



The Federal Court and the Clash of the Titans: Balancing Human Rights and National Security

It is a delight to be back in Robson Hall and I thank Professor Guth and the faculty for this opportunity.

I would like to speak this afternoon about the unique role Parliament has entrusted to the Federal Court in connection with national security and human rights, and the challenges that role presents to those judges of the Federal Court who are designated by its Chief Justice to exercise the Court's jurisdiction in this area.

First, of course, the caveats. The most important is that, as a sitting judge, I do not believe it appropriate that I debate or comment upon the policy choices which Parliament has made in legislation concerning national security. That is a matter for informed debate between citizens and their parliamentarians. Judges of the Court can, however, impart information about our role to help inform the debate.

Second, in order for me to return to my duties, carry the confidence of my Chief Justice, and continue to have access to sensitive information, it is important that I maintain a degree of judicial restraint and discretion. This restraint and discretion may preclude full answers to questions that may touch on protected information.

I will canvass the following topics in the course of my remarks to you.

- Explaining what has been described to be the "Clash of the Titans".

- Defining national security.

- Defining the post 9-11 threat to national security and the role of the Canadian Security Intelligence Service (CSIS).

- Describing the nature of the Federal Court's jurisdiction in matters of national security.

- Identifying the challenge the Clash of the Titans poses to the independence and impartiality of the judiciary.

- Explaining how the designated judges of the Federal Court approach their duties.

I turn first to what has been described as the "Clash of the Titans".

In a speech delivered in 2004 by Mr. Justice Ian Binnie of the Supreme Court of Canada to the Hong Kong Conference on the Criminal Law, Justice Binnie concluded his remarks by stating that the "conflict between human rights and national security is truly a clash of the titans". What is this clash?

In a 1981 decision U.S. Supreme Court Chief Justice Warren Burger wrote that "no government interest is more compelling than the security of the Nation" for the important reason that without such security it is not possible for the state to protect other values and interests. However, liberal democracies, such as Canada with its entrenched Charter of Rights, define themselves by the respect they show to the rule of law and the protection they provide to civil liberties and human rights. Canadians expect, and are generally guaranteed by the Charter, open courts, transparent decision-making, political accountability and robust reporting by a free press.

The tension between the imperatives of the collective interest in security and individual rights is apparent.

Thus, the challenge 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.

The Supreme Court recently addressed this delicate balance when it was required to consider the legality of a judicial investigative hearing conducted in relation to the Air India trial, as authorized by section 83.28 of the Criminal Code. There, Justices Iacobucci and Arbour stressed that the appropriate judicial response to measures adopted by Parliament to protect Canada from terrorist attacks was neither to accept Cicero's maxim "silent are the laws in the clash of arms" nor to interpret or apply legislation without regard to the context of national security and its exigencies. They wrote: The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law.

Consequently, the challenge for a democratic state's answer to terrorism calls for balancing of what is required for effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law.

A similar statement by the Supreme Court of Canada regarding the Titanic clash is found in Suresh at paragraphs 3 and 4.

Our duty on the Federal Court is to balance the requirements of national security with the rule of law and protection of individual rights.

What is national security?

National security is somewhat difficult to define. The Royal Commission into Royal Canadian Mounted Police wrongdoing, known as the McDonald Commission, suggested in 1981 that two concepts were central. First, the need to preserve the territory of our country from attack. Second, the need to preserve and maintain the democratic processes of government. Any attempt to subvert Canada's territorial integrity or its democratic processes by violent means is a threat to the security of Canada.

Canada's National Security Policy, published by the Privy Council Office in 2004 states that "[n]ational security deals with threats that have the potential to undermine the security of the state or society".

The Canadian Security Intelligence Service Act defines "threats to the security of Canada" to mean (and I will simplify and paraphrase, thus losing some technical detail, but not the essence of the definition):

espionage or sabotage that is against Canada or its interests,

foreign influenced activities that are detrimental to the interests of Canada, and are clandestine or deceptive, or involve a threat to any person,

activities directed to the threat or use of serious violence for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

activities directed to undermining by covert unlawful acts, or directed to the overthrow by violence of, the constitutionally established system of government in Canada.

A threat to Canada's security, as defined by the Act, does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the above activities.

While historically national security may have equated to the defence of the realm, it is now recognized that terrorism in one country may implicate other countries. Thus, in *Suresh* the Supreme Court of Canada concluded that a danger to the security of Canada does not mean simply proof of a direct threat in Canada. What is required is to establish "a 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 security".

Canada's National Security Policy defines three core national security interests which reflect the inter-relationship of our security with that of other countries. The interests are: first, protecting Canada and the safety and security of Canadians at home and abroad; second, ensuring that Canada is not used as a base for threats against our allies; and third, contributing to international security.

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, international covenants (for example the International Covenant on Civil and Political Rights) and in the jurisprudence of the Supreme Court of Canada in cases such as *Chiarelli and Ruby*. Most recently, in *Medovarski* the Supreme Court interpreted the objectives expressed in the Immigration and Refugee Protection Act to include an intent to prioritize Canada's security.

Defining the post 9-11 threat to national security and the role of the Canadian Security Intelligence Service, Angela Gendron, a Senior Fellow at the Canadian Centre of Intelligence and Security Studies, associated with the Norman Paterson School of International Affairs, Carleton University, wrote in an article entitled "Just War, Just Intelligence: An Ethical Framework for Foreign Espionage": 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 than 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 an ideology. As recent events in the United Kingdom show, those individuals may be "home grown" citizens, born and raised within the societies they wish to target.

One of the organizations charged with protecting Canada's national security is CSIS. The Service is established pursuant to the Canadian Security Intelligence Service Act and it has two significant mandates. First, to collect (to the extent that it is strictly necessary) analyze and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, to report to and advise the Government of Canada. Second, in relation to the defence of Canada or the conduct of the international affairs of Canada, to assist the Minister of National Defence or 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.

Pursuant to subsection 6(2) of the CSIS Act, the Minister of Public Safety (Minister) issues annual national requirements for security intelligence in order to provide general direction to CSIS. The 2004-2005 Annual Report of the Security Intelligence Review Committee (SIRC), the body that oversees the work of CSIS and reports annually to Parliament as to its oversight, notes that for 2004-2005, the Minister directed CSIS to pursue priorities that included:

- Safeguarding against the possibility of a terrorist attack occurring in or originating in Canada or affecting Canadian citizens or assets abroad;
- Assessing the potential for attacks involving weapons of mass destruction;
- Providing advice on Canada's economic security;
- Safeguarding confidential information of the Government of Canada; and
- Advising on threats to critical infrastructure.

SIRC notes in that annual report that it has previously been acknowledged that a significant portion of the world's terrorist groups are represented in Canada. Those groups engage in such activities as fund-raising, lobbying, document fraud, planning and staging of terrorist acts, manipulation of émigré communities, facilitation of movement to and from the United States, and the procurement of dual-use materials.