The Federal Court and National Security

Keynote speech by the Honourable Allan Lutfy Chief Justice of the Federal Court at the international seminar "Making National Security Accountable: International Perspectives on Intelligence Review and Oversight" Norman Paterson School of International Affairs May 18, 2005 Ottawa, Canada

Thank you Gary (Mr. Filmon), I would also like to thank Professor Martin Rudner for playing a major role in organizing this conference and for my opportunity to speak this morning. You have honoured the Federal Court by involving us in this meeting and for that I am also grateful.

Making National Security Accountable is the theme of this international symposium. My perspective is that of a judge in this process, keeping in mind both human rights and national security.

I will speak to you today about human rights and national security and about the role of the Federal Court in Canada's attempt to increase our protection against terrorist threats, while preserving our hard won civil liberties.

But before I do that, I would like to pay tribute to the substantial contribution made by the Security Intelligence Review Committee to the evolution of a proper balance between safety and freedom in Canada.

In 1977, in the midst of leaks and allegations of wrongdoing, the government established the commission of inquiry into the security related activities of the Royal Canadian Mounted Police. Its chair was the late Honourable David C. McDonald. The public testimony during the McDonald Commission somewhat heightened the public's distrust of Canada's intelligence services while framing an intense debate about the intrusive powers our intelligence agencies should wield. As happens so often as a prelude to new initiatives, it was in the aftermath of this atmosphere that Parliament created a separate security service, the Canada Security Intelligence Service, and the Review Committee.

Few outside the Government may have believed that either SIRC or the Inspector General of CSIS would be able or allowed to find out what CSIS was actually doing, let alone hold the Service to account if it strayed over the demarcation line between appropriate and inappropriate activities in a democracy.

The five members on the first Review Committee were appointed in November 1984. The Committee believed in itself and in the importance of its role. After its early reports, this became evident. Each annual report provided more information than had been expected. Over time and contrary to all expectations, the media and the public became more convinced that the review system was working as it was intended to work. Even the most cynical observers became less suspicious that the Committee was simply a spokesperson for the government and the Service. The Committee had proved the earlier conventional wisdom to be wrong. Its independence could no longer be reasonably questioned.

Not only did SIRC establish its bona fides with the public, it also, eventually, convinced sceptics within CSIS itself of the merits of SIRC's review and recommendation process. On more than one occasion, the Service's senior officials have publicly and with some conviction stated that SIRC has contributed to making CSIS a stronger, more disciplined and more effective organization.

As with so much in the realm of human activity, the Committee's future success and credibility depended on those first impressions created in its early years. All its members deserve our gratitude, but I think that a major part of the credit is owed to the Committee's first Chair in those difficult formative years: the Honourable Ron Atkey. Under his leadership, procedures were established that have served us well with very little change until today. More importantly, he set the tone that established the Committee's credibility.

His legacy was supported and enhanced by his successors as Chair: John White Bassett, Jacques Courtois, Edwin Goodman (as acting Chair) and Paule Gauthier. Me. Gauthier deserves special mention. She not only served on the first Committee, but, when her current mandate ends, will have been a member for some seventeen years, including the last eight years as Chair.

Please join me in saluting Ron and Paule and all who served with them during the last twenty years with a sincere vote of thanks.

Today will be perhaps the first time any Chief Justice of the Federal Court has spoken publicly about our three principal activities concerning national security. I am doing so today because I would like to try to demystify--- to make a little more transparent--- the work of the Federal Court. While doing that, I would like to touch upon some of the challenges facing the Courts in all democratic countries, not just in Canada. I hope to engage your interest and attention while also maintaining an appropriate degree of judicial reserve - I want to have a job to go back to tomorrow! !

Why is it important to be more open and transparent about the way the Court works? The major reason is that I don't think that modern societies are any longer content with leaving it to the experts. "Doctor knows best" is no longer a phrase that ends all discussion. Patients want more and more information about their health challenges and about the proposed remedies. Greater transparency of our institutions, where appropriate, should only strengthen them in the long run.

I believe, and trust, that there is still great faith in the courts in democratic societies, but there is little doubt in my mind that this will erode if we expect blind faith. It will only endure if the public becomes well informed and still remains convinced that the courts are providing balance and fairness among the strongly competing forces now in play. Justice Ian Binnie of the Supreme Court of Canada so aptly encapsulated these competing interests when he said last year: "The conflict between human rights and national security is truly a clash of titans".

Two hundred years ago Justicia's visible scales looked exactly as balanced as they do now. In reality, however, they were rather unbalanced, and her sword may have been her most important and most often wielded attribute, but not always to protect the innocent. Thousands of people were sent to prison or shipped to the penal colonies, without any semblance of a fair hearing. Natural justice was not a common precept on the benches of the western world. As recently as the first half of the 20th century, injustices occurred in Canada which no one would dare to defend today.

Since then, the scales have slowly but immutably become more balanced. We now have a system of justice that most people would agree gives proper consideration to fairness in criminal law and, to an ever growing extent, in administrative law. Mistakes can still be made but, as I said a moment ago, there is considerable faith in the fairness and balance of the system.

And so, until very recently, our current system of justice, with its longstanding traditions, its steadily increasing regard for the rights of the individual and its independent judiciary, seemed to have reached its apotheosis, and to be one of the ornaments typical of western civilization. It seemed most unlikely that it would change ---- other than slowly and incrementally at the margins, and for the better.

No one can be so sanguine today. Much of our system has been challenged by the age of terrorism. Not yet significantly changed, but certainly challenged. In Australia, for example, the intelligence agencies may obtain the authority to detain persons who might simply have information regarding terrorism. In Britain, the legislation that allowed prisoners to be detained indefinitely without charge in Belmarsh, "the prison with three walls", has had to be re-framed as the Prevention of Terrorism Act. And that legislation, which much more directly involves the courts in Britain, is still controversial and will be revisited within one year. In Canada, our Anti-terrorism Act of 2001 is currently under parliamentary review.

The intense contest between advocates of civil liberties and those who want stronger, much more effective protection against terrorism is vividly exemplified by competing statements in the Derogation Challenge recently decided in the United Kingdom.

In 2002, when that case was before their Court of Appeal, Lord Justice Brooke assessed the threat to the nation from 9-11 related terrorism in these words:

"But unless one is willing to adopt a purist approach, saying that it is better that this country should be destroyed, together with the ideals it stands for, than that a single terrorist should be detained without due process, it seems to me inevitable that the judiciary must be willing ... to put an appropriate degree of trust in the willingness and capacity of ministers and Parliament ... to satisfy themselves about the integrity and professionalism of the Security Service. If the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further."

However, two years later, in the same case, Lord Hoffman's speech in the House of Lords characterized the same threat much differently:

"But the question is whether such a threat is a threat to the life of the nation. ... Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms.

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of the nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community." ...

Most of this audience is already aware of these and many other examples of "the clash of titans", the tension between our desire to maintain, or even to continue to expand civil liberties, and our equally valid desire to protect ourselves and our children from the violence randomly perpetrated by terrorists. Finding the proper balance between these two often incompatible objectives is the challenge for legislators and the judiciary.

There is little doubt in my mind that we are now at a critical point in our ongoing search for this proper and sustainable balance between safety and freedom, between security and human rights.

In a word, the direction in which Justicia's scales will tilt next - and how far - is now more uncertain than it has been for over a century. Much will depend on how intelligently we deal with the almost intractable problems facing us, but, unfortunately, much might also depend on external events --- perhaps terribly tragic events. Should a terrorist cell manage to create a future disaster approaching the scale of September 11, Bali or Madrid, despite recently implemented precautions, there will be intense pressure for draconian measures. We must hope that such a thing does not happen, but that if it does, our democratic institutions will, with common sense, serve us well.

The role of the Federal Court in national security matters is not new. For over twenty years now, the Chief Justice of the Federal Court or judges of the Federal Court designated by the Chief Justice have heard national security proceedings pursuant to the Canadian Security Intelligence Service Act, our immigration and refugee legislation and section 38 of the Canada Evidence Act. Our work in this area began long before the events of September 11, 2001 and continues under legislation not substantially affected by the Anti-terrorism Act.

On application from CSIS endorsed by the appropriate Minister, 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 within Canada on matters relating to the defence of Canada or the conduct of Canada's international affairs. All this is set out in the relevant provisions of the CSIS Act.

How do we do this work? Hearings of warrant applications are conducted in private and in secure premises controlled by the Court. The material filed in support of an application remains under the control of the Court as with any court of record.

One designated judge is on duty each week to respond to applications that may be filed pursuant to our national security legislation. The identity of the duty judge is not disclosed in advance. Each application, of course, is determined in the designated judge's own way. Many of our practices are common. For example, in a section 12 application under the C.S.I.S. Act, allegedly relating to threats to the security of Canada, the judge has the opportunity, usually some days prior to the hearing (where no emergency exists), to review the application material. This may also involve reviewing related files or, if the application is for a renewal, the file material relating to earlier authorizations.

The typical hearing is attended by CSIS counsel, the CSIS affiant and the analysts knowledgeable about the application. The judge has every opportunity to question these persons on issues of fact or law. Again, depending on the complexity of the application, it is not unusual that the judge's preparation and hearing time can take up the better part of one working day. The process is thoughtful and thorough.

Most applications, but not all, have been approved by the Court. The approvals have often been accompanied by court imposed conditions which govern the implementation of the powers granted by the warrant.

Over the past two decades, the Court's designated judges have been able to provide constructive criticism that has steadily improved the quality of the applications and the terms of the warrants. From time to time, the Service will also propose changes which in its view reflect the comments received from designated judges.

Designated judges meet as a group more often then we have in the past to discuss, among other issues, developments in warrant applications. We meet under the constraints of our other itinerant responsibilities. Very recently, a lawyer with the appropriate security clearance has begun attending warrant hearings for the Court. This additional presence will enhance the continuity of information among designated judges.

Observers of this process can also take comfort from the role of S.I.R.C. in reviewing each year a small number of the warrant applications that have been approved by the Court. In its review, S.I.R.C. has full access to all the C.S.I.S. file material and it can further assess the accuracy of the affidavit evidence filed with the Court.

In short, this is a work in progress. The legislation has not changed in twenty years but our work has evolved, always sensitive to getting it right in the balance between privacy rights and the state's interests in investigations relying on increasingly intrusive technology.

Our second principal area of activity is the determination of the reasonableness of ministerial certificates under the immigration and refugee legislation. For over twenty years now, it has been possible to detain foreign nationals who are the subjects of ministerial certificates. The provisions that allow the designated judges to receive sensitive information from government witnesses in the absence of the interested persons and their counsel are not new. It is only recently, however, that there has been as much public scrutiny of these legislative provisions, presumably because of the increase in the number of certificate cases since 2001.

Here again, the designated judges of the Court doing this work have tried to demystify the role of the judge. Secret information is not taken at face value. Inquiries are made concerning sources, their number, their reliability and any corroborating or exculpatory information. The interpretation of the source information must be scrutinized. All of this is set out in great detail in the reasons for judgment my colleagues have issued, particularly since 2002.

Again, for some twenty years, we have been resolving disputes under section 38 of the Canada Evidence Act. Where the Attorney General of Canada is of the view that sensitive information is about to be disclosed before any court or tribunal in Canada, section 38 provides that the matter is referred to the Federal Court for adjudication. Once again, our Court is called upon to balance legitimate competing interests: whether the public interest in disclosure of sensitive information outweighs in importance the public interest in non disclosure.

All section 38 proceedings must be conducted in private, even where all the parties are present and no secret information is disclosed. The Court has questioned the necessity for the extent of this secrecy. I note that the Canadian Bar Association has raised this issue before the current parliamentary review of the anti-terrorism legislation.

Boiler plate assertions that the disclosure of the information would injure national security will not suffice. To weigh properly the competing interests, the Court requires specific affidavit evidence. Can a portion of the information be made public? Can the information be made public in summary form? Can a release be obtained from the institutional source of the information to allow the disclosures and, if not, why not?

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 helpful to the Court in testing the government's assertion of secrecy and in balancing the competing interests.

How do we improve the Court's significant accomplishments to date in national security proceedings? Over the past months, a number of initiatives have been undertaken to even better the expertise we have acquired over two decades.

Since last summer, we have been working with Maurice Archdeacon to better our judicial education program in matters concerning privacy, human rights and national security. As you know, he brings to the Court two decades of experience in reviewing CSIS activities as an outsider, both as SIRC's first executive director and as Inspector General.

One year ago, designated judges participated in a seminar with criminal law judges to better understand their perspective and to explain our role in criminal proceedings with national security implications. The participation of some of my colleagues in today's conference is another example of what I have in mind: exchange and dialogue.

We are beginning a series of informal discussions with persons, from Canada and elsewhere, knowledgeable in national security, from the perspectives of both governments and civil liberties.

Each of us is aware of the enormous increase in the power of technology in recent years. Because of the new technology, the warrants we issue today confer greater intrusive powers than they did twenty years ago when the CSIS Act became law. The Court is conscious of these changes. We are currently investigating appropriate methods for ensuring that judges dealing with warrant applications are comfortable with their level of knowledge about the extent of these technological advancements.

It is only with ongoing enhancement of our own knowledge as to how the intelligence community implements the warrants we issue that we can properly assure, to the fullest extent appropriate, the privacy rights of persons in Canada.

We are also working with the National Judicial Institute, a think tank and education facilitator for judges. I hope that before too long we can design productive and well balanced seminars to enable the Court to keep in touch with issues affecting its role. We will also determine how best to structure an appropriate forum for providing the Court's designated judges with information on any subject they believe might assist them in carrying out their onerous responsibilities.

Simultaneously, again with Mr. Archdeacon's assistance, we are developing contacts with colleagues in other jurisdictions also involved in national security proceedings. Last year, the Federal Court received the Chief Justice of Israel, President Aharon Barak, to discuss the judgments of his Court in balancing human rights against terror. Recently, we have met with judges of the Foreign Intelligence Surveillance Court in the United States and with judges of the High Court of Justice in the United Kingdom and other members of their Special Immigration Appeals Commission, as it existed until the recent legislative amendments of March 14th. My objective is to continue this dialogue.

Our counterparts in other countries are facing the same problems I mentioned earlier, all of them seeking balance and fairness in the clash of titans. We can only better ourselves, it seems to me, in exchanging with others, always keeping in mind that at the end of day we will adopt practices and procedures which are consistent with Canadian legislation and with the Canadian way of doing things.

It would be naÃ¯ve, unfortunately, not to expect that national security cases are with us in the foreseeable future. The Federal Court is well positioned to meet its responsibilities with its acquired expertise. I hope that some of you, with your different points of view, will engage in a thoughtful dialogue to better our work.

This has been necessarily a fairly sketchy overview of what I see as a situation facing the Court, and our society, now and in the future. I leave you with one final thought about your purpose here for the next two days. Twenty four years ago, the report of the McDonald Commission spoke of the unique challenge facing liberal democracies in maintaining the security of the state. The Commission's words were written in an era facing fewer challenges than is the case today, but they still remain true. "Very simply", the report stated, "the challenge is to secure democracy against both its internal and external enemies, without destroying democracy in the process."

Thank you for this opportunity and may you have a good symposium!