be the target of a CSIS warrant[22]. While it is usually necessary that these decisions be partially redacted, the Court nevertheless strives, insofar as possible, to respect the Open Court principle, recognizing that public confidence in the system can only be enhanced through transparency.

There is additional oversight of the warrant process. That is, the Security Intelligence Review Committee, or SIRC, annually reviews a number of warrant applications approved by the Court. In its review, SIRC has full access to all CSIS file materials in order to be able to assess the accuracy of affidavit evidence filed with the Court.

The 2011-2012 SIRC Annual Report[23] shows that for that fiscal year, the Federal Court approved 206 warrants. Fifty of these were new warrants, whereas 156 replaced, renewed, or supplemented existing warrants.

It is thus clear that warrant work forms a substantial portion of the national security work done by the Federal Court.

Before leaving the issue of warrants, I would like to note that CSIS' mandate is the gathering of *intelligence*. However, in recent years, the information gathered by CSIS, which may have originally contemplated to be use only for intelligence purposes, has increasingly come to be used as *evidence* in administrative or criminal proceedings. I will come back to this point later, but would simply note at this point that in such cases, there will be an opportunity for the person affected to challenge the validity of the warrant or the admissibility of some or all of the evidence collected pursuant to the warrant.

The *Canada Evidence Act*[24]

Let me turn now to discuss our work under the *Canada Evidence Act*.

Where the Attorney General of Canada is of the view that €œsensitive information (as the term is defined in the legislation) is about to be disclosed before any court or tribunal in Canada, including a judicial inquiry, section 38 of the *Canada Evidence Act* provides that the issue of disclosure must be referred to the Federal Court for adjudication. This could arise, for example, in a criminal prosecution such as the Toronto 18 case, or in an Commission of Inquiry such as the Arar Inquiry[25]. These are just examples, however, and there are many other situations where section 38 could be engaged.

The task of the designated judge in these cases is to balance important competing interests, and to determine whether the interest in disclosure of sensitive information outweighs the public interest in non-disclosure.

In addition to hearing from the individual and his lawyer, the Court may also appoint an *Amicus Curiae* to represent the interests of the affected person in the section 38 proceeding. Once again, the *Amicus* will typically be a security-cleared lawyer with experience in national security matters.

The *Amicus* will be given access to the disputed materials on a confidential basis, and will be able to challenge the government's claims that the public disclosure of the information in question will harm national security, national defence or international relations. The *Amicus* can also make representations on behalf of the accused person or interested party in relation to the balancing exercise that has to be carried out by the designated judge.

The Court requires and reviews affidavit evidence provided to establish that disclosure of information will harm national security. The designated judge can and does receive, in the absence of the government's counsel and representatives, submissions from the private party as to why it needs the sensitive information. This is extremely important in balancing the competing interests.

For example, in a criminal case, defence counsel may want to explain an aspect of the defence strategy to the designated judge so that the judge can fully appreciate the relevance or significance of certain undisclosed documents to the fairness of the criminal trial, in carrying out the balancing exercise mandated by section 38. Obviously, the defence will not want to do this in the presence of Crown counsel, and to avoid this, they can request an *ex parte* hearing before the designated judge.

Even if the designated judge is satisfied that there is a compelling national security interest in the non-disclosure of certain information that outweighs the interest in public disclosure, he or she will then have to go on to consider whether there are other ways of protecting the rights of the party whose interests may be affected, or the public interest in disclosure.

This may include determining whether conditions can be imposed on the disclosure of information to limit the injury to national security, national defence or international relations. This could include as releasing the information in a redacted form, or releasing the information in a summary form. In the case of information obtained from third parties under a promise of confidentiality, it may be possible to seek the consent of the source of the information to allow for disclosure.

In this regard, it is necessary to understand that Canada is a relatively small player on the international stage, and much of the intelligence received by CSIS comes from foreign intelligence agencies under an express promise of confidentiality. As the Supreme Court of Canada observed in the *Ruby* case, Canada is a €œnet importer of intelligence information, and the receipt of this information is necessary for the security and defence of Canada and its allies[26].

Indeed, it is easy to imagine that the source of much of our intelligence would quickly dry up if Canada were to unilaterally disclose sensitive information that had been received from a foreign intelligence agency under caveat. This could potentially have disastrous consequences for Canadians.

Even if a Federal Court judge determines that certain information should be disclosed, for example, in a criminal proceeding, it is still open to the Attorney General of Canada to direct that the information not be disclosed[27]. This may, however, result in a stay of proceedings being entered in the criminal proceeding if the trial judge is satisfied that the effect of the non-disclosure is to compromise the accused's right to a fair trial.   A couple of other points on the section 38 process.

As it is currently drafted, the *Canada Evidence Act* requires that all section 38 proceedings be conducted in private, even where all parties are present and no secret information is disclosed. The Court could not even acknowledge the existence of a section 38 proceeding in the absence of the consent of the Attorney General, and there was uncertainty as to whether decisions rendered by the Court under section 38 could be distributed, even to other judges of the Court designated to conduct such proceedings.

This of course raised concerns with respect to the open court principle, and in a 2007 decision involving the *Toronto Star*[28], former Chief Justice Allan Lutfy held that several provisions of section 38 of the *Canada Evidence Act* violated the open court principle, a core democratic value inextricably linked to the fundamental freedoms of expression and of the media protected under paragraph 2(b) of the *Charter*.

Because these provisions were over-broad, they failed at the minimal impairment stage of the *Oakes*[29] test and thus could not be saved under section 1 of the *Charter*. Consequently, Chief Justice Lutfy ordered that the impugned provisions of section 38 be €œread down so as to allow for the presumptive public disclosure of everything filed in a section 38 proceeding, save and except *ex parte* material,

As the Supreme Court of Canada observed in the *Ahmed*[30] case - a case involving the prosecution of members of the €œToronto 18 - section 38 cases can bring into conflict two fundamental obligations of the state under our system of government: the need to protect society by preventing the disclosure of information that could pose a threat to international relations, national defence or national security; and the ability of the state to prosecute individuals accused of offences against our laws.

The Supreme Court held that with the section 38 scheme, Parliament has recognized that on occasion it may become necessary to choose between these objectives, but that it has laid out an elaborate framework to attempt, where possible, to reconcile them.

The Supreme Court was very clear, however: where this conflict is irreconcilable, an unfair trial cannot be tolerated. Under the Rule of Law, the right of an accused person to make full answer and defence may not be compromised.

Proceedings under the *Immigration and Refugee Protection Act*

The final area of the Court's national security jurisdiction is in proceedings under the *Immigration and Refugee Protection Act*. The most well-known of these proceedings are the Security Certificate cases, although national security issues can arise in other types of immigration proceedings as well. In a Security Certificate case, the Minister of Public Safety and the Minister of Citizenship and Immigration certify their belief that a person, other than a Canadian citizen, is inadmissible to Canada on grounds of security, violating human or international rights, or participation in serious or organized criminality. A Security Certificate must then be referred to the Chief Justice of the Federal Court or a designated judge for a determination as to its reasonableness. Thus Federal Court is to some extent sitting in judicial review of a government decision in a Certificate case. Our mandate is to determine whether, on the evidence, the Security Certificate is reasonable.

It is important to note that a Security Certificate case is an immigration proceeding, not a criminal trial, and the judge is given discretion to receive into evidence anything that he or she considers appropriate, even if the information would not be admissible under the normal rules of evidence.

If the reasonableness of the Certificate is upheld, it becomes conclusive proof that the person named is inadmissible to Canada and the Certificate takes immediate effect as a removal order.

The procedure established under the *Immigration Refugee Protection Act* was intended to be a scheme for the summary removal from Canada of non-citizens viewed to present a danger to its security. The right to remove non-citizens is consistent with jurisprudence of the Supreme Court such as *Chiarelli* where the Court characterized €œthe most fundamental principle of immigration law to be that €œnon-citizens do not have an unqualified right to enter or remain in the country[31]. The Court went on to quote from its earlier decision in *Kindler*[32] stating that €œ[t]he Government has the right and duty to keep out and expel aliens from this country if it considers it advisable to do so.

While there certainly have been Certificate cases that have proceeded expeditiously in the summary fashion contemplated by Parliament, the majority have not. Why is this?

There are many reasons for this, some of which are the following.

Parliament provided in the legislation that where a person named in a Security Certificate applies for protection, the hearing into the reasonableness of the Certificate must be suspended until the Minister decides the application for protection.

Proceedings have been delayed while challenges to the constitutional validity of the Security Certificate process have been litigated.

Proceedings have sometimes not been expeditiously pursued by persons named in Security Certificates.

Moreover, if the person has been detained, the Act provides for periodic detention reviews, which are often hotly contested proceedings.

In addition, the process is cumbersome. It often involves a substantial record, much of which may be challenged by the named person.

Probably the biggest issue with respect to delay arises out of the disclosure process. Since the Supreme Court of Canada's decision in *Charkaoui #2*[33], the Government is obliged to disclose all of the information in its possession with respect to the named person, whether or not that information is being relied upon by the Government in support of its case.

This can involve literally thousands and thousands of documents, each of which will have to be carefully reviewed so as to ensure that nothing injurious to Canada's national security is released.

Indeed, much of the information relied upon by the Ministers to support the reasonableness of the Security Certificate will involve sensitive intelligence material. The Act puts the onus on the the judge to ensure the confidentiality of information submitted to the Court, where the judge is of the view that its disclosure would be injurious to national security or to the safety of any person. At the same time, it is the duty of the designated judge to ensure that the named person is treated fairly and knows the case that they have to meet.

As a result, the designated judge, Government counsel and Special Advocates appointed for the named person will all have to review masses of confidential material and assess whether they think it can be disclosed to the named person. The Court will, of course ultimately make that determination after hearing from both sides.

If it is determined that information cannot be disclosed - for example - because it concerns an ongoing investigation where the disclosure of the information would alert those working against Canada's interest and allow them to take evasive action - or where it would identify an informant - consideration will then have to be given as to whether a summary of the material can be prepared that will give the named person the substance of what is contained in the document in question, while protecting the identity of the informant or the ongoing investigation. All of this takes time.

There may be questions raised with respect to information received from foreign agencies or governments as to whether any of the information was obtained through the use of torture. If so, it will be excluded from a Certificate case[34]. These questions may require a lengthy evidentiary hearing to decide, and our Court has developed detailed jurisprudence in relation to this area[35].

There may also be challenges to warrants under which some of the evidence against the named individual was obtained.

As I mentioned earlier, CSIS' mandate is the gathering of *intelligence*. However, in recent years, information gathered by CSIS, which may have originally contemplated to be use only for intelligence purposes, has come to be used as *evidence* in administrative or criminal proceedings.

This €œjudicialization of the intelligence gathering process has presented challenges for the Service, as different considerations will arise, depending upon the use to which information is to be put.

For example, it was for many years CSIS' practice to destroy the original tapes and notes of intercepted conversations, once summaries of the intercepts were prepared which summaries would then be entered into a CSIS data bank by a CSIS analyst. Such summaries have formed part of the Government's case in Certificate proceedings in the past.

CSIS policy of destroying material dates back to the recommendations of the MacDonald Commission in the late 1970's, where it was suggested that only essential information be retained so as to protect the rights of individuals under investigation. However, the practice raised obvious concerns once the information in question was going to be used as evidence.

Some of the intercepted communications were not originally in English or French and summaries would be prepared from a translation of the original conversation. These interventions thus potentially impaired the ability of the named person to verify the accuracy of either the translation or the summary in order to challenge the case against him.

In *Charkaoui No. 2*, the Supreme Court of Canada found that CSIS was under a duty to retain raw intelligence materials such as operational notes or recordings of intercepts, and that its failure to do so constituted a serious breach of that duty, violating the section 7 rights of the named person.

In the recent *Harkat*[36] decision, the Federal Court of Appeal held that the prejudice to Mr. Harkat resulting from the unavailability of the original source material was such that the summaries had to be excluded unless Mr. Harkat was himself a party to the conversation, in which case he would presumably be in a position to know what was or was not said in the conversation in question. This issue, it should be noted, is currently before the Supreme Court of Canada.

These are just a few examples of the issues that have presented themselves in Security Certificate cases. As you can imagine, each poses a difficult challenge to the designated judge in carrying out his or her mandate.

Conclusion

The designated judges of the Federal Court are all aware that, in the words of Jeremy Bentham, €œPublicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity[37]. We are also acutely aware that when proceedings are not open to public scrutiny, there is a tendency to suspect that what goes on in secret must be Kafkaesque or perverse.

With this in mind, we endeavor to be as transparent as possible in what we do, while recognizing that, of necessity, some of our work simply cannot be conducted in public, with all of the protections that come with the conventional adversarial system.

Speeches of this nature are part of that de-mystification process, and I hope that my comments have helped to shed some light on the work done be the designated judges of the Federal Court in the national security area.

1 Portions of this presentation are based upon earlier speeches given by Justice Edmond Blanchard and Justice Eleanor Dawson, both then of the Federal Court.

2 The Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security under the Law: Second Report, (Ottawa: Supply and Services Canada, 1981).

3 R.S.C. 1985, c. C-23.

4 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3.

5 *Suresh*, at para. 88.

6 *Securing an Open Society: Canada's National Security Policy*, online at http://www.publicsafety.gc.ca/cnt/ntnl-scrt/scrng-eng.aspx

7 (2005) 18:3 International Journal of Intelligence and Counterintelligence 398.

8 R.S.C., 1985, c. C-5, ss. 37 (as am. by S.C. 2001, c. 41, ss. 43, 140).

9 S.C. 2001, c. 27.

10 2000, c. 17, s. 1; 2001, c. 41, s. 48.

11 S.C. 2001, c. 41.

12 *Haig v. Agee*, 453 US 280 (1981) at 307.

13 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 Mar. 1976, accession by Canada 19 May 1976).

14 *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

15 *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3.

16 *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539.

17 *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

18 R.S.C., 1985, c. O-5.

19 Section 27.

20 Keynote speech given by the Honourable Allan Lutfy, Chief Justice of the Federal Court €œMaking National Security Accountable: International Perspectives on Intelligence Review and Oversight conference held at the Norman Paterson School of International Affairs, Ottawa, Canada, May 18, 2005, available online at http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Speech_18may05.

21 *Canadian Security Intelligence Service Act (Re)* (F.C.), [2008] 4 F.C.R. 230; *Canadian Security Intelligence Service Act (Can.) (Re)*, [2009] F.C.J. No. 1153.

22 *Canadian Security Intelligence Service Act (Can.) (Re)*, [2012] F.C.J. No. 1536

23 Online at http://www.sirc-csars.gc.ca/anrran/2011-2012/index-eng.html.

24 Please note the speech was delivered before Bill S-7 (*An Act to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act*) was enacted and became law.

25 Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006).

26 At paragraph 44.

27 Section 38.13.

28 *Toronto Star Newspapers Ltd. v. Canada*, [2007] 4 F.C.R. 434.

29 R. v. Oakes, [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200.

30 *R. v. Ahmad*, [2011] 1 S.C.R. 110.

31 At paragraph 24.

32 *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at paragraph 33.

33 *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] 2 S.C.R. 326.

34 *Immigration and Refugee Protection Act*, section 83(1.1).

35 *Mahjoub (Re)*, [2010] F.C.J. No. 900; *Jaballah (Re)*, [2012] F.C.J. No. 20.

36 *Harkat (Re)*, [2012] 3 F.C.R. 635.

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